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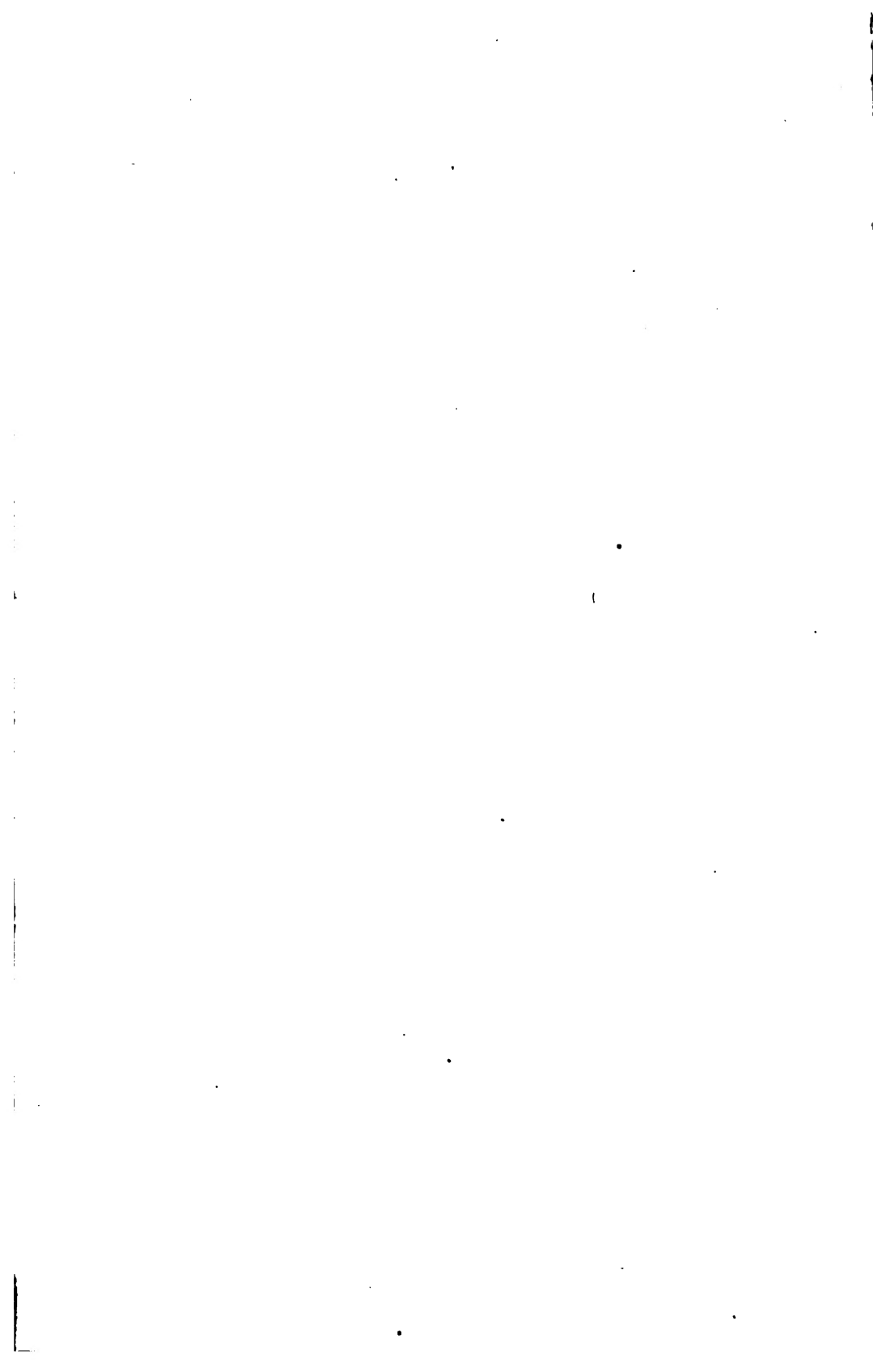
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VOL. 38—LOUISIANA ANNUAL.

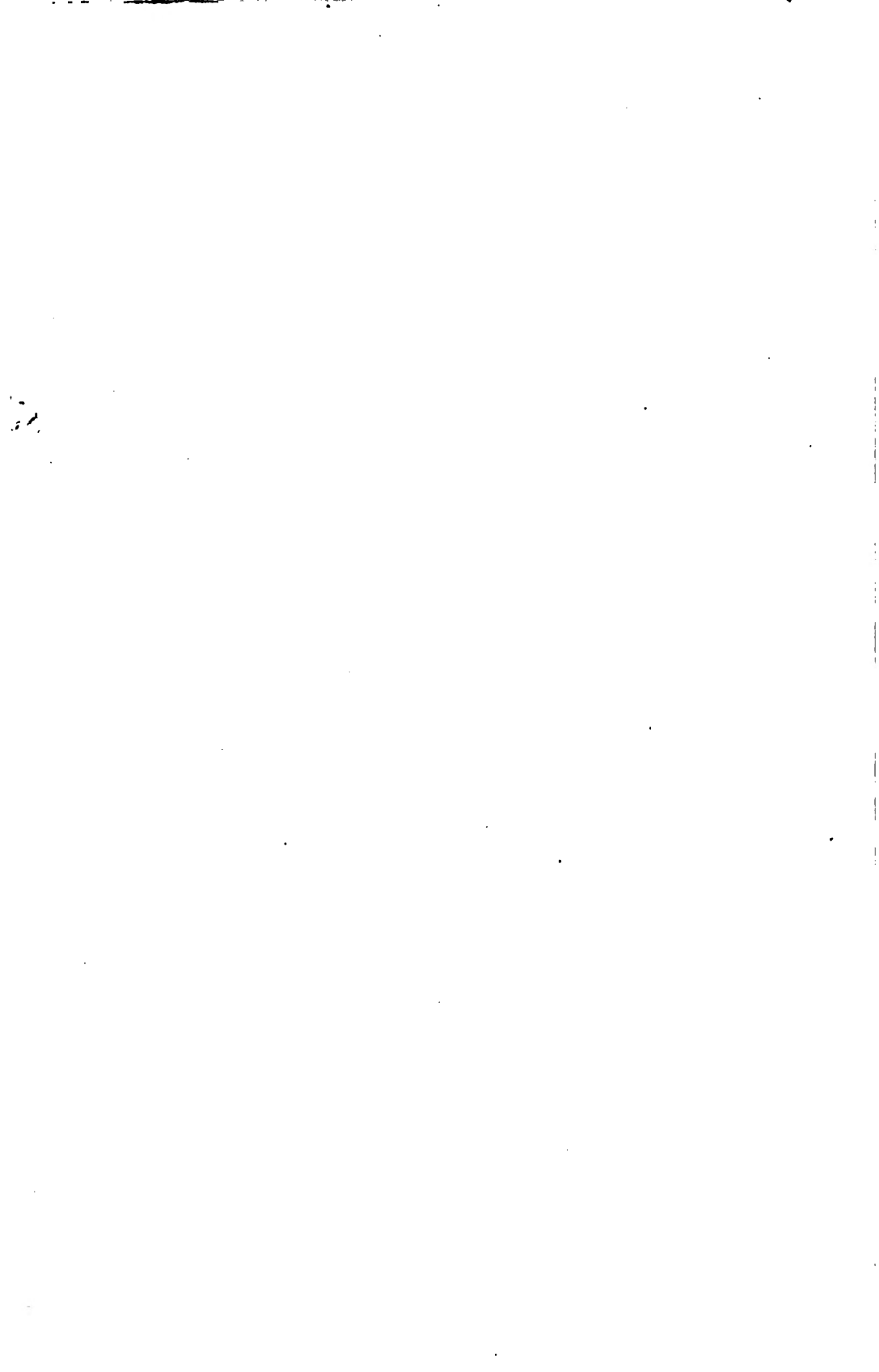
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LOUISIANA

Annual Reports.



REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

LOUISIANA.

VOL. 38—FOR THE YEAR 1886.

HENRY DENIS,
REPORTER.

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F. F. HANSELL & BRO., PUBLISHERS
1886.

Rec. May 17, 1877

JUDGES OF THE SUPREME COURT,

DURING THE TERM OF THESE REPORTS.

CHIEF JUSTICE:

EDWARD BERMUDEZ, LL. D.

ASSOCIATES:

FÉLIX P. POUHÉ,

ROBERT B. TODD, LL. D.,

THOMAS C. MANNING, LL. D.

CHARLES E. FENNER,

LYNN B. WATKINS.*

ATTORNEY GENERAL:

MILTON J. CUNNINGHAM,

CLERKS OF THE COURT:

GEORGE W. DUPRÉ, New Orleans.

ROBERT J. WILLSON, Monroe.

L. SUMPTER TAYLOR, Opelousas.

PETER J. TREZEVANT, Shreveport.

*Appointed on the 19th of April, 1886.

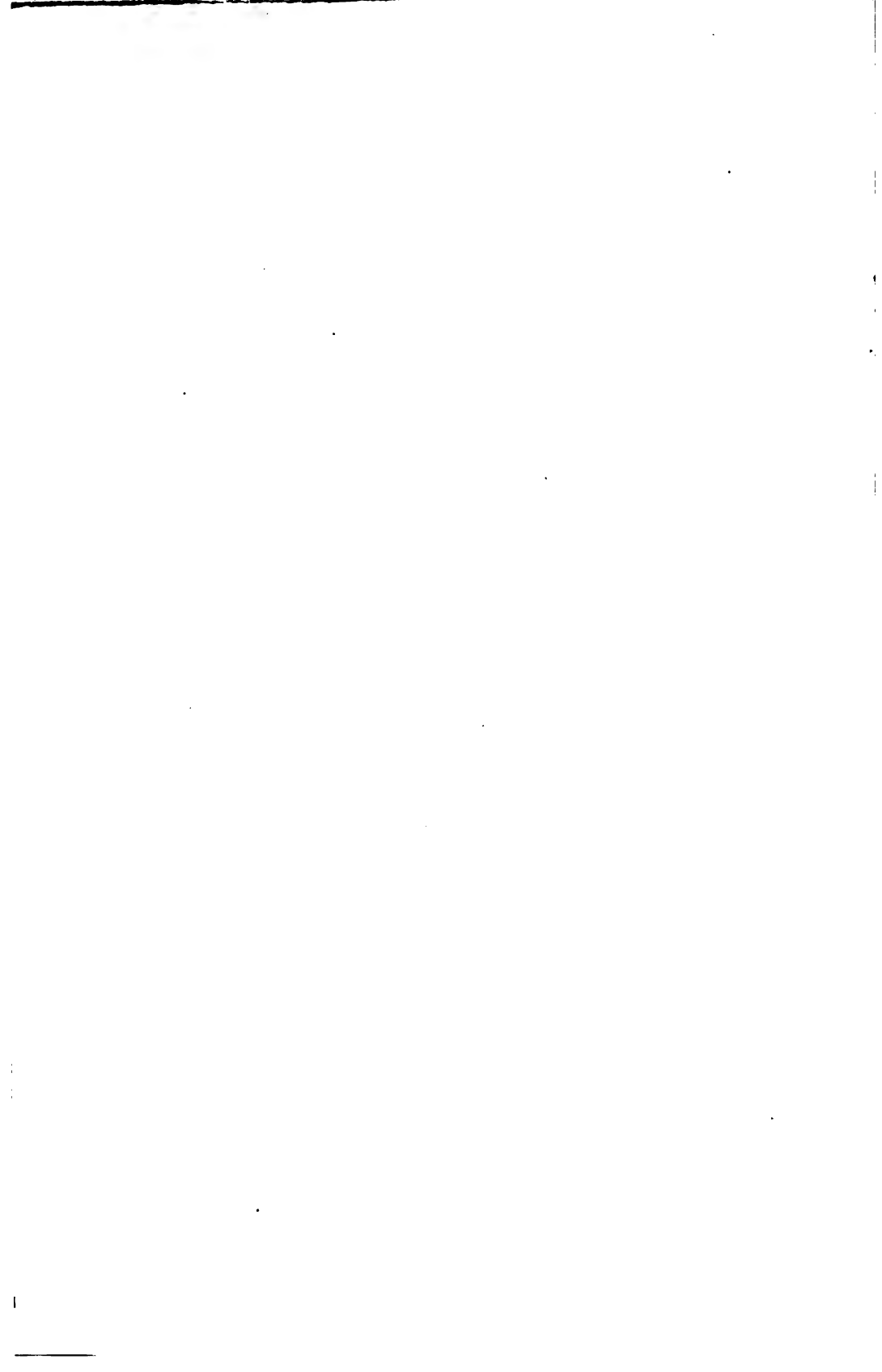


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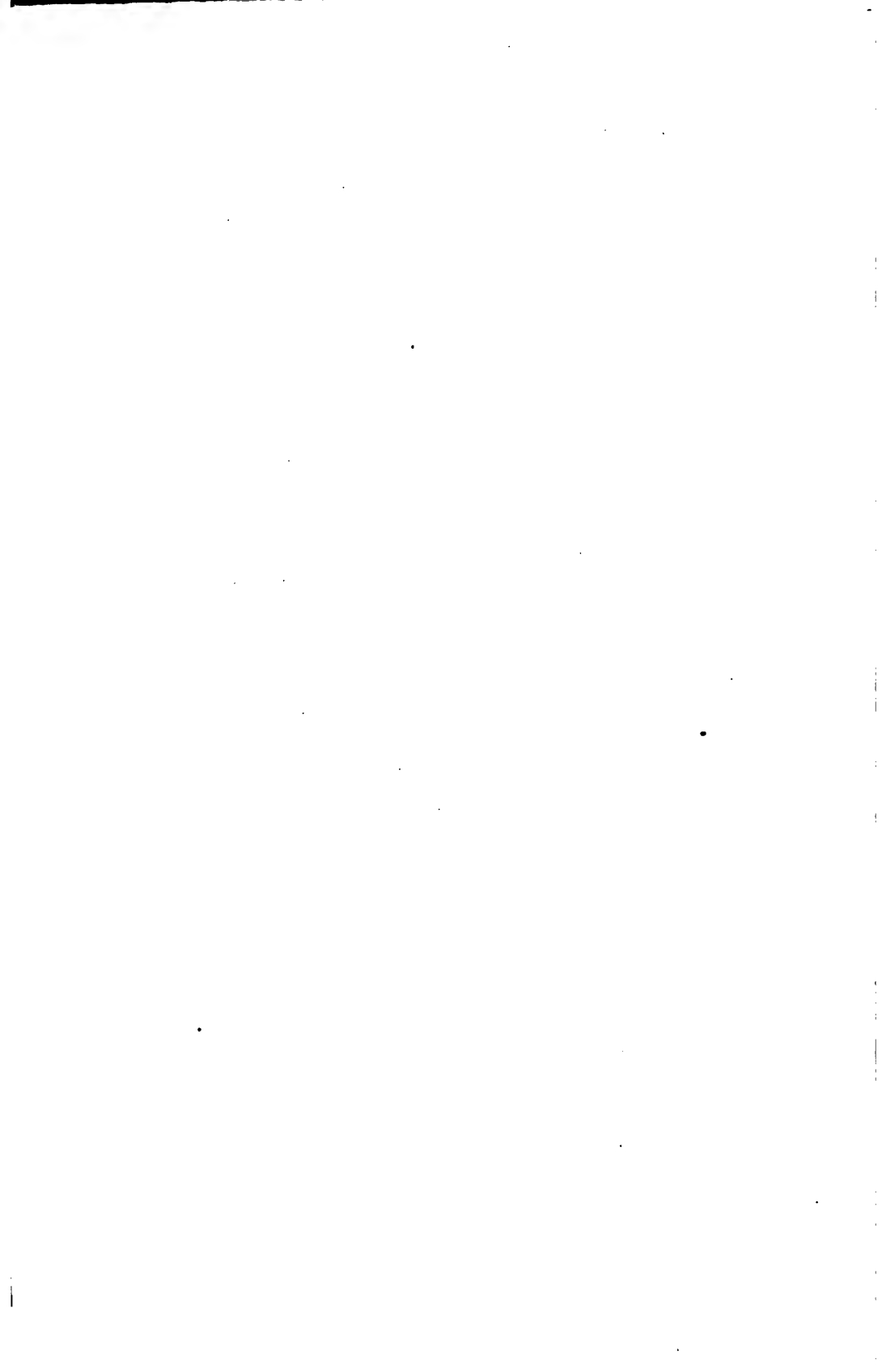
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CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT NEW ORLEANS.

IN

JANUARY, 1886.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice.*

HON. FÉLIX P. POCHÉ,

HON. ROBERT B. TODD,

HON. THOMAS C. MANNING,

HON. CHARLES E. FENNER,

} *Associate Justices.*

No. 9544.

THE STATE OF LOUISIANA vs. GEORGE L. BRIGHT.

A municipal corporation has no right to enforce obedience to the ordinances which it has the power to pass, by fine or imprisonment or other penalty, unless that right has been unquestionably conferred by the lawgiver. The infliction of punishment for the commission, or omission of the act declared to be an offense, is a prerogative which, as a rule, appertains exclusively to the sovereign.

The city of New Orleans has no right to inflict a fine and, in default of payment, imprisonment for non-compliance with an ordinance relative to the establishment of a uniform grade for all sidewalks within corporate limits. That right was not delegated to it by the charter. The words found in Section 7, which authorize provision for the punish-

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ment of any violation of certain ordinances, refer to *such* regulations as the council is authorized to pass and have executed as may be necessary and proper to preserve the peace and good order of the city and to maintain its cleanliness and health. They surely do not justify a fine and, in default of payment, the imprisonment of the transgressor of the ordinance attacked in this instance.

A PPEAL from First Recorder's Court.
Davey, J.

Walter H. Rogers, City Attorney, for Plaintiff and Appellee :

1. There is an express grant to the city by the State "to exercise a general police power in the city of New Orleans." Act No. 20, 1882, par. 15, Sec. 8; Act No. 20, 1882, par. 1, Sec. 1.
2. The subjects of the police power are as numerous as the wants, safety and good conduct of the community require; they arise from the necessities of society.
3. Under this power is embraced the authority to provide for the establishment, maintenance and control of public highways, etc. *Gas Light Co. vs. Light and Heat Co.* U. S. S. C., (not reported); 1 Otto, 540-547.
4. The banquettes of the city of New Orleans are public highways. 14 Ann. 285.
5. It is lawful for the City Council, having authority to regulate streets, to direct its Surveyor and Commissioner to perform its ministerial work. 6 Otto, 341-353; Act No. 20, 1882, Sec. 24; Act No. 20, 1882, Sec. 26.
6. A power granted to a municipal corporation to grade streets, is a continuing power. 6 Wheaton, 503-508; 20 Howard, 135, 149.
7. An ordinance regulating a street grade, is not a contract with property owners. *Id.*
8. A charter authorizing corporation to open and keep streets in repair, authorizes cutting down grade. *Id.*
9. Effect must be given to all ordinances regularly passed and within the powers conferred by the charter. 14 Ann. 318; 10 Ann. 228; 3 Paige, 218.
10. The power of the corporation to fix a penalty for a violation of its ordinances, and the power to enforce such ordinances, cannot be questioned. 3 Ann. 689.
11. A proceeding before and a sentence by a recorder for violation of a police ordinance, is lawful. 14 Ann. 37; *State vs. Nannessier*, Op. Book No. 53, p. 237; Art. 253, Constitution of Louisiana; Act No. 20, 1882, Secs. 49, 50.

Geo. L. Bright for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The question presented in this controversy, involves the power of the city of New Orleans to enforce, by fine and in default of payment of such, by imprisonment, compliance with the requirements of an ordinance relative to the establishment of a uniform grade for all sidewalks, within corporate limits.

The defendant, who was prosecuted for such non-compliance, appeals from the judgment rendered against him.

The ordinance (No. 749, A. S.) reads as follows :

"*Resolved*, that a uniform grade shall be established for all sidewalks within the corporate limits of this city, and that the owners of all property, fronting any public alley or street shall, at their own ex-

State vs. Bright.

pense, cause their sidewalks to be made in conformity to said grade, within ten days after the same shall have been established by the city surveyor, and notice served by the commissioner of public works, upon the owner, agent or tenant of said property. Any owner of property, who shall fail to cause said sidewalk to be so graded, after due notification and within ten days thereafter, shall be subject to a fine of not less than twenty-five dollars for each offense, and in default of payment of said fine, to imprisonment for a period of not less than thirty days, or both, at the option of the court; said fine or imprisonment to be imperative, and to be enforced by any court of competent jurisdiction."

It is claimed, on the one hand, that the right to provide for an uniform grade for all sidewalks within corporate limits, and to enforce compliance with the regulations on the subject, is vested in the city, not only by her charter, but also by the police power with which she is necessarily clothed as an indispensable inherent prerogative, essential for her existence and maintenance.

On the other hand, it is urged that the city possesses no such right, for the reasons that it was not conferred by the charter and that it is not inferable from such police power.

It is further pressed that, if the city has the right to provide for the grade of sidewalks, such power cannot be delegated to the city surveyor, and that the observance of regulations on that subject cannot be coerced by fine and in default of payment by imprisonment.

It is needless to inquire and determine whether the city authorities have the right, either under the charter or the prerogative attaching to the exercise of the police power, to provide for an uniform grade for all sidewalks within corporate limits and whether this right was or not delegated to the surveyor.

If it be true as claimed, that the city has no right to enforce an ordinance to accomplish that object *by fine*, and in default of payment by *imprisonment*, it follows that the ordinance in this case, would be clearly unwarranted and illegal in that respect. This would suffice to render it inoperative and to relieve the defendant from the effect of the judgment from which he has appealed.

It is a principle which cannot be controverted, that a municipal corporation which is the creature of the law and a State functionary, can exercise only those powers which have been expressly delegated to it, and which are necessarily implied as inherent to its existence and thus absolutely indispensable for its administration and maintenance in the

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accomplishment of the functions for which it was put in being and given life.

It is, therefore, acknowledged by text writers, supported by abundant authorities, that a municipal corporation has no right to enforce obedience to the ordinances which it has the power to pass, by fine or imprisonment, or other penalty, unless that right has been unquestionably conferred by the lawgiver; for this is inflicting a punishment for the commission or omission of an act declared an offense, a prerogative which, as a rule, appertains to the sovereign only. Dillon, § 336, p. 343; § 353, p. 353; Desty on Tax, p. 765.

We have carefully examined the sections of the charter (Act 20 of 1882) of the city (Sections 7 and 8), and have failed to discover in them any delegation of such right for non-compliance with ordinances relative to streets or sidewalks.

The words "shall provide for the punishment of any violation of such ordinances or regulations, by fine or imprisonment," found in Section 7, refer to ordinances which the common council is authorized to pass and have executed, as may be necessary and proper to preserve the peace and good order of the city and to maintain its cleanliness and health.

Those words, under no circumstance, even in the cases stated, would justify the city in imposing a fine, and in default of payment in imprisoning the transgressor, as was done by the ordinance attacked in this instance.

For those reasons:

It is ordered and decreed, that the judgment appealed from be reversed; and it is now ordered and decreed, that the prosecution be dismissed and the defendant discharged from the claim against him.

In holding as we do, we make no reflection on what right the city may have to enforce otherwise compliance with such ordinances.

No. 9509.

FLASH, PRESTON & CO. VS. AMERICAN GLUCOSE COMPANY.

Parties offering goods and wares on the market, through brokers whom they employ as their agents for such purposes, are bound for all the stipulations made in their behalf by their said agents. This obligation includes guarantees that perishable goods will keep good and merchantable during a certain period of time.

Goods of a uniform nature, such as manufactured liquid goods, for instance, syrup, which are sold to be delivered in separate packages, may be returned as unmerchantable, even though some of the packages have the appearance of being good and sound.

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The redhibitory defects of such goods cannot be tested under the rule of law which provides that the vice of one of several things sold together, gives rise to the redhibition if all of the things were matched, such as a pair of horses; but it must be governed by the principle which releases the purchaser from his contract when it appears that the defect of the thing sold renders its use so inconvenient as to justify the conclusion that he would not have purchased it had he known of the vice.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

White & Saunders for Plaintiffs and Appellees:

When a contract is made verbally and partially executed, the acceptance of a writing which incorporates its terms erroneously does not prevent oral testimony of the true terms.
111 Mass. 45; 45 N. Y. 712.

Leory & Leovy and *J. P. Blair* for Defendant and Appellant:

1. The sale is considered perfect between the parties as soon as there exists an agreement for the object and the price thereof, although the object has not yet been delivered, nor the price paid. C. C. 2456. The place of delivery is presumed to be where the goods happen to be at time of sale. C. C. 2484; Pothier on Contract of Sale, p. 30; Benjamin on Sales, (1 Amer. Ed.) § 682, p. 596. When the vendor is to send on the goods, delivery to the common carrier is delivery to the vendee. Benjamin on Sales, § 181. Hence, in the present case, the sale was perfect and the ownership and risk in the buyer, so soon as the syrup was measured, put in barrels, and delivered on board the cars at Leavenworth, Kansas.
2. The implied obligation of the seller to warrant the buyer against the hidden defects or redhibitory vices of the thing sold, is fully discharged when, at the time of sale, the goods are in good condition and of a merchantable quality. When a vice makes its appearance subsequent to the sale, the burden of proof is on the buyer to show that the defect existed at the time of sale. C. C. 2530; 5 Ann. 583, *Baker vs. Irvin*; 30 Ann. 907, *Peterkin vs. Oglesby*; Pothier on Contract of Sale, pp. 128 and 130.
3. Parol evidence is inadmissible to prove warranty when the sale is in writing. Benjamin on Sales, § 631; Abbott's Trial Evidence p. 344.
4. A broker has no implied authority to warrant the merchantable quality of the goods sold. Benjamin on Sales p. 545 (note); Ewell's Evans on Agency, p. 173 (note); *Upton vs. Suffolk County Mills*, 11 Cush. 586; *Dodds vs. Farlow*, 11 Allen, 426. Especially is this true when the act is not justified by the usage of the trade. *Story on Agency*, 225, 226; 11 Allen, 426. An authority to warrant does not carry with it authority to give a continuous warranty. 11 Cush. 586.
5. Except in special cases, where things are sold together, as a pair of horses, the whole purchase should not be returned because some articles are defective. C. C. 2540; Pothier on Contract of Sale, p. 139; 3 Ann. 377, *Huntington vs. Lowe*.
6. The rights of the parties were not affected by the resale under the circumstances of this case. When the buyer has been put in default, the vendor may sell as agent of the buyer. C. C. 2565; 8 Mar. (O. S.) 402, *Gilly vs. Healey*; 2 Ann. 640, *White vs. Kearney*; Benjamin on Sales, pp. 683, 688; 9 R. 495; 14 Ann. 352.

It is not necessary for the resale to be at public auction. 2 Ann. 640; Benjamin on Sales, p. 684 (note); 6 Ann. 381, *White vs. Broom*.

7. The measure of damages is the difference between the contract price and the market price at the time of resale, after deducting from the latter the reasonable expenses attending the resale. C. C. 2565, 2555; 30 Ann. 264, *Bartley vs. City of New Orleans*.

The opinion of the Court was delivered by

Flash, Preston & Co. vs. American Glucose Company.

POCHÉ, J. This suit grows out of a contract of sale entered into by the parties hereto, on the 3d of March, 1883, the main issue of which is predicated on the following salient facts:

Plaintiffs agreed to purchase from the defendant's predecessor, 1500 barrels of glucose syrup, to be delivered in New Orleans in equal instalments of 500 barrels a month in each of the months of April, May and June, 1883.

During April and May shipments were made aggregating 850 barrels, which arrived in apparent good order and were received and stored by plaintiffs.

After disposing, in due course of their business, of 167 barrels of the syrup, plaintiffs discovered that the balance of the lot then in warehouses, was fermenting and souring, whereupon they notified the defendant company through a broker named Brodnax, a resident of New Orleans, with whom they had dealt in the purchase, that the goods, consisting of 683 barrels of syrup, which had been warranted not to ferment during summer, were not of the quality which they had purchased, and that the syrup was at the risk of the defendant company as vendor of the same.

The goods were taken, under protest, by the defendant, and were sold on the market at various prices, all under the contract price, and as unmerchantable goods.

Plaintiffs claim reimbursement of freight and other charges on the 683 barrels which they refused to keep, and defendant claims in re-convention the difference between the contract price and the price which was actually obtained on the 683 barrels referred to.

This appeal is prosecuted by the defendant from a judgment which allowed plaintiffs' claim, and rejected its reconventional demand.

The contention presents two main questions:

1. Whether the goods were sold under a guarantee of non-fermentation during summer.
2. Whether the goods returned by plaintiffs were in a state of fermentation, such as to render them unmerchantable at the time that they were tendered back to the vendor.

Plaintiffs rely on the affirmation of both of these propositions, and defendant's reconventional demand turns upon negative proof of at least one of them.

1. The first point involved in the guarantee alleged by plaintiffs, is to ascertain whether the contract of sale of March 3, 1883, was made verbally or in writing.

Flash, Preston & Co. vs. American Glucose Company.

Contending that the contract had been made in writing, defendant objected to the introduction of parol testimony to prove the agreement, and reserved a bill from an adverse ruling.

The record proves beyond a doubt that the agreement on the third of March was made in plaintiffs' office, after negotiations which had lasted several days, and that it was made verbally between William Flash, a member of plaintiff's firm, and Brodnax, acting in behalf of the defendant company.

But it appears that a few days afterwards, the broker signed and handed to a member of the firm, a document containing the principal stipulations of the contract; and on this fact alone is vested the argument that the contract was made in writing.

It is clear to our minds that this document amounted to nothing more than a memorandum, intended to facilitate the memory of the contracting parties, but that it by no means evidences the slightest intention of the parties to enter into a written contract. It was not signed by the plaintiffs, and unless supported by parol testimony it surely could not have been judicially enforced against them as a contract. Hence the district judge did not err in admitting parol testimony of the agreement.

On the question of continuing guarantee *vel non*, the evidence is decidedly conflicting; and to that, as the pivotal question in the case, we have given very careful study and very serious consideration. Our conclusion is that the weight of evidence, both direct and circumstantial, is largely in favor of a guarantee from fermentation during summer, and that such a guarantee was the determining reason in plaintiffs' mind to yield to the broker's repeated importunities to sell them those goods, for use in the principal sugar and molasses market in the country. Several other dealers in molasses and syrups testify that in their contracts with the defendant and other glucose factories, the goods sold for several years previous to 1883, had always been guaranteed against summer fermentation; this is conceded in their testimony by the broker, Brodnax, and by Jones, his partner, but they assert that in the early part of the year 1883, they had received written and positive instructions from the defendant corporation to cease selling any of their goods in Southern climates under such a guarantee.

But unfortunately for defendant's cause, Brodnax and Jones, although specially requested thereto, failed to produce any proof of such written instructions.

Defendant next contends that Brodnax was simply a broker, and was not its agent; that therefore he had no legal authority to bind the company in such a stipulation.

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The record satisfies us that he was the duly accredited agent of the company, with full and special power to bind his principal in just such a contract, in terms as he stipulated with plaintiffs in the premises.

It is unnecessary to detail in full all the elements of testimony and all the circumstances which have led us to that conclusion.

But the very contention that such a power had been withdrawn from him, only a short time before the date of this contract, is clearly pregnant with the admission that he had been clothed with the power, and we note his utter failure to prove the withdrawal of the same. But on the contrary, his acts and dealings in the matter of this very contract, leave no reasonable doubt of the fact that he was not only the broker, but the fully accredited agent of the defendant. 33 Ann. 1364, *Rochi vs. Schwabacher & Hirsch*.

2. The record is yet more complete on the second point of the defendant's contention as to the unmerchantable condition of the 688 barrels of syrup at the time that they were tendered to the vendor as an avoidance of the sale.

It appears from the evidence that the consignment of 500 barrels for the June instalment was in a fermenting condition when the goods arrived in New Orleans, and that it was not accepted by plaintiffs.

Brodnax, to whom the bills of lading were, on that account, transferred, took charge of the goods and disposed of them to the best advantage of his principal, the defendant company, after paying the freight and other charges due thereon.

That circumstance brought about an examination of the lot of 688 barrels then stored for account of plaintiffs, and they were found in a fermenting condition.

It is true that many of the barrels were subsequently found not to be technically fermenting or sour. But this circumstance cannot support defendant's argument that the whole lot should not have been returned.

In large commercial transactions, purchasers of commodities in separate packages cannot be required or even expected to pick and retain certain packages and to refuse others.

Article 2540 of our Code does not apply to such a case, which is governed by the general principle as embodied in Article 2520, which reads as follows:

"Redhibition is the avoidance of a sale on account of some vice or defect in the thing sold, which renders it either useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it, had he known of the vice."

Levy vs. Succession.

Under the evidence as we have read it, plaintiffs' case can successfully stand the test of that rule.

They proposed to buy a lot of glucose syrup for the use of their trade during the summer months, and they bought an article which was warranted not to ferment during that time.

On examination, at the end of June, they discover, as shown in the record, that one-half of the packages containing the goods are fermenting; they have every reason to believe and in fact to know that the evil will increase instead of decreasing: is it natural or rational to suppose that they would have bought the syrup, even with the guarantee, had they known that it would ferment at the first approach of summer weather?

This question is answered by the defendant and its agent themselves through their own acts. The record shows that they offered and sold these identical goods on the market at reduced prices and as unmerchantable goods, and are thus estopped from denying that they were fermenting.

We therefore conclude that substantial justice has been meted out to the parties by the district judge.

Judgment affirmed.

No. 9504.

ADOLPH LEVY VS. SUCCESSION OF I. L. LEHMAN ET ALS.

An attachment cannot legally issue against a succession or the property thereof, whether the succession is opened and administered in this State or in another State.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Braughn, Buck & Dinkelspiel for Plaintiff and Appellant:

1. An attachment against a non-resident does not fall by his death, but thereafter a *curator ad hoc* may be appointed to his succession and his absent heirs, and judgment rendered, with privilege and preference on the property attached. *Bussey vs. Nelson*, Supreme Court, No. 7160.
2. And, as an attachment against a resident would fall by death, therefore an attachment cannot issue against the succession of a resident; but the rule does not apply to that of a non-resident.

Robt. H. Marr, Jr., curator ad hoc.

Farrar & Kruttschnitt for Defendants and Appellees:

I.

No court in Louisiana, either upon principle or authority, has the power to issue a writ of attachment against the property of a deceased *non-resident*. *DeBuys vs. Yerby*, 1 N. S. 360; *Oaky vs. Ducker*, 13 La. 378; *Trimble vs. Brichta*, 10 Ann. 779; *Cheatham vs. Carrington*, 14 Ann. 696.

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II.

The succession of persons domiciled out of the State of Louisiana, and leaving property in this State at their demise, are to be opened and administered upon as are those of citizens of the State. R. S. § 3677.

III.

That the estate of a dead man is a distinct and separate entity—a distinct and separate succession—in each and every State or country where he leaves property, is well settled. Succession of Taylor, 23 Ann. 22; Burbank vs. Payne & Harrison, 17 Ann. 15; Atkinson vs. Rogers, 14 Ann. 633.

IV.

The case of Bussey vs. Nelson, Manning's Unreported Cases, p. 339, is correctly decided; but has no application to the case at bar.

V.

A writ issued by a court without jurisdiction is mere *brutum fulmen*, and may be ignored by any person having an interest in ignoring it. State ex rel Liversey vs. Judge, 34 Ann. 741.

The opinion of the Court was delivered by

TODD, J. The plaintiff, a creditor of I. L. Lehman, a resident of Kentucky, where the debt was contracted, and who died there, instituted a proceeding by attachment, wherein was seized a stock of goods in this city in the possession of A. R. Lehman and Theodore Frois, doing business under the name of Lehman & Frois. The suit was brought after the death of I. L. Lehman, the debtor, and it was alleged that the goods were shipped to Lehman & Frois by I. L. Lehman during his lifetime, and belonged to him at his death, and that the title thereto set up by Lehman & Frois was a pure simulation. These last named parties were joined in the suit. A *curator ad hoc* was appointed to represent the succession of I. L. Lehman, which was stated to be under administration in the State of Kentucky, and in charge of an executor appointed there.

Judgment for the debt claimed was prayed for against all the parties defendant, and it was further asked that the title to the stock of goods in possession of and claimed by Lehman & Frois, be declared simulated, and the same be decreed subject to the debt sued upon, and sold to pay the same.

There was a motion to dissolve the attachment filed by the *curator ad hoc* and a similar one by the other defendants, (Lehman & Frois), coupled with a further motion to quash the seizure which were sustained, and from a judgment dissolving the attachment and quashing the seizure, the plaintiff has taken the appeal now before us.

The motions contained several grounds, only one of which we deem it necessary to notice and that is to the effect:

"That a writ of attachment under the laws of Louisiana cannot issue against a succession; but that plaintiff's remedy, if any cause of

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action be had, is by regular proceedings, to open and administer upon the succession of said Lehman in this State."

The writ of attachment under our laws is termed a conservatory writ, and inasmuch as its issuance is authorized in advance of any judgment for the debt sought to be secured by means of it, the right to resort to it is closely guarded; and it can only be obtained in certain exceptional and well defined cases, and with the observance of clearly prescribed formalities. A cursory glance at these special legal provisions relating to this writ, will show beyond question, that an attachment cannot issue or be directed against a succession or succession property. These provisions indubitably contemplate and refer to the condition or acts of a living debtor as controlling the issuance of the writ. This will be plainly seen by citing some of them. Thus an attachment may issue where the debtor is about leaving the State permanently; where he resides out of the State; where he conceals himself to avoid being cited; where he is about to dispose of his property and with intent to defraud his creditors, etc.

All of which conditions exclude the idea that these prescribed requisites for the writ can, by the most strained construction, be made to apply to successions, succession property or succession debts.

Another consideration respecting successions and their administration, presents quite as formidable obstacles as the above against the proposition of succession property being subject to the writ of attachment. It is an elementary principle relating to successions, that the rights of creditors are fixed at a man's death; that succession property constitutes a common fund, the equal pledge of all the creditors except as relates to privileges and mortgages acquired before the death, and provision is made for the concurrent payment of all debts according to their rank; which precludes one creditor by superior diligence or by any device or process whatever after death, from obtaining an advantage over others. *Boyce vs. Escoffie*, 2 Ann. 573; *Kisner vs. Duncan*, ex., 3 N. S. 570.

Another consideration that suggests itself in this connection is, that an attachment being a conservatory remedy, is only designed to hold the property *pendente lite*, that it may be sold under the proper writ to satisfy the judgment when obtained. But nothing is better settled than that succession property cannot be sold under a writ of *fi. fa.*, the only writ by or through which an ordinary moneyed judgment can be executed. 1 Ann. 173; 13 Ann. 476; 25 Ann. 154.

It seems, however, almost idle to engage in a discussion of general principles pertaining to this subject, when the direct issue involved

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has been so often decided by this Court that the jurisprudence on the question has been completely settled. See *Debuys vs. Yerby*, 1 N. S. 380; *Trimble vs. Brechta*, 10 Ann. 778; *Cheatham vs. Carrington*, 14 Ann. 696.

Nor is the case of *Bussey vs. Nelson* (*Manning's Unreported Cases*, p. 339) invoked by plaintiff's counsel opposed to those above cited, since in this last case the debtor was alive when the attachment was issued and executed.

Finally, it is contended that *Lehman & Frois* have no right, or are not in a position to make objection to the writ of attachment referring to the authorities, respecting the rights of an intervenor in a like case in support of the contention. We scarcely deem it necessary to consider this point, since this same ground which we have been considering is contained in both motions to dissolve, and if we determine the question adversely to the plaintiff, exclusively with reference to the motion of the *curator ad hoc* appointed at the instance of the plaintiff, as the representative of *Lehman's* succession, the legal consequences of the dissolution of the attachment would not be confined to the succession alone, but would extend to all affected by the seizure; that is, it would operate to annul the seizure as to all parties interested.

Judgment affirmed with costs.

No. 9523.

HARRIS, PARKER & CO. vs. A. G. NICOLOPULO.—CITIZENS BANK,
INTERVENOR.

The lien of the unpaid vendor of cotton, when enforced in five days, is superior to that of the holder for value of a bill of lading for the cotton.

Although the vendee of the cotton has put it on shipboard, and has drawn his bill of exchange against it, and the bill of exchange with bill of lading attached was bought by an innocent party for full value who has had the bills endorsed and delivered to him, yet if the vendor has not been paid and he pursues his vendee and the cotton within the five days allowed him, he must prevail over the holder of the bill of lading.

The vendor's lien on cotton for five days yields to nothing unless it may be to a warehouse receipt which has been pledged as collateral for money borrowed, and not to that unless the receipt has been paraphed before issue "for hypothecation."

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

T. J. Semmes & Payne for Plaintiffs and Appellees.

Miller & Finney for Intervenor and Appellant.

The opinion of the Court was delivered by

MANNING, J. This case presents the question whether the unpaid vendor of cotton, or the holder for value of the bill of lading for it, shall prevail in a contest for the amount of the purchase price.

The case comes up on a statement of facts, and they are as follows:

The defendant bought fifty-nine bales of cotton from the plaintiffs for two thousand seven hundred and seven dollars and twelve cents, on January 3, 1885, and did not pay for it. The cotton was delivered on January 5th following, and the plaintiffs instituted this suit for the recovery of the price within the five days specified in Art. 3227 Rev. Civ. Code. Meanwhile between the delivery and the institution of this suit, the purchaser Nicolopulo had shipped the cotton, drawn his bill of exchange against it, and the bill of exchange with bill of lading attached was bought by the Citizens Bank for full value, both bills having been endorsed and delivered to the bank and the cotton being on shipboard. Nicolopulo is insolvent and has made a cession to his creditors.

The bank contends that the Act of 1868, to prevent the issue of false receipts or bills of lading and to punish fraudulent transfers of property by cotton presses and others, overrides and repeals the preference given the vendor of agricultural products whenever the purchaser has shipped the cotton and transferred the bill of lading for value.

The point was not presented in *Gumble vs. Beer*, 36 Ann. 484. Nevertheless we think the principles therein announced control this case and the whole reasoning in that opinion foreshadows our conclusion in this.

The intention of the legislature to protect the vendor of agricultural products as against all the world, for a given time after their sale, was first manifested a little more than thirty years ago, and it has been persistently and consistently adhered to ever since. The Act of 1854 was of course included in the revision of the following year, and it was incorporated in the Code upon its revision in 1870. Jurisprudence meanwhile had recognized that intention in all its fullness and had enforced it whenever occasion arose.

The Act of 1868 recognized the negotiability of bills of lading, and declared that the transferee of them shall be deemed and taken to be the owner of the goods therein specified so far as to give validity to any pledge, lien, or transfer made or created by such person. Acts, p. 194. But this was only the announcement in general terms of certain qualities imparted to bills of lading, and a declaration that the transferee of them under normal circumstances should have and exercise certain rights. He was deemed the owner so far as to give validity to

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his pledge of them or lien upon them or transfer of them, but it requires very different and much stronger and more precise language to express the intention that a lien given the vendor within a given time, absolute and overmastering every other claim, which legislation had created and jurisprudence enforced, was to be done away with and abrogated. The enactment in the same statute whereby a criminal offence is created, and a violation of its provisions is declared punishable with severe penalties, does not add force to the suggestion that the vendor's lien was intended to be destroyed or that it was to be relegated to a lower rank in the scale of privileges and subordinated to a bill of lading.

Even if this were less clear the subsequent legislation of 1876, Acts, p. 113, would put it beyond cavil, for there it was enacted that the vendor's lien of five days, now allowed in commercial transactions for the payment of the purchase price, shall not be affected by that Act except where a warehouse receipt has been pledged as collateral for money borrowed, and in order that it may come within the benefit of the exception, the receipt must be paraphed before issue "for hypothecation."

Compare this minute and precise language with that of the Act of 1868 and observe the particularity with which a warehouse receipt is singled out for exception. Had it been intended that bills of lading should under any circumstances have been given priority over the vendor's lien and have been accorded a rank alongside of paraphed warehouse receipts, apt language would have been found to express that intention, and the circumstance that warehouse receipts were given such dignity by name and no mention is made of bills of lading shews that the legislature intended to confine this alteration of the law to the former.

The Act of 1876 has impressed upon it throughout the intention to give this priority to a paraphed warehouse receipt and nothing else, and instead of the halting language of the Act of 1868 when it says the transferee of a bill of lading shall be deemed to be the owner of the goods so far as to give validity to his pledge, etc., the Act of 1876 says outright, the holder of the warehouse receipt shall be considered and held as the actual owner of the property described in the receipt. Sec. 5.

The judgment of the lower court was for the plaintiffs enforcing their lien as vendors, but it did not go far enough. It simply gave them a judgment against the defendant with recognition of their lien and dismissed the intervention of the bank. It is admitted that the bank has.

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the funds and is agreed that judgment shall go against it for the amount of the plaintiffs' claim if we shall decide as we have done, and an amendment of the judgment to accomplish that end is prayed. Therefore,

It is ordered and decreed that the judgment of the lower court is amended in this wise, that the plaintiffs have and recover of the Citizens Bank, intervenor herein, two thousand seven hundred and seven dollars and twelve cents, with interest from January 3, 1885, and costs of both courts, and as thus amended that it is affirmed.

No. 9530.

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J. O. TERRY & SONS VS. THEIR CREDITORS.

In insolvent proceedings, where no objection is made to the votes of creditors before the notary holding the meeting or within ten days after the filing of the *procès verbal*, objections based on the informality or insufficiency of the affidavits to the debts made before the notary cannot, thereafter, be urged.

A surety or accommodation maker or endorser of a note, only becomes a creditor of his principal when he has paid the debt and, until such payment, he is not entitled to vote as a creditor in the insolvent proceedings of his principal.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

W. S. Benedict and *H. C. Cage* for Plaintiff and Appellant.

E. E. Moise and *J. Timony* for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. The commercial firm of J. O. Terry & Sons and the individual members thereof, J. O., O. F. and W. S. Terry made a cession of property to their creditors, and filed schedules of their firm and individual assets and liabilities respectively.

A meeting of their creditors was held, at which there were two candidates for syndic, and it appears from the notary's *procès verbal* that of the entire number of creditors voting, including firm and individual creditors, forty-six creditors representing \$11,000 voted for J. W. Stockton, and thirty-three creditors representing \$14,500 voted for J. S. Hodgins. The *procès verbal* thus showed on its face that no one had received the majority in number and amount requisite to the election of a syndic.

No objection was made at the meeting to the reception of any of the votes cast except to that of A. Bradley, an individual creditor of O. F. Terry for \$9000, against the admission of which a protest was made.

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before the notary on grounds fully stated therein and hereafter to be considered. If this vote were rejected, Stockton received a clear majority in number and amount of the votes and was duly elected.

The *procès verbal* was filed in court on April 17, 1885.

On the same day Stockton took a rule on Hodgins, Bradley and the insolvents to show cause why the vote of Bradley should not be stricken from the *procès verbal* and why he, the mover, should not be decreed to be the duly elected syndic.

On April 21, Stockton filed a regular opposition to the homologation of the *procès verbal* on the same ground, and praying that it be amended by striking out Bradley's vote and thereupon decreeing his own election as syndic.

No other opposition was ever filed to the *procès verbal*, and the jurisprudence is well settled that, except so far as opposed, the *procès verbal* became absolute, without any formal homologation. *Goodale vs. Creditors*, 8 La. 125; *Gouy vs. Creditors*, 2 La. 358; *Pandelly vs. Creditors*, 9 La. 387; *Gwartney vs. Creditors*, 13 Ann. 188.

The rule taken by Stockton went regularly to trial. No written answer thereto was filed. It is admitted that no question was raised or submitted in the lower court except the validity of Bradley's vote. The court, holding the vote to have been properly received and counted, rejected Stockton's demand, discharged the rule and appointed the civil sheriff of the parish as syndic; from which judgment Stockton prosecutes the present appeal.

The only appellees appearing by counsel in this Court are the insolvents.

They almost abandon the question raised in the lower court as to the validity of Bradley's vote, and claim the affirmance of the judgment on entirely different grounds.

Thus they say that the *procès verbal* shows that a large number of the votes were cast by proxies whose affidavits as to the debts were not made of their own knowledge.

We fully adhere to the doctrine heretofore affirmed that the law requires proxies, in making the required oath to the debt, to swear of their own knowledge and not merely of their belief or from merely derivative knowledge. *Phillips vs. Creditor*, 36 Ann. 904; *Pandely vs. Creditors*, 9 La. 393.

Had the votes been opposed on this ground, either before the notary or by opposition to the *procès verbal* within ten days, the opposition would have been successful. But it is unquestionably too late to raise such objections after the lapse of ten days from the filing of the *procès*

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verbal. The *dictum* in Pandely vs. Creditors that such illegal votes must be struck out has no application, because in that case the issue was distinctly raised by timely opposition.

Nor is the defect of a character such as to render the proceedings void on their face, and therefore null without opposition, under the *dictum* in Goodale vs. Creditors.

The nullified homologation resulting from the lapse of the ten days is as much *res judicata* as if this defect had been urged in an opposition and overruled.

We conclude, therefore, that even had this point been raised before the lower judge, he would have rightly disregarded it.

It only remains to consider whether the objections to the reception and counting of Bradley's vote were well founded. We think they were. On his own showing he was not a creditor of O. F. Terry. He had signed notes for the accommodation of Terry, which had been passed to D. C. McCan & Son, who now hold them. Terry was and is bound to hold him harmless against any liability on said notes, and should he pay them, he would undoubtedly be a creditor of Terry; but, until he pays them, he is not a creditor. 2d Daniel's Neg. Instr. §§ 1:339 *et seq.*

He has not paid them; and although McCan & Son have obtained judgment against him on one of the notes, they have been unable to find any property on which execution could be levied or any means of enforcing payment, and the evidence exhibits no probability of their ever being able to do so.

The vote of Bradley should be expunged.

This leaves Stockton with a clear majority, number and amount of firm and individual creditors, and gives him a clear right to the appointment as syndic.

This relieves us from the consideration of questions raised as to the relation of partnership and individual creditors. The firm creditors are unquestionably creditors of the individuals, and so counted, Stockton has a majority in number and amount of the creditors of the firm and of each individual member.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now ordered and decreed that the rule herein taken be made absolute; that G. W. Stockton be declared the duly elected syndic of the creditors of the insolvent, and entitled to be appointed and confirmed as such in conformity to law, and that this case be remanded to the lower court with instructions to make the orders and take the other steps requisite for the execution of this decree, appellees to pay costs of rule and of this appeal.

State vs. Roland.

No 9522.

THE STATE OF LOUISIANA VS. SAMPSON ROLAND.

A juror accepted on the faith of the truth of his sworn answers, but who on cross-examination contradicts himself, may be challenged peremptorily before the oath is administered to him.

A copy of a coroner's inquest, by the clerk of the Criminal District Court who is the legal custodian of the same, is admissible in evidence.

A motion in arrest of judgment cannot be entertained where it is not based on errors patent on the face of the proceedings.

Testimony in support of such motion cannot be received

A PPEAL from the Twenty-second District Court, Parish of Ascension. *Duffel, J.*

M. J. Cunningham, Attorney General, for the State, Appellee :

1. Where a juror in a criminal trial has been accepted by the district attorney upon the faith of his sworn replies and tendered to the accused, and upon this subsequent examination he contradicts himself and admits that he has heard of the case, the State may exercise her right of peremptory challenge. This right exists until the oath is administered to the juror. *Bishop*, Vol. 1. § 945; *Wharton P. and P.* § 672; *Proffat on Jury Trials*, § 165.
2. A tender of the juror to the accused is no waiver of the right of peremptory challenge. *Wharton P. and P.* § 675.
3. A copy of the coroner's inquest, certified to by the deputy clerk of the Criminal District Court, parish of Orleans, is admissible in evidence to prove the *Corpus delicti* in a trial for murder in one of the country parishes. The copy is as authentic as the original.
4. Grand jurors cannot be heard to impeach their finding. Nor is their evidence admissible to prove allegations contained in a motion in arrest of judgment, which can only be sustained for errors patent upon the face of the record. 15 Ann. 557; 28 Ann. 658; 30 Ann. 91; 28 Ann. 129; 8 R. 513.

A. Gondrom for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The accused appeals from a sentence of death passed upon him on a verdict of guilty of murder.

The record contains bills of exceptions to the rulings of the district judge, permitting the peremptory challenge of a juror by the State; admitting a certified copy instead of requiring the original of the coroner's inquest, and refusing the introduction of testimony in support of a motion in arrest of judgment.

I.

It appears that, when examined by the State on his *voir dire*, the juror said that he knew nothing of the case and that when cross-examined by the defense, he admitted having heard talk about it.

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The State then challenged the juror peremptorily. The court overruled the objections of the accused and discharged the juror. To this ruling a bill was taken.

It suffices to say that it is well settled that the challenge, either by the prosecution or by the defense, must be made before the oath is commenced, down to which period the rights exists. *Waterman C. D.* p. 602 (140); *Wharton C. P. and P.*, 672; *Bishop on C. P.* Vol. 1, § 945; *Proffat Jury Trials*, § 105.

It is no waiver of the right to challenge for cause for the defendant to pass the juror over to the court or the opposite side for examination. *Wharton C. P.* 675.

It is also settled, that even after the administration of the oath, it lies in the discretion of the court whether a peremptory challenge shall be allowed or not. *Proffat on Jury Trials*, § 165.

In the present case the challenge was made after tender to accused, but before the qualifications of the juror had been admitted and before he had been sworn.

The challenge was in time and properly sustained.

II.

The court was right in admitting in evidence a certified copy of the coroner's inquest which was at the time on record in the clerk's office of the Criminal District Court for the parish of Orleans, within whose jurisdiction the murdered man died and the inquest was held.

The law provides that, in case of murder or manslaughter, the coroner shall return to the court the inquisition, written evidence and all recognizances and examination by him taken. See *R. S.* 664.

The clerk of such court thus becomes the lawful custodian of such papers and documents. A copy of the same, certified by him, is equivalent to the original, in point of authenticity.

It is not pretended that the copy was not an exact and correct transcript of the original and that the accused suffered any injury.

It appears that the coroner who made the inquest was heard as a witness on the trial of the case, but nothing shows that the sufficiency of the copy was attacked.

III.

The rule is that a motion in arrest can be entertained only for errors apparent on the face of the record.

The offer of testimony in support of such a motion, which did not disclose such errors, was properly rejected.

Judgment affirmed.

State vs. Spell.

No. 9547.

THE STATE OF LOUISIANA VS. STRICKLAND SPELL.

Proof of previously communicated threats against the life of the accused by the deceased in cases of homicide, is inadmissible unless preceded by *proof* of some assault or hostile demonstration by the deceased against the accused at the time of, or immediately preceding the killing.

The question of the admissibility of such evidence is within the exclusive province of the trial judge, who must be satisfied that proper foundation has been laid before admitting the evidence, and who has the legal discretion to disbelieve testimony which to his mind appears incompatible with the proven facts and circumstances of the case.

Rulings on this point in the cases of *Ford, Labuzan and Jauvier*, 37 Ann., re-affirmed. An accused cannot be allowed to introduce as evidence his own declarations of motives and intentions connected with the killing, made to another person previous to the homicide.

A PPEAL from the Twenty-fifth District Court, Parish of Vermilion.
De Baillon, J.

M. J. Cunningham, Attorney General, *R. C. Smedes*, District Attorney, and *W. B. White*, Associate Counsel, for the State, Appellee:

1. A statement made by the accused a few moments before the killing is inadmissible to prove the prisoner's object in being at the place when the killing occurred. The declaration is self-serving. 30 Ann. 538; Wharton's Cr. Ev. §§ 690, 692, 693.
2. Evidence of threats communicated or uncommunicated, made by the deceased against the accused, or of attempts made by deceased at waylaying the accused, prior to the day on which the homicide was committed, is inadmissible unless the proper foundation has been laid by establishing a hostile demonstration on the part of the deceased against the prisoner, sufficient to disclose an intention on the part of the deceased to carry those threats into execution. Wharton, Homicide, §§ 482, 605, 606; Wharton Cr. Ev., § 68, 757; *Desty Cr. Law*, § 128 a.; 5 Ann. 490; 6 Ann. 420, 554; 14 Ann. 827; 32 Ann. 1084; 33 Ann. 1087; 34 Ann. 1078; 35 Ann. 71; 36 Ann. 81, 859; 37 Ann. 460; 36 Ann. 148.
3. In order to bring before this Court the ruling of the court *a qua* refusing to grant an application for a new trial, and also refusing to charge as requested by the defense, formal bills of exceptions should have been taken thereto. 34 Ann. 881; 35 Ann. 543, 770, 742, 769, 823.

W. W. Edwards for Defendant and Appellant:

When there have been threats, accompanied with an attempt to kill, and the party in danger believes, and has the right to believe, he can escape in no other way except by killing his foe, he is not obliged when he casually meets him to fly for safety, *nor to await his attack*. *Bohanan vs. Com.*, 8 Bush, 481; *Wat. Crim. Dig.*, p. 315, No. 663; *Cotton vs. State*, 31 Miss. 504; *Granger's case*, 5 Yerger, 459.

In homicide, when there is any evidence going to show excuse or extenuation, it is proper to go to the jury. *Whar. Crim. Ev.* 9th Ed., § 335 and note 2, under § 334; 9 Met. 93.

All acts and sayings immediately connected with the principal act form part of the *res gestæ*, as the case of the Philadelphia riots, and are admissible. *Whar. Crim. Ev.* § 262; *Cowen and Hill's Notes to Phil. Ev.*, *Vancott's Ed.* vol. 3, part I, p. 213, *et seq.*

Any fact which tends to prove the real motive of the defendant in killing the deceased, is relevant evidence, whether offered by the State or by defendant. *Flanagan vs. State*, 46 Ala. 703; also 1 Archb. Pl. and Pr., p. 812 *Pomeroy's Ed.*; *Stokes vs. People*, 5 N. Y. 174.

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If defendant negligently formed an erroneous opinion as to the necessity of killing, it is manslaughter; but if the opinion was not negligently formed, though erroneous, he is justifiable, Whar. Cr. Law, 9th Ed., §§ 492 and 493.

Uncommunicated threats are admissible to corroborate other threats communicated (when the latter are admissible.) 1 Arch. Cr Pl. and Pr. pp. 809, and 811, Pomeroy's Ed.; see also *People vs. Stokes*, 53 N. Y. 174.

The opinion of the Court was delivered by

POCHÉ, J. The defendant appeals from a conviction of murder without capital punishment, and he relies on errors to his detriment, which he sets forth in seven bills of exception.

All the grounds of his complaint, although embraced and detailed in numerous bills, may easily be summarized into and discussed under the heading of one general principle.

The pivotal point of his complaint involves the alleged error of the trial judge in excluding the testimony of several witnesses, by which the accused intended to show repeated threats against his life by the deceased, and a conspiracy between the latter and another person to kill the accused by waylaying him, and thus to perpetrate a cold-blooded assassination.

The reasons of the judge for his course are included mainly in the first bill, to which he refers in all the subsequent bills contained in the record.

The substantial ground which he advances is the failure of the accused or of his counsel to have laid the proper foundation for such proof, by showing that the deceased had made some assault on his slayer or some hostile demonstration against him at the time of, or immediately preceding, the killing.

The judge informs us in his statement subjoined to the bill, that the proffered evidence had reference to alleged threats and acts which had preceded the homicide by several days, and that no proof had been made of an apparent intention of the deceased to carry any of the alleged threats into execution when he met the accused on the occasion of the homicide; the meeting took place in a prairie in broad daylight, and the deceased was shot down by the defendant, in the very act of begging for his life.

Such proof of the manner in which the homicide occurred, in the absence of any proof of any preceding assault on his slayer or of any hostile demonstration against him, on the part of the deceased would, in the light of well settled jurisprudence, seem to have left to the trial judge no other alternative but to exclude the proffered testimony.

But counsel for the accused submits that the judge is in error in his appreciation of preceding evidence which did show hostile demonstra-

tions on the part of the deceased and of his co-conspirator, against the accused, when they all three met in the prairie.

And counsel further argues that the trial judge simply usurps the functions of the jury when he claims the right of judging of the nature of the evidence as preliminary to the introduction of testimony of alleged threats on the part of the deceased. The argument is quite obsolete when tested under the established rules of criminal jurisprudence.

This question was maturely considered by us in the recent case of Ford, 37 Ann. 443, which has perhaps not yet reached counsel for the accused. We said on that subject: "In passing on such a question, the trial judge must of necessity be clothed with the authority to decide whether a proper foundation has been laid for the proffered evidence, and that authority necessarily includes the discretion to ignore and not consider testimony which his reason refuses to believe."

We will not do the injury to the district judges of the State of supposing, with counsel for the accused, that any one of them can be found, so devoid of all sense of duty as to secure conviction of an accused by designedly excluding testimony which might be favorable to him. If there be such a judge, his case should be dealt with in other proceeding, for which the Constitution has made ample provision, but the issue cannot be met in an appeal which merely involves the correctness of his rulings.

The rule laid down in the Ford case was not without precedent, and it has been subsequently followed by this Court. *State vs. Labuzan*, 37 Ann. 490; *State vs. Janvier*, 37 Ann. 644.

In the case of Janvier the district judge was upheld in his admitted refusal to give credence to the statements of two witnesses in support of a hostile demonstration, on the ground that their testimony appeared "improbable in itself, and inconsistent with all the proven facts and circumstances of the case." * * *

In one of the bills the trial judge is charged with error in excluding testimony tending to show that two days before the homicide the defendant had stated to the proffered witness that the deceased and his co-conspirator were lying in wait in the woods for the accused, and that the latter was actually afraid to go by alone. What a convenient defense would there be afforded to murderers in their yearning desire to remove their enemies! Counsel's argument that such a statement, made two days before the killing, is admissible as evidence to show the state of the mind of the accused, needs no other refutation than a mere mention.

The same answer is sufficient to meet the complaint against the exclusion of testimony consisting of a statement of the accused to the

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witness a short time before the killing, that his object in going to that spot was to hunt for a lost pistol. It was by no means part of the *res gesta*, as erroneously argued by counsel, and surely the witness could not know the object of the accused in going to that prairie at that particular time. State vs. Ford, 37 Ann. 462.

Our examination of the record has disclosed to our entire satisfaction that the accused had had a fair and impartial trial.

Judgment affirmed.

No. 9551.

THE STATE OF LOUISIANA VS. ROSE SIMPSON.

The Constitution and laws guarantee to a party charged with crime the right to be heard by counsel, and where the party is unable to employ counsel, it is the duty of the court to assign one. This right is not an empty formality, but an inestimable privilege, and the counsel so assigned should be allowed a reasonable time to make preparation for the defense, and where under oath he states that he has been unable to do so, assigning just reasons therefor, and asks a delay for the purpose of preparation, and it is refused him and he has not been wanting in diligence, *held* that such ruling was error.

A PPEAL from the Twenty-fourth District Court Parish of Plaquemines. *Livaudais, J.*

M. J. Cunningham, Attorney General, and *James Wilkinson*, District Attorney, for the State, Appellee.

F. C. Zacharie for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant, indicted and tried for murder, and convicted of manslaughter, appeals from a sentence of imprisonment at hard labor for twenty years.

The indictment was returned into court on the fifth of October, 1885, the same day the accused was arraigned and counsel assigned to defend her, and the case fixed for trial on the ninth of same month. On that day the counsel made a motion for a continuance accompanied by his affidavit, stating that he "was only assigned as counsel in this cause late on the evening of the fifth of October, and that said counsel is entitled to an indulgence from this honorable court of a reasonable time, on which to prepare a suitable and valid defense, which counsel believes there is in this case. That said assigned counsel has not had any time to do so, inasmuch as said assignment was made in the midst of a busy term of court, when the said assigned counsel was already preoccupied with a mass of other business which compelled him to de-

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State vs. Simpson.

vote the whole of Tuesday to its transaction, and that he had been constantly occupied during Wednesday and Thursday, going to and returning to the city of New Orleans, where he was engaged in the transaction of other business during his limited stay there, only arriving at the court-house last evening (Thursday), at a late hour; that the accused is without means or any other assistance in the world outside of the counsel assigned, that she is an ignorant field hand; that Stella Plantation, where the crime is charged to have been committed, is distant twenty-five or more miles from the court-house, with only communication twice a day at irregular hours, and that the assigned counsel has been unable to visit the place or to see any of the witnesses in this cause, or generally to prepare the case involving as it does the life of a human being, embracing points of law and fact, requiring much study and research, which said counsel has been unable to devote to it."

This counsel was F. C. Zacharie, Esq., a resident of New Orleans.

It moreover appears from his brief—and his statement is not denied—that the murder was charged to have been caused by ill treatment and starvation; that the defense was that the death resulted from a disease with which the deceased was alleged to be afflicted; that this defense required an examination of a work or works on medical jurisprudence, and there were none at hand, and also required the testimony of medical experts or physicians, and with the exception of the coroner who was a physician and a witness for the State, there were none in the place where the court was held. It also appears, that when this application was made, the session of the court was drawing to a close, and a postponement of the trial to allow sufficient time for preparation asked by the counsel at the same term of court, was impracticable.

The delay asked was refused and a bill of exceptions taken to the ruling of the court.

Considering that the offense charged was murder; that the indictment had only been filed at the same term of court; that the counsel assigned for the defense was a non-resident of the parish where the court was held, and had no sufficient opportunity to confer with the witnesses, and that the defense to be made required great research of authorities on a question of much difficulty and intricacy, we think the judge *quo* erred in overruling the motion.

The Constitution and laws of the land guarantee to parties charged with crime, the right to be heard by counsel. This is no meaningless formality, but it is an inestimable right, and the more appreciable when the charge involves the life of a human being. It would be a

Levy vs. Waterworks Company.

barren right if the counsel were not allowed a reasonable time to prepare for the defense, time to investigate the facts, and to examine the law applicable to the case. Even in civil cases, counsel appointed to represent an absentee is allowed time for preparation and to correspond with his client, and it would seem a crying injustice if the same privilege were not extended to one indicted for a crime involving his life.

The counsel under a proper and conscientious sense of his responsibility in this case, only asked for such delay as was necessary for the proper discharge of the grave and responsible duties that the appointment in question devolved upon him.

There is another bill of exceptions in the record taken against the refusal of the judge to grant a continuance on account of the absence of material witnesses, which impresses us as possessing force and merit, but we prefer to rest our decisions on the ground first above presented. A review of the entire record satisfies us that the prosecution was characterized by undue haste, scarcely compatible with the guarantee of a fair and impartial trial.

It is, therefore, ordered, adjudged and decreed, that the verdict and sentence appealed from be reversed and set aside, and that the cause be remanded to be proceeded with according to law.

No. 9507.

ISAAC LEVY VS. NEW ORLEANS WATERWORKS COMPANY.

The act of incorporation of the New Orleans Waterworks Company forbids it to charge more for water than was paid to the city at the date of its incorporation on March 31, 1877, and the charge made by the city at that time was fifteen cents for a thousand gallons to large consumers.

An owner of a rice-mill in New Orleans is entitled to the use of water conveyed through the pipes and conduits of the Waterworks Company on paying in advance for his supply at that rate.

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A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Jonas & Nixon for Plaintiff and Appellee.

J. R. Beckwith for Defendant and Appellant:

I.

A writ of injunction cannot be lawfully resorted to to compel specific performance where it appears that the alleged contract which it is sought to enforce is not completed or certain in all of its parts, nor where the plaintiff has not carried out as far as possible his part of the alleged contract. High on Injunctions, par. 708, and cases there cited.

 Levy vs. Waterworks Company.

II.

The fact that a remedy of law exists for the violation of alleged contract or right is always a sufficient objection to the interference by injunction. *High on Injunction*, par. 695, *et seq.*; *Morris vs. Society, etc.*, 1 Halst. Ch., 203; *Greggerson vs. Insley*, 4 Blatch, 503; *Canton vs. R. R. Co.*, 21 Md. 383; *Collins vs. Plumb*, 16 Ves., 454.

III.

Where a plaintiff seeks to enforce what he believes a right secured to him by law, and resorts to injunction, the pleadings must show that not only is his supposed right clear and palpable, but that he has tendered full compliance with all conditions imposed on him. *Posey vs. Wright*, 31, p. 387; 11 Wall. 108; 15 Wall. 547; 72 U. S. 575; 113 U. S. 516.

IV.

A writ of injunction cannot be used to take property out of the possession of another, nor to compel any person to sell his property to another without his consent, or without any agreement as to price. *Murdock's case*, 2 Bland 461; *Bosley vs. Susquehanna*, 3 Bland 63; *Farmers vs. Reno*, 53 Penn. 224; *Washington vs. Green*, 1 Md. Ch., 97; *Blackmore vs. Glunmorganshire*, 1 Myl. V. K., 154.

V.

The plaintiff in this case is not entitled to any relief or injunction until he in due form tenders the defendant the amount he admits due, or pays the same into court, where the defendant, if he so elects, may take the same without being compelled to resort to a lawsuit to fix the amount or recover the money.

VI.

Under the pleadings in the record and the proofs, the plaintiff has shown no cause of action or right to recover.

The opinion of the Court was delivered by

MANNING, J. The plaintiff is a rice-miller in New Orleans, the motive power of his machinery being steam, and he obtains his supply of water from the defendant. He alleges that the defendant by the terms of its charter is compelled to furnish him with water needful for his mill at rates not greater than those charged by and paid to the City of New Orleans on March 31, 1877, but that the company demands from him four hundred dollars a year for his water-supply, a sum greatly in excess of the rates it is permitted to charge, and threatened to cut off that supply entirely unless he complied with its demand. An injunction was prayed and issued forbidding the execution of this threat and certain proceedings under it have heretofore been before us. *State ex rel Waterworks Co. v. Levy*, 36 Ann. 942.

The defendant, after an exception of no cause of action which was overruled, answered averring that the sum demanded was just and reasonable and the true amount due. There was judgment for the plaintiff decreeing that he had a right to use the water from the pipes and conduits of the defendant at the rate of fifteen cents for one thousand gallons, and that this amounts at present to two hundred dollars a year which he must pay in advance, and reserving the right of the

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company to recover more if hereafter the supply shall be increased and reserving Levy's right to pay less if the supply shall be decreased, always preserving the rate fixed by the judgment.

The defendant's charter was given it by the legislature of 1877, Acts Ex. Sess. p. 51, and its 15th sect. provides that the Waterworks Company shall have the right to fix the rates of charge for water provided that the net profits of the company shall not exceed ten per cent. per annum, and whenever they do exceed that rate the City Council shall have the right to require a reduction to that rate, and provided further that the charges shall not exceed those then paid to the city. The date of the act is March 31, 1877.

Obviously it was only necessary to ascertain what was the rate paid to the city at that date in order to ascertain the maximum rate that the defendant could charge.

There is a mass of testimony on that point. Prior to and at the date of that Act this mill paid \$150 a year for water, and immediately thereafter when the defendant took charge of the waterworks, \$175 was demanded and paid, and this sum continued to be paid yearly until the demand was increased to \$400 when it was resisted by this suit. It is not claimed, nor is it the fact, that any change had been made in the mill either in machinery or time or manner of running that would increase the consumption of water. It does not appear that these rates of annual charges were the result of any accurate or approximate computation of the quantity of water consumed, but the fact that the city was content with \$150 a year as long as she held the waterworks, and that the defendant was content with \$175 a year thereafter from 1877 to 1883, creates a strong presumption that these sums were not far wrong or inadequate.

Nor is there any support by the record of the suggestion, made by the defendant in oral argument and in brief, that these rates were affected by the abnormal condition of the City government and of public affairs at that time. If it had appeared that the fixing of these rates had been the result of corruption, official venality, or other like cause, we should not think the defendant bound for all time by rates fixed under exceptional circumstances.

The testimony was addressed to the ascertainment with accuracy of the actual quantity of water consumed, and the price paid to the city by consumers in March 1877. This last is found to be fifteen cents for a thousand gallons to large consumers. The defendant's engineer says a fair way of estimating the quantity is to allow a gallon of water

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to each pound of coal, but that this will vary with different kinds of coal, and that experiments recently made by him at the Company's works shewed that even one and one-fifth gallons of water may be evaporated with a pound of coal but that it is unusual and not under ordinary conditions.

He appears to have made examinations and computations specially with reference to the issue involved in this case and with the view of informing himself of the details in order that he might testify on this subject intelligently. He says he knows the size of the plaintiff's boilers and is able to form a correct estimate of the quantity of coal consumed in them in twenty-four hours, and having ascertained the quantity of coal, fixes 7000 or 7500 gallons as the quantity of water consumed in the same time.

It appears that during the year in question the mill ran about eight months. It began about the middle of August and continued until the following May, but from this time is to be deducted alternate Sundays during the time the mill is running day and night, which is two and a half or three months in the first part of the milling season, and still more is to be deducted for the remaining five months of that season when the mill is run only twelve hours or during the day only during which time there are also intervals of two weeks' rest. The lower judge computed the water consumed for three months or ninety days at 7500 gallons a day and for five months or one hundred and fifty days at half that quantity a day, and thus gives a sum total of 1,237,500 gallons for the season, the cost of which at fifteen cents a thousand gallons is a fraction over \$185. The plaintiff offered to pay \$200, and the judgment fixes that as the sum to be paid by him for that year, providing at the same time for its increase or decrease as the consumption of a greater or less quantity of water shall warrant.

The judgment is based on as reliable data as can be obtained. It is more favourable to the company than the computation warrants but the plaintiff does not complain.

The defendant foresees ruin if it is compelled to abide by a rule that inexorably requires it to furnish water at the various rate prescribed in the judgment, but in truth the rate was fixed and prescribed in its own act of incorporation. The cardinal requirement is that it shall not charge more than was paid to the city at the time when it accepted the franchise, and the estimates of its own engineer indubitably fix the sum due from the plaintiff as not exceeding that for which judgment was awarded.

Judgment affirmed.

No. 9508.

ISAAC LEVY VS. NEW ORLEANS WATERWORKS COMPANY.

The codal provisions of our practice touching injunctions are broader and more comprehensive than the rules of the chancery courts and include causes for injunctions that would not be sanctioned in a common-law court. Differences in the manner of obtaining the writs under the two systems are not less manifest than the difference in their scope. Under our system when it has been judicially determined that the writ was rightfully issued, there can be no doubt that the party who has been injured by disobedience of it may recover all damages he has suffered thereby.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Jonas & Nixon for Plaintiff and Appellee.

J. R. Beckwith for Defendant and appellant.

The opinion of the Court was delivered by

MANNING, J. This suit is for the recovery of damages alleged to have been sustained because of the cutting off water from the plaintiff's rice-mill by the defendant company. It is a pendant to the injunction-suit between the same parties.

The items are loss of profit of sixteen days milling estimated at \$2,520.20—the expenses of the mill while idle, \$439.52—interest on the value of the mill-machinery and on the value of the rice on hand at the stoppage, \$189.12—sum expended on attempting to bore wells to obtain water, \$150—total \$3,298.84.

The lower court gave judgment for \$94.58.

The water was cut off October 5, 1884, and was restored on 21st. of same month. On the day before its restoration the parties to this suit agreed in writing that the plaintiff should pay four hundred dollars cash for his water supply for two years from Oct. 1, 1883 to same date 1885, reserving the question of any further sum due the defendant to the decision of the injunction suit pending, and the defendant agreed to turn on the water at once, the right of each to claim damages of the other being reserved. The money was paid and the next day the water-connection was restored.

The petition was filed while the injunction-suit was pending and therefore before it had been judicially determined whether the injunction had been rightfully or improvidently granted. This was made the ground of an exception of no cause of action which was properly overruled.

Of course the plaintiff, in bringing his suit for damages during the pendency of the injunction, ran the risk of an adverse decision in the

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Levy vs. Waterworks Company.

first suit, in which event his suit for damages would not only have fallen but his adversary, on suing him in turn for damages for the wrongful injunction, could have included the costs and expenses put upon him by the plaintiff's second suit. But if he chose to take the risk no harm was done. The two suits went along *pari passu*, the injunction having been first tried, and the fact that we have the two records now on appeal at the same time, each complete and with all necessary or available proof, is an answer to the objection that the present suit was premature.

It is still claimed by the defendant that the injunction was wrongfully obtained and that there is no warrant of law for it, but even if rightfully issued that it did not extend beyond Oct. 1, 1884. All contention on the duration of the writ is closed by our decision in *State ex rel. Waterworks Co. v. Levy*, 36 Ann. 941, and upon the plaintiff's right to the writ it is very likely that at common law it would not be issuable, but the codal provisions for our practice are broader and more comprehensive than the rules of the chancery courts and include many causes for injunctions that would not be sanctioned in a common-law court. Differences in the manner of obtaining the writs under the two systems are not less manifest than the difference in their scope, and there can be no doubt that when it has been determined that the writ was rightfully issued, the party who has been aggrieved by disobedience of it may recover all damages he has suffered thereby. Code Prac. art. 308.

In estimating these damages we do not find data in the record that justify us in altering the amount assessed by the lower judge. The expenses of employees would be included by us as they would have been included by him, but they were employed by the year and no loss *quoad* their salaries was sustained by the stoppage of the mill.

Judgment affirmed.

DISSENTING.

POCHÉ, J. Referring to my dissenting opinion in the case of the *State ex rel. Waterworks Company vs. Levy*, 36 Ann. 941, and believing for the reasons therein given that there was no injunction on the fifth of October, 1884, restraining the Waterworks Company from cutting off Levy's water supply, I hold that they cannot be mulcted in damages for disposing of their own property according to their own judgment and in the light of their best interests.

I therefore dissent from the opinion and decree of the majority in this case.

BERMUDEZ, C. J. I concur in this opinion.

No. 9608.

THE STATE EX REL G. W. SENTELL ET AL. VS. JUDGE OF THE
TWELFTH DISTRICT COURT, PARISH OF AVOYELLES.38 31
44 1083

District courts have no power to question the authority of mandates of this Court or to refuse to execute them; but the utmost effect which can be claimed for them, so far as their execution is concerned, is that they shall be executed according to law. When an application is made to restrain further proceedings in execution of a writ on the ground that the requirements of the law as to the mode of execution have been violated, the district court does not exceed its powers in granting such an injunction. When, thereafter, it has rendered a judgment dissolving the injunction, the party cast had the right to a suspensive appeal, and in granting the same the judge only performed his legal duty. During the pendency of such appeal, the injunction operates as if never dissolved, and it is not the duty of the judge to proceed with the execution of a writ thus enjoined. An application for mandamus directing him so to proceed cannot be allowed.

APPPLICATION for Mandamus.

Thorpe & Peterman and L. K. Barber, Jr., for the Relators.

The opinion of the Court was delivered by

FENNER, J. At the recent term of this Court at Opelousas, in the suit of G. W. Sentell et al. vs. Mrs. Dora L. Stark, a final judgment was rendered in favor of plaintiffs and against defendant for a certain sum claimed, with recognition of special mortgage on property described and ordering the enforcement thereof to pay the judgment. Our mandate was duly recorded in the district court and a writ of *feri facias* was issued in accordance therewith.

When the sheriff had made his seizure and was proceeding in execution of the *fi. fa.*, the defendant filed a petition for an injunction restraining the plaintiffs and the sheriff, "from advertising, selling or proceeding any further with the seizure, advertisement and sale of her property" under said writ, until the final determination of the injunction suit. The judge issued the injunction on a bond for two thousand dollars.

Thereupon Sentell et al. filed a motion to dissolve the injunction with damages.

Upon hearing of said motion, the judge rendered his judgment dissolving the injunction and condemning Mrs. Stark and her sureties to pay damages. Within the legal delay, Mrs. Stark applied for and obtained an order for a suspensive appeal upon a bond of two thousand dollars.

Under this state of case, the relators make the instant application of a writ of mandamus ordering the district judge to proceed with the execution.

Unless the judge acted beyond his powers in granting the injunction thus rendering the injunction itself an absolute nullity, or in granting a suspensive appeal from his judgment of dissolution, it clearly cannot be his duty to proceed with the execution of the writ, during the pendency of such appeal and, therefore, mandamus would not lie.

We understand relators to contend that the injunction was a nullity, because it restrained the execution of a judgment of this court, and because the district courts are without authority to arrest or suspend the execution of judgments rendered by this Court.

If the injunction issued was based on any grounds assailing the plenary authority of our judgment or its absolute title to be executed according to law, the contention might have force. But we have examined the petition for injunction and we find no such questions raised. The attack is levelled exclusively against the form of the writ and the proceedings under the writ.

The utmost effect which can be claimed for our judgments, so far as their execution is concerned, is that they shall be executed according to law. In this respect they stand on a plane with all other final judgments.

The power of the district court to restrain illegal proceedings under writs issued in execution of judgments is unquestioned; and its exercise involves no reflection upon the authority of the judgment and no denial of its title to execution.

We have examined all the cases referred to by relator's counsel, on the subject of the power inferior courts have over the execution of mandates of this Court, viz: 11 La. 366; 6 Rob. 92; 16 Ann. 233; 20 Ann. 521; 33 Ann. 443. None of them go further than to assert the duty of inferior courts to recognize the conclusive authority of our mandates, and to award them legal execution. Not one denies or questions the right to restrain proceedings under writs issued in their execution when violative of legal requirements.

We must decline to follow counsel in his discussion of the merits of the grounds upon which the injunction was claimed. If they were as frivolous as he contends and, however, apparent, it might be that the motive was to procure delay, that would only consign the proceeding to the company of that huge catalogue of unjust suits with which the ears of courts are constantly vexed.

It is enough for us to find that in granting the injunction the district judge acted within his power and jurisdiction; that in dissolving it he did the same; that in granting a suspensive appeal from the

State vs. Joseph et al.

judgment of dissolution he merely accorded to appellants a settled and constitutional right; that, during the pendency of such appeal, the injunction operates as if never dissolved, and that it is not his duty to proceed in execution of the writ in violation of the injunction. Hence the relief sought by relators must be denied.

It is, therefore, ordered, that the alternative writ of mandamus herein issued be set aside, and that relator's application be denied at his cost.

No. 9487.

THE STATE OF LOUISIANA VS. NARCISSE JOSEPH ET AL.

An appeal in a criminal case made returnable "according to law" and which ought to be returned at the place where the court holds sessions, will be dismissed, *proprio motu*, when the transcript is filed at an improper time and place, where the court was not sitting.

When such an appeal is granted and the transcript is certified in June, from Iberville parish, the transcript should have been filed either at Monroe, or Opelousas, at which the court was holding sessions in that and the following month and not at New Orleans where it was not sitting.

The State as well as the accused has an interest in the speedy determination of criminal cases.

A PPEAL from the Twenty third District Court Parish of Iberville.
Talbot, J.

Alex. Hebert, District Attorney, for the State, Appellees.

Chas. O. Lauve and David N. Barrow for Defendants and Appellees.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The accused were convicted of conspiracy to commit murder and sentenced to hard labor. They appealed.

Watson and Johnson have abandoned formally their appeal. That taken by Narcisse Joseph is the only one before us.

He was sentenced to five years, on the 15th of June last, and on the same day moved for an appeal, which was instantly "granted returnable to the Supreme Court of the State of Louisiana according to law."

The transcript was immediately presented by the clerk, certified on the following day, (16th) and filed in the clerk's office, in this city, on the 29th of the same month.

The appeal allowed having been made returnable to this Court according to law, and the law requiring that appeal in all criminal cases be made returnable before this Court at its next term, wherever held, there to be tried by preference—the transcript of appeal, ready

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Samuels et al. vs. Brownlee et als.

when it was, should have been filed, not in the clerk's office at New Orleans, where the court was not sitting, but if not at Monroe, at least at Opelousas, where the Court was holding sessions in June and July. Act 30 of 1878, Sec. 4, p. 56; Act No. 69, 1884, p. 92.

To allow appellants in such cases, to elect at their convenience, the place at which the transcript of appeal is to be filed, when the appeal is granted by the court, returnable "*according to law*," would be to nullify the law which requires appeals in criminal cases, to be summarily returnable and tried, at the place at which the court sit when the appeal is taken, and practically to permit appellants to designate for themselves a return day, different from that fixed by law and to postpone, for an indefinite period, the speedy trial of cases in which as well as the accused, the State has a deep interest.

This Court has settled, and it has become a rule of practice, that an appeal returnable on appellant's own motion and suggestion at a time and place other than those provided by law, will be dismissed by the court *proprio motu*. 27 Ann. 540; 32 Ann. 692, 542; 35 Ann. 980; *Minor vs. Budd ante*, p.— 36 Ann. 865, *State vs. Jenkins*.

It is, therefore, ordered, that the appeal be dismissed with costs.

TODD, J., takes no part.

Rehearing refused.

No. 9483.

E. H. SAMUELS ET AL. VS. ISABELLA H. BROWNLEE ET ALS.

The appellant who presents a defective transcript, and who is shown to have had the transcript made through or under the exclusive supervision of his own counsel, outside of the clerk's office, is legally responsible for all defects, omissions and irregularities therein, and is not entitled to any time to correct such errors or omissions. In such a case, appellee's suggestion, without a formal motion to dismiss, will prevail, and the appeal will be dismissed.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

R. H. Marr, John McEnery and T. C. W. Ellis for Plaintiffs and Appellees.

W. S. Benedict contra.

The opinion of the Court was delivered by

POCHÉ, J. In this suit, which is an action for partition between plaintiffs and defendants of certain immovable property, James Brownlee, the appellant herein, intervened for the purpose of being

recognized as owner of one-fourth of the property to be partitioned and to be entitled as such to that proportion of the proceeds of the sale.

In their brief filed on the day of trial in this Court and in their oral argument, counsel for appellees suggested that the transcript was incomplete, owing to the absence therefrom of several important documents and pieces of evidence which were offered below and which are not to be found in the transcript.

An inspection of the record shows that their complaint is well founded, and that the transcript is not sufficient to apprise us of all the matters argued and contested below.

That conclusion seems to have been impressed on the mind of appellant's counsel, for it appears from our minutes of that day that he submitted along with the merits of his case a motion for leave to complete his transcript.

That motion is the first matter for our consideration.

But we must at this time dispose of another matter which has doubtless arisen from a misapprehension in counsel's mind of the true *status* of the case.

We find in the record a motion for leave to complete the record, which reads as an order to that effect, rendered on the day of trial by this Court, and we find that acting doubtless on the authority of such an order, appellant has prepared and has filed in the case a supplemental transcript, containing some of the documents which were found missing in the original transcript. Whereupon the whole case was handed in by our clerk on the 26th of December last past.

Appellant's counsel has entirely misapprehended the nature of the relief which the Court undertook to grant to him on the day that the cause was submitted.

In this connection our minutes read as follows :

"After hearing counsel and taking under advisement a motion of counsel for appellant to complete the transcript, the whole matter was submitted for consideration."

It thus appears that the right urged by appellant to complete his avowedly defective transcript is yet under advisement, and to that question we shall now direct our attention.

Article 898 of the Code of Practice, which is the law of the case, provides as follows :

"If, at the time of argument, or before, the appellant perceives that the copy of the record is incomplete, either through mistakes or omissions, or from the clerk having failed to certify the copy as containing

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the testimony produced in the cause, or from any similar irregularities not arising from any act of the appellant, the court may grant him a reasonable time to correct such errors or omissions, during which time judgment on the appeal shall be suspended." As stated above, we find that the evidence and the documents which had been omitted from the record were material to the issue presented in the case, and that no correct or just conclusion could be reached in the premises without due consideration of the same.

The next inquiry is to ascertain whether any of the omissions can be attributable to the act of appellant.

That information is furnished by the certificate of the clerk attached to the transcript; the truth of which is not denied, but on the contrary was admitted by appellant's counsel in his oral argument.

Among others, the certificate contains the following statement:

"And I further certify that this transcript was made outside of this office, and by the attorney for appellant."

The full responsibility for the transcript is thus irrevocably fixed on the appellant himself, and under the textual provisions of the Code, as uniformly understood and enforced by this Court, he is not entitled to the indulgence which he now seeks to obtain.

The Court is supplied with an avowedly defective transcript, the record shows that it was made by the appellant himself, through his attorney, the fault is therefore undisputably attributable to the appellant, and the legal penalty is the dismissal of the appeal. *Torres vs. Falgoust*, 35 Ann. 818; *Hoover vs. York*, 33 Ann. 652; *Labat vs. Decuir*, 33 Ann. 350; *Cooley vs. Broad*, 29 Ann. 72; *Lanfear vs. Durand*, 20 Ann. 161; *Morton vs. Owners*, 15 Ann. 708; *Harris vs. Hayes*, 8 Ann. 433; *Jones vs. Neville*, 9 Rob. 478; see also *City vs. Cremonini*, 35 Ann. 367.

It is therefore ordered that appellant's motion for leave to complete the transcript in this case be denied, and that his appeal be hence dismissed at his costs.

No. 9535.

THE STATE OF LOUISIANA vs. JOHN J. WECKERLING.

A manufacturer of beer, or one charged as "engaged in the business of a brewery," is not exempt from license taxation under the State Constitution. The subject of such exemption is regulated by Art. 206 of the Constitution. Article 207 refers alone to a property tax.

A brewer or manufacturer of beer is not one "engaged in distilling and rectifying alcoholic or malt liquors," and is not therefore subject to the license tax provided by Section 9 of Act 4 of the Extra Session of 1881; but such license is governed and regulated by Sec-

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108	646

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tion 3 of said act. Under that section, where the receipts are \$30,000, and less than \$40,000, such manufacturer is only liable to a license tax of ten dollars, instead of seventy-five dollars.

A PPEAL from the Second City Court, Parish of Orleans.
Voorhies, J.

John McEnery and W. B. Sommerville for Plaintiff and Appellee.

J. Q. A. Fellows for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant is appellant from a judgment which condemns him to pay a license of seventy-five dollars, imposed under the provisions of Sec. 9, Act 4, of Extra Session of 1881, upon those engaged in "distilling and rectifying alcoholic or malt liquors."

His contention is that he is exempt from the payment of a license by the State Constitution, and that the act imposing the license in question is unconstitutional, because violative of the exemptions therein declared in favor of manufactures; and that in any event he, defendant, is not liable for a greater license than ten dollars, imposed by section 3 of said act on the manufacturers of beer, he being such a manufacturer.

1. The first question to be determined is whether the defendant is liable to a license tax under the Constitution.

Article 206 of that instrument exempts from the payment of it, quoting: "Manufacturers, other than those of distilled, alcoholic or malt liquors, tobacco and cigars, and cotton seed oil."

We have heretofore held that "the Constitution clearly exempts (from license tax) all manufacturers not excepted." *Ernst vs. City*, 35 Ann. 746. It would be impossible to hold otherwise under the express terms of this article (206). Article 207 obviously applies exclusively to property taxation, and although its language is "there shall be exempt from taxation and license, * * * the capital, machinery and other property employed in certain designated manufactures," it is clear that the exemption applies only to property and has nothing to do with license taxation on persons pursuing any trade, profession or calling.

That subject was covered and exhausted by Art. 206.

Hence defendant, as a manufacturer, is exempt from license taxation, unless he is within the exception of Art. 206, as being a manufacturer of distilled, alcoholic or malt liquors. It is contended that the term "distilled" applies to malt liquors as well as to alcoholic liquors, and that as beer is not a distilled malt liquor it is not subject to license

taxation. It was obviously intended to exclude from the exemption manufacturers of malt liquors as well as of distilled alcoholic liquors. Such is the natural meaning of the words, independent of artificial grammatical niceties. We thus construed it ourselves, when we said in the Ernst case, "the excepted ones are those who manufacture alcoholic or malt liquors," and we cite this not as a decision on the point, but as showing the plain meaning conveyed to our minds by the words, when not confused by grammatical refinements.

Hence we conclude that the defendant is liable to license taxation.

2. The next question is as to the amount of the license tax he is subject to under the statute above referred to.

The first paragraph of sec. 3 of said act, which is under the caption of "Manufactures," provides:

"That for carrying on each business of manufacturing, not expressly exempted by Articles 206 and 207 of the Constitution, the license shall be based on gross annual receipts, as follows, viz: * * * *

"Twenty-third Class. When said receipts are thirty thousand dollars or more, and less than forty thousand dollars, the license shall be ten dollars."

The business of manufacturing malt liquors, which, as stated, includes beer, is expressly excepted from the exemptions declared by that article, and therefore it would seem clear that the amount of license due by the defendant as manufacturer of beer, under this section—granting his receipts to be under \$40,000—would be only ten dollars. There would be no doubt on this point but for the language of sec. 9 of the statute, which provides, "that for carrying on the business of distilling and rectifying alcoholic or malt liquors," the license to be paid where the receipts are \$37,500 or more, and less than \$50,000, shall be seventy-five dollars—which is the amount of the license sought to be collected in this case.

Considering that the rule in this case shows expressly by its language that the defendant is proceeded against and charged as carrying on a "brewery," which, as we construe it, is a manufacture of beer, and inasmuch as this last provision fixing the license at \$75 is to be found under the head of "Miscellaneous," and not under that of "Manufactures," which calls for the smaller license; and considering, moreover, that the defendant is strictly a brewer, a manufacturer of beer, and cannot by any reasonable rule of construction be held to be engaged in "distilling and rectifying" alcoholic or malt liquors, we conclude

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that he is liable only for a license of ten dollars. He was adjudged to pay a license of seventy-five dollars, which was erroneous.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be amended by striking out the words "seventy-five" and substituting therefor the word "ten," and as thus amended it be affirmed; appellee to pay costs of appeal.

No. 9536.

J. C. DENIS, PRESIDENT NEW ORLEANS COTTON PRESS ASSOCIATION,
VS. JAMES D. HOUSTON, STATE TAX COLLECTOR.

A suit enjoining the collection of taxes in amount less than two thousand dollars on the ground that the property has been sold at a probate sale and the inscription of the taxes has been erased and the lien and privilege for them has been transferred to the proceeds of sale, is not within the jurisdiction of the Supreme Court, and cannot be put within its jurisdiction by a letter from the appellee's attorney to the appellant's attorney, written after the appeal has been taken and perfected, informing him that the taxes due are really more than were enjoined and that they exceed two thousand dollars.

If more taxes were due than were enjoined there was no hindrance to the collection of the excess over those enjoined.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

E. W. Huntington, Joseph P. Hornor and F. W. Baker for Plaintiff and Appellant:

1. Municipal taxes not recorded, do not affect real estate in the hands of a third person. 26 Ann. 592; 30 Ann. 296; 28 Ann. 496; 25 Ann. 334; 30 Ann. 1365; 36 Ann. 765; Constitution, Art. 176.
2. Even if properly recorded the privilege against real estate is prescribed in three years. Constitution, Art. 176.
3. Municipal taxes are prescribed in ten years. 30 Ann. 1260.
4. Taxes not assessed or recorded in the name of the true owner, do not affect real estate in the hands of third persons. 15 Ann. 15; 28 Ann. 537; 29 Ann. 509; 30 Ann. 176.
5. Where property is sold under order of court in a succession to pay debts and all claims for taxes are by order of court transferred to the proceeds of sale, the property passes to the purchaser free from such taxes. 30 Ann. 1261; 33 Ann. 258; 23 Ann. 298.

Blanc & Butler for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. This is an injunction restraining the defendant from selling a square of ground in New Orleans for taxes.

The petition alleges ownership and that the collector has advertised the property for sale to enforce payment of taxes due the State for 1876 amounting to \$200, and City taxes for 1870 and 1877 amounting

Denis vs. Tax Collector.

to \$1,000. The ground of injunction is that the property was sold in 1878 at the succession-sale of Henry Fassman, its then owner, and all liens and privileges were shortly thereafter cancelled on the mortgage books and among them these tax inscriptions, and that the defendant must look to the proceeds of that sale for payment.

The answer is a general denial with an averment that the taxes set out in the plaintiff's petition are legal, due and exigible, and concludes with a prayer for the dissolution of the injunction.

Obviously the sum involved is below our jurisdiction, and there is not such question of the legality or constitutionality of the tax as would attract our jurisdiction independent of the amount in controversy. *Adler v. Bd. Assessors*, 37 Ann. 507.

There was judgment for dissolution on May 14, 1885, and an appeal was taken which was perfected by a bond executed and filed June 10.

Two days after, a letter was written by the defendant's attorneys to those of the plaintiff which has found its way into the transcript and appears at the close of it. It is as follows:

NEW ORLEANS, June 12, 1885.

Frank W. Baker, Esq.:

DEAR SIR—Mr. Houston has just sent us a statement of amount due for State and City taxes on property described in petition filed in suit *J. C. Denis, President New Orleans Cotton Press Association vs. J. D. Houston*, tax collector, as follows:

State tax 1876 interest and costs to date.....	\$ 537 58
City tax 1870 " " " "	2,676 85
	<u>\$3,214 43</u>

We therefore admit that the amount involved in said suit is upwards of three thousand dollars.

Very truly yours,

BLANC & BUTLER,

Atty. for J. D. Houston, tax col.

It is very clear that only \$1,290 of taxes were enjoined. If more were due there was no hindrance to the collection of the excess over that sum, and therefore such excess is not in controversy. There was nothing before the lower court altering or increasing the sum set out in the pleadings, and that sum cannot be increased to attract our jurisdiction by a letter written after judgment and appeal correcting an error made by the draftsman of the petition. The case belongs to the Circuit Court.

We must therefore dismiss the appeal and it is accordingly so ordered.

THE STATE OF LOUISIANA VS. PHILOGÈNE SIMMONS.

Alleged errors in rulings of the judge affirming the competency of jurors who were objected to by accused, have no weight when the jurors were peremptorily challenged and did not serve on the jury, and when it does not appear that accused's peremptory challenges were exhausted before the jury was empaneled.

Where it appears from the statement of the evidence attached to a bill of exception that the laws, touching which a charge was asked of the judge, had no application to the case, he did not err in refusing the charge on the ground that it had no such application.

A PPEAL from the Twenty-first District Court, Parish of St. Martin. *Gates, J.*

M. J. Cunningham, Attorney General, and *C. H. Mouton*, District Attorney, for the State, Appellee.

Felix Voorhies and *Mouton & Martin* for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The bills of exception taken to the ruling of the court touching the qualifications of jurors, may be summarily disposed of by the statement that the jurors referred to did not serve upon the jury, but were peremptorily challenged by accused, and that the record does not show that the peremptory challenges allowed by law to the accused were exhausted. This has been decided so often that it is no longer open to question.

There remain two bills of exception based on substantially the same grounds, one to the denial of a motion for a new trial, the other to the refusal of the judge to give a charge requested by counsel for accused.

We will consider the one affecting the new trial first.

The motion for new trial was based on the grounds substantially that the indictment charged the accused with larceny of a cow belonging to *unknown*, while the evidence showed that it belonged either to the parish of St. Martin by reason of forfeiture under the provisions of Act 236 of 1855, or to Césaire Delahoussaye by prescription acquired under Articles 3454 and 3509 of the Civil Code. Attached to the bill of exception is a statement of the evidence on the subject, from which it appears that neither of the laws cited had the slightest application to the facts. The Act of 1855 only applies to stray cattle "not owned by any citizen or resident of this State or owner and cultivator of a farm within the State." The evidence does not suggest such non-resident ownership in the remotest manner; nor does it appear that the parish had ever claimed or enforced the forfeiture, as provided in the statute.

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... is concerned, the statement of the evidence, ... conclusively shows that he does not claim to be ... and advances no title whatever by prescription or other-
... the evidence is to establish conclusively that the ... of an unknown person, as charged in the indict-
... did not err in refusing the new trial.
... have just said equally disposes of the exception to the re-
... to give certain charges touching the laws above re-
... he refused on the ground that said laws "had nothing to
... the cause on trial"; and he was clearly right.
... affirmed.

No. 9566.

THE STATE OF LOUISIANA VS. SAMUEL COHN.

... of appeal in a criminal case, making an erroneous return both as to time and
... when suggested by appellant, is illegal and will not sustain the appeal.
... lodged by appellant at a place different from that designated in the order, cannot
... be considered by the Supreme Court, and on motion will be dismissed.

APPEAL from the Seventeenth District Court, Parish of East
Raton Rouge. *Burgess, J.*

J. Cunningham, Attorney General, *L. D. Beale*, District Attorney,
for the State, Appellee.

H. N. Sherburne for Defendant and Appellant.

The opinion of the Court was delivered by
Poche, J. This appeal was taken on July 3, 1885, and on motion
of counsel for the accused it was made returnable to this Court, at
Shreveport, on the second Monday of October, 1885. As this Court
held a session at Opelousas, which begun on the first Monday of
July, the appeal should have been made returnable at that place within
ten days after the order granting the appeal. Act No. 30 of 1878, sec.
4; Act No. 69 of 1884, sec. 4.

The erroneous return was made on appellant's own suggestion, hence
the error which is fatal to his appeal must be attributed to him. *State*
vs. Jenkins, 36 Ann. 865.

But it appears further that the transcript was not filed in this Court,
at Shreveport, in compliance with the order of the district court, and

that it was filed in this Court, at New Orleans, on the fourth of November, 1885.

This error is, if possible, still more palpable and fatal than the erroneous order of return both as to time and place.

In the recent case of the State vs. Narcisse Joseph, not yet reported, the order of appeal rendered in June made the appeal returnable according to law, and the transcript was filed in this Court, at New Orleans, within ten days, and we held that the appeal should have been lodged at Opelousas in order to comply with the law, and that it was a fatal error to have selected another place for the return.

The irregularity in the instant case is yet more glaring, hence the motion of the Attorney General to dismiss this appeal must prevail.

It is therefore ordered that the appeal herein be dismissed.

No. 9510.

38 43
49 842

THE STATE EX REL. E. BAUMAN ET AL. VS. JUDGE OF CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVISION D.

A mandamus properly lies to compel the city council to provide for the payment of an acknowledged claim against the city. If such mandamus is disobeyed, the judge issuing it can punish for contempt those guilty of the disobedience.

In such case the process for contempt should not be directed against the entire city council but against those only who have refused to obey the writ.

Disobedience to a mandamus, ordering the city council to provide for the payment of a city debt, is shown by those members of the council who, after the debt is budgeted on the report of the finance committee, vote against an ordinance for its payment.

A PPLICATION for Certiorari and Prohibition.

Walter H. Rogers, City Attorney, for the Relators.

The opinion of the Court was delivered by

TODD, J. On the 5th of June, 1885, Herman Newgass, a creditor of the city of New Orleans, applied for and obtained a peremptory mandamus against the city council and the members thereof to provide for the payment of his claim.

Eight members of the council refused to obey the writ. The claim had been placed on the budget, and the finance committee had reported an ordinance directing its payment, but the eight members above referred to, voted against the ordinance for its payment and by their vote defeated its passage, and at the same time signified their disobedience of the order requiring provision to be made for its payment.

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So far as Delahoussaye is concerned, the statement of the evidence, as given by himself, conclusively shows that he does not claim to be the owner, and advances no title whatever by prescription or otherwise.

The sole effect of the evidence is to establish conclusively that the cow is the property of an *unknown* person, as charged in the indictment.

The court did not err in refusing the new trial.

What we have just said equally disposes of the exception to the refusal of the judge to give certain charges touching the laws above referred to. He refused on the ground that said laws "had nothing to do with the cause on trial"; and he was clearly right.

Judgment affirmed.

No. 9566.

THE STATE OF LOUISIANA vs. SAMUEL COHN.

An order of appeal in a criminal case, making an erroneous return both as to time and place, when suggested by appellant, is illegal and will not sustain the appeal.

An appeal lodged by appellant at a place different from that designated in the order, cannot be considered by the Supreme Court, and on motion will be dismissed.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

M. J. Cunningham, Attorney General, *L. D. Beale*, District Attorney, for the State, Appellee.

H. N. Sherburne for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. This appeal was taken on July 3, 1885, and on motion of counsel for the accused it was made returnable to this Court, at Shreveport, on the second Monday of October, 1885. As this Court held a session at Opelousas, which begun on the first Monday of July, the appeal should have been made returnable at that place within ten days after the order granting the appeal. Act No. 30 of 1878, sec. 4; Act No. 69 of 1884, sec. 4.

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But it appears further that the transcript was not filed in this Court, at Shreveport, in compliance with the order of the district court, and

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The irregularity in the instant case is yet more glaring, hence the motion of the Attorney General to dismiss this appeal must prevail.

It is therefore ordered that the appeal herein be dismissed.

No. 9510.

38 43
49 842

THE STATE EX REL. E. BAUMAN ET AL. VS. JUDGE OF CIVIL DISTRICT
COURT FOR THE PARISH OF ORLEANS, DIVISION D.

A mandamus properly lies to compel the city council to provide for the payment of an acknowledged claim against the city. If such mandamus is disobeyed, the judge issuing it can punish for contempt those guilty of the disobedience.

In such case the process for contempt should not be directed against the entire city council but against those only who have refused to obey the writ.

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Walter H. Rogers, City Attorney, for the Relators.

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Eight members of the council refused to obey the writ. The claim had been placed on the budget, and the finance committee had reported an ordinance directing its payment, but the eight members above referred to, voted against the ordinance for its payment and by their vote defeated its passage, and at the same time signified their disobedience of the order requiring provision to be made for its payment.

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Thereupon under a rule taken, the members of the council, thus refusing obedience to the mandamus, were adjudged guilty of contempt by the judge who issued the writ, and were each sentenced to pay a fine of fifty dollars and to be imprisoned in the parish jail for ten days.

They complain of this action of the judge, and have applied to this Court for writs of *habeas corpus*, *certiorari* and *prohibition*, under which they seek to have the sentence set aside and annulled.

It is almost needless to say that the writ of *habeas corpus*—being only authorized in aid of the appellate jurisdiction of this Court—we cannot consider it, and must confine our attention to the other relief sought.

1. The relators first contend that the proceeding for contempt was wholly unauthorized in this case, and that the party aggrieved by the non-action of the relators in the premises, had his remedy under Art. 636 of the Code of Practice, providing in certain cases for the enforcement of judgments by writs of *distringas*.

In our opinion, that article is wholly inapplicable to the matter in hand. It relates to judgments and decrees rendered in the ordinary course of judicial proceedings, and not to peremptory orders issued in summary proceedings requiring or prohibiting the performance of some specific act.

The thing ordered to be done by the relators in this instance, was the performance of a purely ministerial duty imposed upon them by law, that is, to provide for the payment of a just claim against the city, and already placed as such on the budget of city expenditures.

Under the law and the peremptory terms of the mandate addressed to them by a judge clothed with full jurisdiction over the subject, they were vested with no discretion in the matter—their plain duty was to obey the law and the writ.

Courts would indeed be comparatively powerless, and the administration of the law and of justice utterly inefficient and worthless, if judges possessed not the authority to enforce obedience to their legitimate orders by the process and means herein complained of.

2. The second contention of the relators is, that the process for contempt should not have been levelled alone against the members refusing obedience to the mandamus, but directed against the city of New Orleans or all the members of the council.

There is no force in this proposition. Dillon in his able work on *Municipal Corporations*, 2 vols, p. 876, in discussing the identical subject now before us says: "The writ, although directed to the corpo-

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ration, is enforced through the members or officers whose duty it is to obey its commands, and if part of the officers or members have done all within their power to comply with the writ, the court will punish only those who are actually guilty of disobedience;" and this doctrine is placed beyond controversy by the decision of the Supreme Court of the United States in the case of Board Commissioners of Leavenworth vs. Sellw, 99 U. S. 623, 624. This decision is in accord with several others rendered by the State courts. 2 Metcalf, (Ky.) 156; 15 Wis. 37; 65 N. C. 114; 19 Wend. (N. Y.) 68; 13 Fla. 451.

It is, therefore, ordered, adjudged and decreed, that the restraining order heretofore rendered be set aside, and the application for the relief herein sought be dismissed at the costs of the relators.

CONCURRING OPINION.

FENNER, J. I rest my concurrence in this decree upon the absence of any ground for the exercise of our supervisory jurisdiction.

This is not an appeal, and a proceeding for contempt is not appealable. Mere errors of law or fact afford no ground for the relief sought. We have but three inquiries to make, which are:

1st. Was the order, for the disobedience of which the relators were arraigned, such as the court had the power to make? It is not denied that it was.

2d. Was the order of a kind such as to authorize proceedings for contempt for disobedience thereto? Confessedly it was.

3d. Was the proceeding regular? It is only in cases where the proceedings are absolutely null and void, such as in the examples given in the Code. "When the inferior judge has refused to hear the party or his witnesses, or has pronounced sentence without having cited them to appear," C. P. 857, that our supervisory jurisdiction can be invoked.

Improper joinder or non-joinder of parties, are not defects of the character referred to in the Code. It is sufficient that relators had due notice and hearing and had the opportunity of setting up this and all other legal defenses against the contempt alleged. If the judge has heard and determined such defenses in due course of proceeding, mere error in his decision does not justify our interference.

Without suggesting that the course of the district judge was not perfectly proper in all respects, I rest my concurrence on the foregoing grounds.

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DISSENTING OPINION.

BERMUDEZ, C. J. The complaint of the relators is that they were committed for contempt by an incompetent court, without observance of the rule of proceedings in such cases.

It cannot be doubted that the court had jurisdiction to make peremptory the *mandamus* addressed to the council directing the budgetting, etc., of the claim of the complainant, and had authority to enforce obedience to its absolute mandate, in the mode provided by law.

The *mandamus* was directed to the board of councilmen and to the members composing it. The failure of the members is the failure of the board. All the members should have met and should have complied with the order of court. No discretion was left them in the matter. For such failure, they are, as the component parts of the board, amenable for contempt as the board itself could be and would be, if it were a tangible or natural person.

The mandate not having been complied with by the board, all the members are delinquent and the aggrieved party has no right to judge and determine which of those members are or not guilty of contravening the peremptory command.

The proceeding should be directed, not against certain members singled out, but against each and all, in order that they respectively might show cause why they should not be punished for contempt.

The councilmen who abstained from attendance may be as guilty as those who obstructed obedience, for it was their duty to be present and carry out the instructions of the court.

It is by their appearance on the rule for contempt and their defense, that the guilt or innocence of each and all is to be determined by the court.

If, in the course of the proceedings, it appear that some members have done all in their power to comply with the judicial command, they must be exonerated; but, if on the other hand, it is established that other members whose concurrence was indispensable, have not given it, either by acting in direct opposition or by omitting to act, the penalty attached to disobedience should be visited alike upon all who are recreant, for they were left no alternative. They are not called upon to determine whether the thing ordered shall or not be done; but they are commanded to do it, unconditionally.

In the present instance, it appears that the concurrence of one more member would have carried out the order of the court.

If the relator in whose favor the *mandamus* was made peremptory, had a right to leave out the members who did not appear at the meet-

ing, he had an equal right to do the same as to seven of the councilmen who were brought to the bar for contempt.

Surely he could do neither without gross and crying injustice.

The proceeding against *all* the members guilty or not, is required by logic and is indispensable in the interest of public order, to prevent reprehensible discrimination.

While under the application for a prohibition, the question of jurisdiction has come up and been decided, under that for a *certiorari*, the proceeding by rule against certain of the members only, is submitted for consideration, that its validity in point of form may be ascertained.

Although the court had jurisdiction to make the *mandamus* peremptory and to enforce obedience to it, it was without authority to proceed against a few ; but should have done so against the body represented by all the members, reserving its action to exonerate and to punish according as each member would or not purge himself by his conduct.

DISSENTING OPINION.

POCHÉ, J. Eight members of the council of the city of New Orleans, in an application for relief by *certiorari*, complain that they have been illegally held for contempt for having voted "nay" on a contemplated ordinance of the council, the passage of which had been ordered by the court through a peremptory writ of *mandamus*. Their complaint embraces two points of alleged error ; one of which is sufficient to entitle them to relief at the hands of this Court.

As the writ of *mandamus* had been directed to the city of New Orleans and the council thereof, the court was without power or legal authority to direct its process for contempt against eight individuals forming part of a council composed of thirty members.

The fact that eight negative votes were sufficient to defeat the passage of the ordinance shows conclusively that several members of the council were absent ; for if all the members had been present and had voted, the result would have showed twenty-two affirmative votes, and the ordinance would thus have been passed, and the relator in the *mandamus* case would have had no right to complain. Under that state of the case, the court would have been powerless to proceed against the members who have cast negative votes. The purpose of its mandate would have been accomplished, and its power over the subject-matter would have been exhausted.

Whence does the judiciary department derive its power to single out a few component parts of a legislative functionary, and to hold them

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in contempt for their votes? Conceding the power of courts to punish a board of commissioners or a municipal council for disobedience of the mandates of a competent tribunal, it is plain that the proceeding or mandamus cannot be directed to the persons composing the board or council, but the process must be addressed to the body as a unit. Such was the course pursued in this case in reference to the mandamus. But when the court was met with a disobedience of its mandate, the rule for contempt was not levelled at the disobedient body, the only defendant or respondent in the mandamus proceeding, but was taken against a component or fractional part of the body only. This was manifestly error, and it involved the court in the exercise of a power not conferred by law and not inherent in the court.

This proposition is not met or answered by the argument that the error complained of is at most one of form. It involves a question of right, and puts at issue the assumed power of the court to proceed against individuals for acts of alleged disobedience of a body corporate.

Under a correct proceeding, the absent members might have been found as much in contempt as the members present who had voted in the negative on the contemplated ordinance; and the obedient members of the body, the true and only respondent, could easily have purged themselves of the alleged contempt of the authority of the court.

These views are supported not only by reason and logic, but by most respectable authority. *State of Iowa ex rel. Rice vs. Smith*, 19 Iowa, Reports, p. 334; *Board of County Commissioners of Leavenworth Co. vs. Sellow*, U. S. 624.

The absolute illegality of the process for contempt against the relators herein, is further demonstrated by the following consideration: the rule is settled that courts cannot take judicial cognizance of municipal ordinances, which must be alleged and proved in order to be judicially considered or enforced, *a fortiori* courts cannot take judicial notice of the particular votes cast in a council meeting by each individual member of the body. The manner of their voting can only be proved or considered in contradictory proceedings, and not *ex parte*.

Hence the process must of necessity issue against the whole body, as the only mode by which the individual members who have refused obedience to the mandamus, can be reached and properly dealt with.

In this very case the writ was directed against nine members and, on investigation, it was discovered that only eight had cast negative votes.

I therefore dissent from the opinion and decree of the majority.

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State ex rel. Roth vs. Judge.

No. 9586.

THE STATE EX REL. C. N. ROTH VS. JUDGE OF THE DISTRICT COURT
FOR IBERVILLE.

The dissolution of an injunction on bond is an exercise of the discretionary power vested expressly in the judge by the terms of the Code of Practice. When refused, a mandamus will not lie to compel a dissolution. The remedy is by appeal.

Where partnership property has been sequestered by one of the partners to prevent devastation and irreparable injury by the other partner, and the property remains in judicial custody, this other partner cannot have the sequestration set aside on bond under Art. 279 of the Code of Practice. He is not such defendant as is contemplated by that article. The sequestration is not of his property but of the property of the partnership in which he has only an interest.

A sequestration is indivisible so long as the property to be seized is undivided. The release on bond of one half of each piece of property would leave the other half of each piece in the sheriff's hands, and as that officer could permit no interference with that the release would be a vain act.

When acts of preservation are necessary to be done at once on sequestered property and the judge has issued an order for their performance, a writ of prohibition will not issue commanding him not to execute that order. The judge's first duty is to preserve property in judicial custody.

APPLICATION for Mandamus and Prohibition.

David N. Barrow and Geo. L. Bright for the Relator.

The opinion of the Court was delivered by

MANNING, J. The relator alleges that John F. Neely has filed a suit against him in the Iberville court for the settlement of an alleged planting partnership in which Neeley has obtained writs of injunction and sequestration, the first prohibiting the relator and the sheriff from removing or selling any part of the partnership property, and the last sequestering the whole of that property—that he applied to the judge to bond both the injunction and the sequestration and was refused, and hence applies for a mandamus to compel the judge to grant these orders.

He further alleges that in the course of these proceedings the judge has ordered the sheriff to take off or use certain parts of the sequestered property, and that the relator applied for a suspensive appeal from that order and was refused, and hence he applies for a writ of prohibition to prevent the execution of that order.

The partnership is of the Upper Eimea plantation, upon which cane is cultivated, and these writs were issued in October, a time of the year when measures must be taken to manufacture the cane into sugar or the crop will be lost.

38	49
49	349
88	49
52	1183
52	1194
38	49
112	614
112	616
113	833

State ex rel. Roth vs. Judge.

The respondent judge justified his action in refusing to dissolve the injunction on bond on the ground that it was an exercise of discretionary power vested in him in such cases, and the remedy was by appeal. This ruling was doubtless based on *State ex rel. Morgan Railroad v. Judge*, 36 Ann. 394, and antecedent cases, and its correctness does not seem to be questioned by the counsel for the relator.

But the counsel maintains that no such discretion is vested in the judge in setting aside sequestrations on bond, but that the relator's right to that remedy is absolute.

The terms of the article would seem to favour that construction—a defendant against whom a mandate of sequestration has been obtained, except in cases of failure, may have the same set aside by executing his obligation, etc. Code Prac., Art. 279. But the respondent judge denies that the relator, strictly speaking, is a defendant within the meaning and intent of that article.

The suit of *Neeley v. Roth* was for the dissolution and settlement of a planting partnership, and the sequestration was of the whole partnership property, embracing the crop and all the implements and appurtenances. It was undivided, was owned jointly by Neeley and Roth, and each was half owner of every piece and part thereof. The sequestration was indivisible so long as the property was undivided. If Roth had been permitted to bond his moiety of each piece of the sequestered property, the other moiety must have remained in the sheriff's hands, and that officer could not have permitted any interference with that, so that setting aside the sequestration of Roth's moiety would have been an idle act.

Besides, the sequestration was not of Roth's property but of the property of a partnership in which he had only an interest, and therefore the judge was quite correct in saying Roth was not such defendant as the Code of Practice contemplated in the article. The execution of the bond under that article would not have entitled him to the possession of Neeley's half of the partnership effects, so that to have granted the order demanded would have been to maintain the sequestration in part and to set it aside in part in relation to each several piece of property. And as granting the order would not have entitled Roth to the possession of the whole partnership property, the only alternative was to refuse it in its entirety.

Besides, and we emphasize this feature, the ultimate object of this suit was to compel a judicial liquidation of the partnership. The appointment of a receiver was prayed, and thus the partnership effects were to be taken out of the hands of either partner and put directly in

the control of an officer of the court. It does not appear that the property was in Roth's sole possession, his partner Neeley being also on the premises.

Another consideration applicable to this case enforces this view. The petition for a sequestration charges Roth with acts of vandalism on the Upper Eimea plantation, among which are the wanton and malicious destruction of ornamental and shade trees, thus exhibiting a fixed and malicious purpose to irreparably injure his co-owner.

The object of the sequestration, or one of its objects, was to prevent this devastation, whereby not only particular pieces of property were destroyed but the whole property was irretrievably deteriorated and its value as a whole was lessened. The sequestration was therefore an auxiliary writ to the injunction, and both were necessary to complete Neeley's remedy. The refusal to dissolve the injunction on bond would have been useless to him if the sequestration had been set aside, and the judge saw that if he had refused the one order and granted the other he would have been holding to the applicant fruit that instantly turned to bitter ashes.

The refusal of a suspensive appeal from the order directing the sheriff to take off the crop was simply a refusal to permit interference with the custodian of the property in doing what was absolutely essential to its preservation.

The time within which a crop of cane can be converted into sugar is short in our climate. The manufacture of sugar is subject to manifold interruptions and accidents, and is precarious under the most favourable circumstances. The whole of the cane crop on this plantation was in the legal custody of the sheriff in October, and the order to that officer to do what must be done then or could not be done at all, was simply a command to him to preserve what was perishable in the only way in which that particular perishable thing could be preserved. To have granted a suspensive appeal from such order would have paralyzed the authority of the sheriff, destroyed the property of the applicant for the writs and of the partnership and its creditors, and given over the whole subject of litigation to the caprice of the appellant. It was preeminently the duty of the court to require its executive officer to preserve the property in his custody, and which the court had required to stay in his custody when it refused to dissolve the one writ and set aside the other on bond. The object of the writ of prohibition was to prevent the execution of an order that the court was bound to make and have executed.

The application for the writs is refused at the costs of the relator.

Moore vs. Hart.

No. 9537.

MRS. FRANCES C. MOORE VS. JUNIUS HART.

This case involves questions of fact alone, and the conclusions of the judge *a quo* are approved.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Thos. J. Semmes, W. B. Lancaster and J. J. O'Connor for Plaintiff and Appellant.

C. H. Luzenberg and H. E. Upton for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. Plaintiff in her petition alleges that her son, Charles Moore, died in this city on January 15, 1884, and that his succession was opened in the Civil District Court of this parish on January 17, 1884. That her said son, on the day of his death, had in his possession \$6000 belonging to her, and which he held as her depository; that at the time of his death, said sum of \$6000 was in the iron safe of her said son, set apart as a package, or in packages of National Bank notes or United States Treasury notes, and marked with her name as the owner thereof; that said safe was in the office of her said son, which office was in the premises occupied by defendant, Junius Hart, on Canal near Rampart street in this city. That immediately after the death of her said son, and on the day that he died, the defendant, Junius Hart, applied to her for the keys of said iron safe, where said money belonging to her was deposited, stating it was necessary to obtain the title papers of the grave lot which her deceased son owned, in order that preparations for the burial of his remains might be made. That, induced by said representations, she delivered to said Hart the keys of said iron safe; two days afterwards said Hart returned the keys, stating that he had taken possession of said packages of said money for her account, inasmuch as they were her property, And further avers in her petition that said Hart was aware of the fact because of her son's occupancy of the office aforesaid on the premises of said Hart, and from intimacy with her son, had obtained from him in his lifetime information as to the ownership of said money thus specially deposited and set apart as the property of plaintiff. She further alleges that said Hart refuses to deliver said sum of money to her or recognize her ownership therein, and prays that said Hart be condemned to deliver to her said packages of money, or in lieu thereof, the sum of \$6000, with interest from January 15, 1884, and costs.

Such are the material averments contained in plaintiff's petition.

The answer of defendant is a general denial.

The law establishes, as applicable to human relations as well as in physics, a certain passive principle of *vis inertiae*, under which the existing *status* is permitted to persist unless overcome by some contrary force of superior power. The judiciary, when called upon to apply such contrary force, refuses to do so unless the grounds of law and fact upon which the interference is claimed be established with such reasonable clearness and certainty as to satisfy the judicial mind of the necessity of interfering.

This doctrine has been crystallized in the hackneyed and somewhat exaggerated aphorism that "the burden of proof is upon the plaintiff, and that to recover he must make his claim certain; to make it only probable is not enough."

It is obvious that where, as in this case, the plaintiff's claim rests upon a charge of crime against the defendant, the principle above stated is reinforced by the powerful presumption of innocence and thus demands the strictest application. To establish her claim, it was absolutely necessary for plaintiff to prove two things, viz:

1. That, at her son's death, there was in the safe referred to a sum of money belonging to her and not to her son.
2. That defendant unlawfully took possession of said money and refused to deliver it to her.

If the money, whatever its amount, remained the property of her son, and if he was a mere debtor of the mother, in whatever amount, plaintiff has no case. For the evidence is uncontradicted that the son's succession was regularly opened and administered; that an inventory was duly taken; that the heirs, including plaintiff, concurred in a notarial act of sale by which they sold to Junius Hart, with full subrogation, all their rights as heirs in and to said succession, he assuming all its liabilities; that before signing the act, plaintiff was distinctly asked whether she had any claim against the succession, had matters fully explained to her, was warned not to sign if she had any such claims; and signed the acts.

Thus, under the facts of the case, as well as under the pleadings, she has no standing in court as heir or as creditor of Charles Moore, but must stand or fall by her proof of ownership of the money claimed.

Now it appears that Charles Moore was a broker in public school teachers' certificates, and that several years before his death he had received \$1700 or \$1800 of his mother's money, which he employed in

Moore vs. Hart.

his business and had never repaid. Of course, he was a mere debtor of his mother for the amount.

What the terms of the loan were does not appear, but it is possible he considered that he would account to her for the profits made on it, and that, in his lucrative business, the sum might have swelled to \$6000 at the time of his death.

It may be that he did tell his mother, as she swears, before his death, that he had \$6000 belonging to her, and even offered to turn it over to her, and advised her to take it; but, if this be so and had she accepted this offer, the likelihood is that he would have handed her \$6000 of the large amount of school certificates which were found in the safe at his death.

Upon this slender foundation, with feminine inexactness of comprehension in business affairs and haste to jump at conclusions, this good lady has, no doubt, honestly built up her belief that her son had told her that he had in the safe six thousand dollars in bank notes put up in a package and marked with her name, and thus set aside as her property.

If he had told her so, the insufficiency of such a statement as a basis for such a claim against the defendant, would be apparent. But the reading of her own testimony does not establish that he ever made such a statement in the distinct terms above mentioned.

None of the surrounding circumstances support the theory that her son had any such sum of money in the safe. He kept books in his business and they exhibited no indication of it; and it is shown that he was, at the time, in need of money for his business.

It is needless to say that the allegation made in the petition that defendant had acknowledged having found and taken the package of money, is entirely unsupported by the evidence.

We conclude, therefore, that there is no proof that Charles Moore left in his safe, at his death, \$6000 or any sum of money placed in a package marked with her name and set apart as her property; and while he may have told her that he had \$6000 for her in his safe, her own testimony does not convince us that he made such statements with regard to its setting apart as would change the relation of debtor and creditor and transfer to her the property in such a sum. Her original statement of what he said conveyed no such idea and it was only on cross-examination that she strengthened and added to her first account.

This leaves no foundation for plaintiff's case and dispenses us from the necessity of discussing the singular conflict of evidence touching

Succession of Strauss

defendant's obtention of the keys. Even if defendant did get the keys and has falsely denied the fact, while this might excite a suspicion of *some* sinister motive and conduct, it would, by no means, establish that he took \$6000 belonging to plaintiff, when there is no proof that the safe contained anything belonging to her.

But the judge *a quo*, who heard and saw the witnesses, evidently gave his belief to those of defendant, and we see no reason to differ from his conclusion.

Judgment affirmed.

No. 9534.

SUCCESSION OF JACOB STRAUSS.

A testamentary disposition by which the testator bequeaths all his property to his grand children, on condition that the legacy should remain under the administration of his testamentary executor until the legatees shall have reached the age of majority, does not create a *fidei commissum*, and has not the character of a condition which is impossible or reprobated by law. Under such a disposition the executor is not made a legatee with instruction to preserve for and turn over the property to another person.

A disposition whereby the testator bequeaths his whole property to his minor grandchildren, on condition of their reaching the age of majority, but that in default thereof, the property shall pass to certain designated charitable institutions, is not amenable to the objection that it is a substitution as prohibited by the civil code.

That feature of a will presents a double institution of heirs depending upon a suspensive condition, but not a double testamentary disposition of the same property, first in favor of one person, and at his death to another person. In this case if the legacy ever vests in the grandchildren, it cannot never reach the asylums, under the effect of the will.

Legatees, whether of age or under age, cannot accept a testamentary succession in part or on conditions different from those imposed by the testator.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

J. Q. A. Fellows and John Rassich, Jr. for the Natural Tutor, Appellant:

1. The will of Jacob Strauss contained the following clauses: "I give all I may die possessed of to my grandchildren, Charles E. S. Cass and Isabella A. Cass. The giving to them to be conditioned on their attaining the age of majority. In case either of them die before attaining the age of majority, then the part or portion given as above conditioned to accrue to the survivor likewise conditioned on such survivor attaining the age of majority. The true intent being to make my said grandchildren my universal legatees upon condition that they reach majority. I desire that during the minority of my said grandchildren, the sum above given them conditionally be administered by my friend Judge E. D. White, of this city, without security. He to administer same for their benefit and pay over same to them on the happening of the conditions on which my gift is based. I expressly exact as a condition that none of the property be ever, in any way, during the minority, administered by their father. In the event of my said

38	55
44	608
38	55
45	966
38	55
46	1134
38	55
48	161
48	179
49	602
49	512
49	1180

Succession of Strauss.

grandchildren dying before reaching the age of majority, then I institute as my universal legatee the Jewish Widows and Orphans Asylum, the Little Sisters of the Poor, etc., "share and share alike."

Contended that the above will and its clauses is a prohibited substitution and *fidei commissum*, as such a nullity and must be considered as not written. And said will is further null because it divests the seizin given by law in favor of said minors, who are legal and forced heirs of their deceased grandfather's estate. Said will further imposing an illegal condition on their legitime. "The giving to them being conditioned on their attaining majority." Rev. Civil Code, Arts. 1519 and 1520; Domat Civil Law, Cushing ed., vol. 2, Art. 3823; Laurent, vol. 14, sec. 402, p. 440, *De la fiducie*; Clague vs. Clague, 13 Lou., O. S., p. 1.

"A disposition by will, in which the property of the estate is to remain in the hands of the executors, until the testator's children or heirs arrive at the age of majority, cannot be distinguished from one that would authorize the executors to keep it and preserve it for and return the estate to them, which is a *fidei commissum*, or trust, and is forbidden by law." Succession Foucher, 30 La. An., p. 1017; Succession Cochrane, 29 An., p. 235; Succession Will. Steven, 36 An., p. 755.

"Whenever the disposition is made in such terms as necessarily to comprehend a charge to keep for and transmit to a third person. It contains a substitution, although not literally expressed. In every substitution or *fidei commissum* the agency of three persons is required, viz: the donor or testator, the person who receives for a certain time and the one to whom is bound to transmit it. Farrar vs. Cutohon, 4 Mar., N. S. p. 48; Arnaud vs. Torbe, 4 Lou., p. 502; Harper vs. Stanbrough, 2 Lou. An. p. 377.

Code Napoleon, article 896, corresponding with article 1507 of our Rev. Civil Code, prohibits substitutions only, while our Code prohibits *fidei commissum* also. Any disposition *mortis causa* or *inter vivos*, by which a person is requested to preserve for and return a certain thing to another person is null, being a *fidei commissum*. the charge *de rendre* appears to be the distinctive characteristic of the *fidei commissum*. The prohibition of the Code is so general that no particular class of *fidei commissum* is excepted from it. Duclosange vs. Ross, 3 An., p. 431; 5 Toullier, p. 28, 30 An., pp. 1020, 1021; 1 Rob. p. 117.

Those who lend their names to *fidei commissum* are viewed, in all cases, as spoliators, and so far from being bound to return the property placed in their hands to the incapable legatee, they contract no other obligation than to restore it to the heirs at law, with the fruits and interests accrued even before demand. "Badillo vs. Tio, 6 An., p. 129 and 136, citing Domat and other authorities.

The nomination by the grandfather in his will of a tutor to his minor grandchildren legatees, (or an executor or special administrator to administer the legacy) to the prejudice of their surviving father and mother, is illegal and the disposition null and must be reputed as not written. 10 La. An., p. 169. Hoggatt vs. Morancy; Succession Foucher, 30 An., pp. 1020-1; Laurent, sec. 403, pp. 441, 442; Rev. Civil Code, 250, 253, 256, 257; 13 La., 1; 10 An., p. 169, and 12 An., p. 767.

When the testament of a grandfather, in favor of his minor grandchildren, is a *fidei commissum* or substitution and null as such, the grandchildren being legal heirs *ad intestatio* (no one having a greater right) are entitled not only to their legitime but to the grandfather's entire estate, the same to be at once delivered over to their father, their natural tutor, to be administered for their benefit as above shown. Rev. Civil Code, articles 886, 887, 940 and 941; Chabot des Successions, vol. 1, pp. 52 and 53; Marcadé Code Civil, vol. 3, p. 33; Rogron Code Civil, p. 150, art. 724; 15 An., Perin vs. McMicken, p. 158.

The legitime goes to the forced heirs by operation of law, unaffected by any restrictions, modifications or conditions imposed by the ancestor, and dispositions imposing such restrictions modifications or conditions must be reputed as not written. Rev. Civil Code.

 Succession of Strauss.

articles 1710, 1493 to 1501 and 1687; Rogron C. Civil, art. 915, p. 192; Laurent, vol. 12 pp. 197-199, sec. 149; Demolombe des Donations, vol. 2, p. 38; Merlin Question, Verbo Legitime, vol. 17, p. 150, sec. 7; 13 Lou., O. S., p. 9, and Succession of John Turnell, 32 La., p. 1218; 3 Mar. 485.

Nicholls & Carroll for the Executor, Appellee.

The opinion of the Court was delivered by

POCHE, J. The controversy presented by the pleadings in this case involves the question of the validity of the olographic will of the late Jacob Strauss, which is of the following tenor:

"This is my last will and testament, entirely written, dated and signed by me, New Orleans, September 20, 1882:

"I give all I may die possessed of to my two grandchildren, Charles Edward Stanislaus Cass and Isabella Amanda Cass, the children of my deceased daughter, Marie Louise Cass. The giving to them to be conditioned on their attaining the age of majority. In case either of them die before attaining the age of majority, then the part or portion given as above conditioned to accrue to the survivor, likewise conditioned on such survivor attaining the age of majority. The true intent being to make my said grandchildren my universal legatees upon the condition that they reach majority. I desire that during the minority of my said grandchildren, the sum above given them conditionally be administered by my friend, Judge E. D. White, of this city—without security—he to invest said amount in good securities and apply the proceeds to the education and support of said grandchildren. He is to administer the same for the benefit of said grandchildren, and pay over the same to them on the happening of the conditions on which my gift to them is based. I expressly exact as a condition that none of the property given by me to my grandchildren be ever, in any way, during their minority, administered by their father. In the event of my said grandchildren dying before the happening of the condition by me above mentioned—that is, they or either of them reaching the age of majority, then I institute as my universal legatee the Touro Infirmary, the Jewish Widows and Orphans' Asylum, the Little Sisters of the Poor, the St. Mary's Catholic Orphan Asylum—share and share alike to each of said institutions. I institute and appoint Judge E. D. White my testamentary executor, with seizin and without security. This entirely written, dated and signed by me at New Orleans, this 20th September, 1882."

J. STRAUSS.

The nullity of the will is propounded by C. L. C. Cass, the father and natural tutor of the two grandchildren of the deceased appellant herein on substantially the following grounds:

Succession of Strauss.

1. That the will contains a *fidei commissum* and a substitution, which are both prohibited by our laws.
2. That it divests the minors of the seizin of one-third of their grandfather's estate, to which they are entitled under the law as forced heirs.

I.

The charge of a *fidei commissum* refers to that disposition in the will which subjects the property of the testator to the administration of the testamentary executor until the minors' legatee shall have reached the age of majority.

Under the provisions of our code, a *fidei commissum* is understood to be "a disposition by which the donee, the heir, or legatee is charged to preserve for or to return a thing to a third person." C. C. 1520.

Now under the terms of this will, the executor is neither a donee, an heir or a legatee. No part of the property of the testator is bequeathed to him, to be preserved for or turned over to another person or succeeding legatee, and it is clear that no right of ownership, either in trust or otherwise, is intended to be vested in him. The only power or right with which he is clothed by the will is one of administration, and under the circumstances it partakes more of the character of an onerous duty than of an enviable right. The practical effect of that feature of the will is to vest the usufruct or right of enjoyment of the testator's estate in his grandchildren, subject to the executor's administration, until they shall have reached the age of majority, and bequeath to them the naked ownership of the same at the time that they shall reach that age. C. C. art 1522.

Such a disposition is not amenable to the reprobation of our law.

The identical question came up and was exhaustively considered by our immediate predecessors in the case of the succession of Macias, 31 Ann. 127. That precise condition was found in the will of Mrs. Macias, and the court held that it was not impossible or reprobated by law. We therefore hold that the will of Jacob Strauss, is not invalidated by reason of that condition.

But it is charged that the disposition by which the testator bequeaths the whole of his property to one of his grandchildren in case of the death of the other before the latter reaches the age of majority, and by which he directs that his property shall pass in equal shares to four designated charitable institutions, in case both of the minors should die before they have reached their respective ages of majority, contains a forbidden substitution.

 Succession of Strauss.

As we have already shown, it appears from a consideration of the will, that it bequeaths no part of the testator's property in full ownership to his grandchildren before they reach the age of majority.

If that condition does not happen, the property of the testator passes at once and in full ownership to the designated asylums. But in case that both minors, or one of them, shall reach the age of majority, the condition under which the asylums could become legatees under the will does not happen, and from that moment their connection with the will is forever severed.

The testator does not pretend to make two testamentary dispositions of the same property, by making it descend as a legacy to one person, and at the death of that legatee, to pass it to a subsequent legatee, independently of the will power of the first legatee, or of the existence of forced heirs to his succession.

It follows therefore that that feature of the will cannot be assimilated to the prohibited substitution referred to in our code.

These views have always prevailed in the jurisprudence of France, from whose code we have derived the provision of our own code on this subject. Code Civil, art 896; Marcadé, vol. 3, p. 364 *et seq.*

The Court of Cassation and other French tribunals have uniformly and correctly ruled that a double institution of heirs, depending upon a suspensive condition, which is the case with the will in hand, does not present the features of a prohibited substitution. Its essential characteristic is that both of the instituted heirs should in turn, and under the effect of the will, become the absolute owners of the property, or that one should succeed the other as legatee of the same thing, under the expressed will and directions of the testator. Journal du Palais, 1885, p. 520, Gildan vs. Phillippon.

II.

We shall now consider the objection to the will on the ground that it imposes illegal conditions on the legitimate portion of the forced heirs. At the threshold of that inquiry we are confronted with the following provisions of our code:

Article 986: "He who has the power of accepting the entire succession cannot divide and only accept a part."

Article 1016: "A succession can neither be accepted nor rejected conditionally."

It is conceded that the testator's grandchildren have no forced legal claim to more than one-third of his estate, and that he had the perfect legal option to dispose by will of the remaining two-thirds of his estate to another or different person. Hence in the case of a will by

Succession of Strauss.

their grandfather, they had no absolute legal right to that portion of his estate.

It is equally clear that he could legally impose any condition; provided it was not impossible or reprobated by law on any person whom he selected as the object of his bounty for that proportion of his estate.

Now in commenting on these provisions of law, which apply as well to testamentary as to intestate successions, (C. C. 975) this Court used the following language in the Succession of Macias :

"A conditional legacy—when the conditions imposed by the testator are neither impossible nor reprobated by law—must and can be accepted by or for the legatee but in accordance with the terms of the will. Whether of age or under age, the legatee cannot be allowed to divide his acceptance to take the donation and repudiate the conditions on which it was made, or take it on conditions which differ from those fixed by the donor. He must accept it as it is or reject it."

Following in the same train of thought on the same subject, the present court, in the succession of Turnell, 32 Ann. 1218, said :

"We think it clear, on both reason and authority, that where the will bequeaths to the forced heir more than his legitimate portion, the testator may attach to the bequest any lawful conditions, and in such case the forced heir must exercise the option of either accepting the bequest as a whole, with the conditions attached, or of renouncing all testamentary advantage and claiming his legitime only as secured to him by the law independent of the testament,"

Having shown hereinabove that the conditions attached to his bequest by Strauss were neither impossible or reprobated by law, it follows that the will must either be accepted in whole or renounced entirely. The conditions imposed by the testator were not intended and must not be construed as imposed on the legitimate portion of his forced heirs, but for the balance of the estate which he would doubtless have disposed of to the exclusion of his grandchildren, had he for a moment supposed that they could have obtained it independently of his will and of the conditions which he attached thereto.

If these grandchildren were of age and were in court in their own right they could not claim one portion of the estate as forced heirs, and the remainder as beneficiaries under the will. The law would compel them to elect whether they would as forced heirs take their legitime without conditions, or accept the whole estate under the conditions imposed by the testator. But their tutor, who now acts in

State vs. Fontenette.

their behalf, has no authority to exercise that option, the law elects for them to accept the most advantageous position in their behalf.

Hence we have no other alternative but to enforce the execution of the will as a whole and all in its parts. These were the conclusions reached by the district judge, his decree must therefore be sustained.

Judgment affirmed.

No. 9580.

THE STATE OF LOUISIANA VS. ADOLPHE FONTENETTE.

Where the blank for the year in an indictment is unfilled, the State may amend by inserting the proper year even after the evidence has closed.

In charging the crime of an assault with intent to commit a rape, it is not deplex pleading to charge a battery as well as an assault. The assault is a component part of the crime, an ingredient of it, and the battery is only an aggravation of the assault, both being the acts of the accused while endeavoring to carry out his intent to commit the more heinous crime.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette.
DeBaillon, J.

M. J. Cunningham, Attorney General, and *R. C. Smedes*, District Attorney, for the State, Appellee.

Mouton & Martin for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The defendant was convicted of an assault with intent to commit a rape and was sentenced to twenty-three months' confinement at hard labour.

After the evidence was closed the District Attorney moved to amend the indictment by inserting the year 1884 in the blank, thus conforming the indictment to the proof, to which the defendant reserved a bill.

Among the many beneficial amendments of criminal practice made by our statutes is that which enacts that no indictment for any offence shall be held insufficient for omitting to state the time at which the offence was committed unless time be of its essence, nor for stating the time imperfectly or on a day subsequent to the date of the indictment or an impossible day. Rev. Stats. sec. 1063. And when objection is made to any defect in the indictment apparent on its face the court is authorized to amend it forthwith. Ibid. sec. 1064.

The provisions amply justify the amendment complained of. *State v. Williams*, 31 Ann. 146; *State v. Johnson*, 35 Ann. 842.

38	61
48	968
38	61
50	1348
38	61
e120	381

Taylor vs. Saloy.

The motion in arrest is for duplicity in that two separate and distinct offences are charged in one count. The charge is that the defendant "violently, maliciously and feloniously did make an assault upon the person of one Althea Dubois with the intention her, the said Althea Dubois, then and there violently, maliciously and against her will, to ravish and carnally to know, and further that said Foutenette, her, the said Althea Dubois, then and there did beat and illtreat and other wrong to her did, contrary, etc."

The defendant's contention is that with the more serious charge there is coupled another of assault and battery.

The objection is not well taken. Our statute is very succinct—whoever shall assault another * * with intent to commit rape shall, etc. Rev. Stats. sec. 792. The crime has to be construed according to the common-law and we look to the common-law for the form of the indictment unless our own statutes have otherwise ordered. Rev. Stats. sec. 976. The common-law form usually charges the assault with the addendum of "beat and ill-treat" before the charge of rape and is the better way, 1 Archbold Cr. Pr. and Pl. 1011, though it is sometimes charged as in this indictment. Wharton's Precedents, 127-8.

The crime charged is not committing a rape, which is a distinct offence punishable with death. Rev. Stats. sec. 787. It is an assault with intent to commit the more heinous crime and the assault must therefore be charged. Even if a battery be charged as well as an assault, as was done in this indictment, it is not bad for duplicity because the battery is part of the assault. It is the act or one of the acts of the accused done at the moment he was endeavoring to carry out his intent to commit the rape.

Judgment affirmed.

No 9514.

JOHN TAYLOR VS. BERTRAND SALOY.

Where, at the moment when the debtor acquired an immovable, there stood recorded against him in the parish a judgment, the judicial mortgage resulting from such record attached to the property *eo instanti* with the ownership, and he could not acquire a homestead in said property to the prejudice of such mortgage.

The jurisprudence is constant and uniform that privileges, mortgagees and real rights attaching to property cannot be disturbed or affected by homestead rights which did not exist at the moment when they attached.

The rule covers judicial as well as conventional mortgages.

A PPEAL from the Twenty-fourth District Court, Parish of Plaquemines. *Monroe*, judge *ad hoc*.

James Wilkinson for Plaintiff and Appellee:

Act 52 of 1865 (R. S. sec. 1691) created homestead exemptions in Louisiana.

Articles 219, 220, of the Constitution of 1879, did not repeal, but extended the provisions of this law. 34 Ann. 339. Neither has, nor can, the Legislature modify said law regulating

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rights to homesteads existing before the adoption of the Constitution, or enlarge the remedy on judgments arising from debts contracted prior to that time. Art. 220, Const. 1879. The right to the homestead is a matter of public policy, not susceptible of conventional waiver or of mortgage. Art. 222. The Act of 1865 was read into defendant's judgment. 37 Ann. 17.

One owing a judgment rendered in 1876 and recorded in 1877, may acquire a homestead in 1881, unincumbered by mortgage, and as against such judgment debt no registry of the homestead is necessary. 35 Ann. p. 927, and authorities there cited.

Even if registry be necessary to protect plaintiff's homestead as against judgments rendered prior to the Constitution of 1879 and Act 114 of 1880, registry herein was made within a reasonable time, and before any intervening rights had accrued. 34 Ann. 337.

R. T. Beauregard for Defendant and Appellant:

Under the homestead provisions of the Constitution of 1879, the exemptions therein provided take effect only from the date of registry, and are inoperative against debts contracted and judicially recognized prior to such registry. 34 Ann. 1013; 35 Ann. 929.

Hence, a judgment obtained and recorded in 1877, founded on an indebtedness existing in 1876, is executory against property acquired by the judgment debtor in 1881, the homestead as to which was declared only six months after his acquisition of same. The judgment debtor is not then shielded by the Homestead Act of 1865, nor the established jurisprudence, which does not embrace the case at bar. 32 Ann. 805, 979; 33 Ann. 240, 390; 34 Ann. 331; 37 Ann. 162, 263.

For, in the interval between the judgment debtor's acquisition of property in 1881 and his declaration of homestead relating thereto six months after such acquisition, the judgment creditor's judicial mortgage extends and attaches to said property, and cannot be defeated by such *ex post facto* homestead declaration. R. C. C. 3328; 35 Ann. 829; R. C. C. 1336; 21 Ann. 253; 32 Ann. 963.

On the dissolution of an injunction staying execution of a money judgment, damages are allowable, less the credit, on the amount due. 27 Ann. 173; 15 Ann. 70; C. P. 304; 32 Ann. 974, 773, 718.

The opinion of the Court was delivered by

FENNER, J. This case is submitted upon an agreed statement of facts and on questions of law arising thereupon, which are also formulated in the agreement.

The facts are briefly as follows:

Saloy is the holder of a judgment against Taylor, rendered and recorded in 1877.

Taylor inherited certain real estate from Julia Lampton, who died in May, 1881, and was recognized and put in possession thereof by order of court in July, 1881.

He has a wife and eight children, and has occupied the property as a home since March, 1881.

He declared and registered the property as a homestead in December, 1881.

In 1885, Saloy caused execution to issue on his judgment and seized the property; whereupon Taylor filed this suit for an injunction, on the ground that the property was exempt from seizure as his homestead.

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The first question of law submitted is: "Whether the execution of a judgment rendered and recorded in 1877, and the homestead exemption asserted against seizure and sale in 1885, is to be tested by the provisions of the Homestead Act of 1865, which was in force at the time when the judgment was rendered?"

This question has already been considered in the case of *Gerson vs. Gayle*, 34 Ann. 337, which was a case where the property claimed as homestead was acquired after the adoption of the Constitution of 1879, and the debt under which it was seized arose prior thereto. We then construed the clause of the Constitution declaring that "rights to homesteads or exemptions under laws or contracts, or for debts existing at the time of the adoption of this Constitution, shall not be impaired, repealed or affected by any provisions of this Constitution or any laws passed in pursuance thereof," and we held that "the right to avail of the provisions of the Act of 1865, in our opinion, continued under this clause, and was only affected as to the manner in which it could be claimed or asserted when the Legislature, in obedience to the constitutional mandate, enacted the necessary laws as to its registration," etc.

We thus intimated the opinion that homesteads, acquired after the adoption of the legislation directed by the Constitution with reference to their setting apart and registry, must conform to the requirements of such legislation in order to be effective even against debts originating prior to the Constitution.

But, in this case, the question as to whether the Act of 1865 or the Constitution of 1879 governs, is of no practical importance.

Conceding that the former act controls, we have twice very distinctly decided that a homestead under it cannot be acquired in property to which a mortgage had attached prior to the acquisition of the homestead.

In one case, the debtor owned and mortgaged the undivided three-fourths of an immovable which, by reason of the indivision, was not subject to the homestead claim. He subsequently acquired the remaining fourth and then claimed the homestead, which we denied, on the ground that the mortgage having attached at a time when the homestead right did not exist, it could not be affected by subsequent facts. *Bramim vs. Womble*, 32 Ann. 805.

In the other case, the debtor had granted a mortgage on property on which he did not at the time reside. He subsequently established his home on the property and set up his homestead right against the mortgage, and we held that as the property had come under the mortgage free from any homestead right, the debtor could not impair the effect

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of the mortgage by subsequently moving on the property and claiming an *ex post facto* homestead. *Gilmer vs. O'Neal*, 32 Ann. 983.

Both of these decisions interpreted the Act of 1865.

The jurisprudence of this Court, as organized under the Constitution of 1868, had given effect to homestead rights under the Act of 1865 as against previously existing debts and even judgments, when not secured by privileges or mortgages antedating the homestead. *Robert vs. Coco*, 25 Ann. 199; *Doughty vs. Sheriff*, 27 Ann. 355.

But, in both the cases, it will be observed that the judgments, as against which the subsequently acquired homestead right was allowed, had not been recorded and, therefore, were not secured by judicial mortgage on the property. The Court distinctly stated that anterior privileges, mortgages or real rights could not be affected.

So, in the case of *Gerson vs. Gayle*, 34 Ann. 337, although the record of the judgment antedated the registry of the homestead, yet the property was acquired and the homestead existed before the judgment had been recorded, and thus took effect before any judicial mortgage had attached.

We discover no reason to make a distinction between a judicial and a conventional mortgage. The principle is constant and universal that privileges, mortgages and real rights which have attached to property free from homestead right at the time, cannot be affected by any such right thereafter arising.

Now, in the instant case, the judgment of plaintiff stood of record in the parish where the immovable in controversy was situated, prior to and at the moment when plaintiff acquired the ownership thereof; and the judicial mortgage resulting therefrom attached at the very instant of ownership. Hence, as the homestead right could only arise in property owned by the debtor, and as the ownership carried with it the attendant mortgage, the latter could not be divested or affected by the homestead.

This disposes of the second question of law submitted, viz:

"Where a judgment rendered prior to the Constitution of 1879 has been duly recorded against the debtor, can said debtor acquire and occupy an unencumbered homestead subsequent to the passage of said constitutional and legal provisions in 1879 and 1880, upon recording his declaration of homestead before the seizure of said property, or within a reasonable time thereafter?"

We have no hesitation in saying that a homestead cannot be acquired in an immovable which, at the moment of its acquisition by the debtor,

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became subject to a judicial mortgage resulting from the record of a prior judgment, to the prejudice, at least, of such judicial mortgage.

The third question, "Was the declaration of homestead made within a reasonable time in the present case?" thus loses all importance and need not be considered.

Our interpretation of the agreement is that the parties are in accord as to the credits which are to be placed on the *fi. fa.*, and that the homestead exemption is the only question submitted to us. Should we be in error on this point, our decree may be corrected on proper showing.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed; and it is now adjudged and decreed that there be judgment in favor of defendant dissolving the injunction issued herein, and rejecting plaintiff's demand at the latter's cost in both courts.

No. 9563.

THE STATE OF LOUISIANA VS. FRANK MOORE.

Under an indictment for entering a store with intent to steal, the prosecuting witness testified substantially that he had walked into the back part of his premises, leaving the store in charge of a child, when he heard the child exclaim, "You are being robbed!" and thereupon rushed into the store and saw the accused in the act of running out. Held, that the judge did not err in overruling an objection to the admissibility of the child's exclamation on the ground that it was hearsay, and in holding that it was admissible as part of the *res gestæ*.

Where, under a statute punishing the offense of entering a shop with intent to steal, the indictment used the word "store" instead of shop, the variance is immaterial, as long since decided. 5 Ann. 340.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee:

1. The exclamation of a child left in charge of a shop where a larceny is committed, made during the continuance of the transaction and addressed to the owner of the stolen property in these words: "You are being robbed!" is admissible as forming part of the *res gestæ*. 1 Greenl. on Ev. §§ 99, 100; Wharton Cr. Ev. §§ 262, 263; Roscoe's Cr. Ev. 6 Am. ed., 22.
- The admissibility of the surrounding circumstances, as constituting parts of the *res gestæ*, is to be determined by the trial judge. 1 Greenl. on Ev., § 108.
2. (a) A "shop" is a place for the sale of goods; a "store" is a place for the keeping and sale of goods. 1 Whart. Cr. Law, §§ 792, 795.

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With us the terms are equivalent and interchangeable, and an indictment for "entering a store" will justify a conviction under a statute for "entering a "shop." State vs. Smith, 5 Ann. 340.

(b) It is not necessary "to state any venue in the body of an indictment, but the State, parish or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment." R. S. § 1062. Nor will any indictment be held insufficient "for omitting to state the time at which an offense was committed in any case where time is not of the essence of the offense. R. S. § 1063.

J. J. Foley for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The errors assigned are presented upon a bill of exceptions and a motion in arrest of judgment.

I.

The indictment is for entering a store with intent to steal and for petty larceny.

The bill of exceptions recites, in its body, that the prosecuting witness stated, among other things, that he had occasion to step into the rear place portion of his store "to get a drink of water and while so occupied a child, whom he said he left minding the place, called out to him "you are robbed!" whereupon the counsel for accused moved that the statement, with regard to the exclamation of the child, should be stricken out as hearsay, which objection was overruled by the court and to which ruling the exception is taken. The judge, before signing the bill, made his own statement in the following words: "The witness stated that he stepped into a room adjoining his store to get a glass of water and as he did so, his little girl cried out you are being robbed; that he rushed in the store as accused was in the act of running out."

Counsel for accused vehemently denies the correctness of the judge's statement and even asks our attention to certain original documents, not part of the transcript and filed here without any authority. Of course we cannot look at these, being completely *dehors* the record.

It is equally clear that we must accept and act upon the statement of the judge. It is his signature alone which imparts force to the bill; and the bill, in fact, is merely his statement of what occurred. He cannot be compelled to make a statement which he does not consider correct; and while his duty to make a correct statement is clear, the breach of that duty cannot be remedied in the mode here proposed. Defendant must either stand upon the bill as signed by the judge, or he has no bill at all.

With due respect to the philosophical discussion of the subject of *res gestæ* by defendant's counsel, we must say that, under the state-

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ment as made by the judge, the exclamation of the child was too clearly a part of the *res gesta* to admit of question. The participants in the events which the witness was relating, were the child who made the exclamation, the witness who heard it and in consequence rushed into the store, and the defendant who ran out of the store; and the three acts are inseparably connected with, and explanatory of, each other and together constitute the transaction. The exclamation falls clearly within the rule laid down by Mr. Wharton and never disputed by any authority, viz: "What is said and done by participants, under the immediate spur of the transaction, becomes thus part of the transaction, because it is the transaction which then speaks. * * * The question is, is the evidence offered that of the event speaking through participants, or that of observers speaking about the events? In the first case what was said can be introduced without calling those who said it; in the second case, they must be called." Whar. Cr. Ev., §§ 262, 263; Roscoe's Cr. Ev., 22; 1 Greenleaf on Ev. §§ 99, 100.

The only question raised by the bill is as to the admissibility of the exclamation. There is none on the subject of its evidentiary value.

II.

The motion in arrest is based on two grounds, viz:

1st. That there is no such offense known to the laws of Louisiana as that set forth in the first count. The defect suggested is that the word used in the indictment is "store," while that used in the statute is "shop." This point was long since disposed of as without force. State vs. Smith, 5 Ann. 340.

2d. That, if the first count be a nullity, the second count for petit larceny, is insufficient in its averments.

As this ground is conditioned upon our finding the first count to be a nullity, our ruling sustaining its sufficiency, destroys the objection which, however, otherwise, has no foundation under §§ 1062, and 1063, Revised Statutes.

Judgment affirmed.

No. 9555.

JOSEPH H. HYNSON vs. WALTER PUGH AND MRS. E. J. EWING.

The owner and the pledgee of certain notes entered into a contract with a third person, by which the latter agreed to pay a certain sum for one of the notes, past due, on a fixed day, and the pledgee bound himself to hold the note and to present it on that day, and to deliver it to the third person upon payment of the sum agreed on that day.

Held, that this contract did not create a mere continuing obligation with a term, but was a commutative contract under which the pledgee was bound to present the note on the

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day fixed, and the third person was only bound to pay, if so presented. The pledgee had only bound herself to deliver, in case on presentment the payment was made on that date. Had the note been presented on the day fixed and not paid, the party could not have claimed delivery on subsequent payment; and it is a necessary sequence of this that the pledgee, not having presented the note according to the contract, could not demand payment on a subsequent presentment.

The owner of the note having been guilty of no fault, and having lost the benefit of the third person's obligation by the fault of the pledgee, the latter is bound to make good the damage occasioned him thereby.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Gibson, Hall & Montgomery for Plaintiff and Appellant:

The sale of a note for future delivery which is held in pledge, to which a pledgee agrees and binds himself to present the note on the day fixed for the delivery, and to deliver it upon payment of the purchase price, and then credit the note to secure which it was pledged, with the amount of the sale, binds the pledgee for the amount of the purchase price to the pledgor, and relieves the pledgor from paying such sum to the pledgee, where it is established that the purchaser would have paid the price agreed upon on the day fixed, if the pledgee had presented and delivered the note to the purchaser. 29 Ann. 663; 28 Ann. 838; 13 Ann. 361; 10 Ann. 160; 12 R. 423; C. C. 2991-92; 4 Ann. 300; 27 Ann. 110; 18 Ann. 27; 28 Ann. 946.

The agreement by the pledgee and pledgor to sell a pledged note, to which a third person, the purchaser, agrees, modifies the original contract of pledge and obliges the pledgee to deliver the note, upon payment of the purchase price, on the day fixed. The pledgee's failure or refusal to deliver it does not destroy the effect of the sale and reinstate the original pledge, and enable the pledgee to sell the pledged note at once to a fourth party. 1 Ann. 344; 18 L. 533; 20 Ann. 570; C. C. 2394 (2315), 2316; C. C. 1902, 3134.

An individual who undertakes to secure another's rights because of the belief that he has been in fault, incurs a legal obligation. 5 M. 194; 12 R. 428; 8 R. 157.

Alfred Grima for Defendant and Appellee:

Mrs. Ewing, by her co-defendant Pugh, as special agent, made to the plaintiff a loan of \$7,272, evidenced by said plaintiff's note and secured by two collateral mortgaged notes. V. and A. Meyer & Co. entered into a written agreement to give \$5,270 for one of the collaterals on the 15th of January, 1885. The said collateral being presented to them on the 19th of January only, Meyer & Co. claimed release, and plaintiff's discharge from his principal debt to the extent of \$5,270.

The defendant, Pugh, acted throughout the matter merely as agent, and cannot be brought to account to plaintiff for his acts of agency, the principal being a party to the suit.

As regards the charge in the petition that Pugh secured the plaintiff against the consequences of the failure of presentment of the collateral to Meyer & Co. on the 15th of January, 1885, it does not constitute a cause of action against him.

1. Because a verbal promise to pay the debt of a third person is not binding. Rev. Stat. 1443; 38 Ann. 452; Id. 532; 34 Ann. 817; C. C. 2278.
2. Because such promise would be without cause, motive, consideration or interest, and of no effect. C. C. 1893, 1896; 1 Demolombe Contracts, p. 342, *et seq.*
3. Because it would have been made under the erroneous belief of a pre-existing liability, resulting from the non-presentment of the said collateral on the 15th of January, 1885,

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which is the only ground upon which personal liability is charged in the petition against the defendant Pugh. C. C. 1846; 34 Ann. 688, Chaffe, Syndic. vs. Scheen et al.

The said failure of presentment did not create any liability against the defendant, Mrs. Ewing. The obligation of Meyer & Co. was one with a term. They could not be compelled to pay *before*, but could so be *after*, the 15th of January, 1885. C. C. 1764, § 3, 2053; 16 Laurent. 205, § 193; 2 Demolombe Contracts, § 650.

The said collateral was equally available, and Meyer & Co. equally solvent, on and after the 19th of January, 1885. Were the plaintiff's situation to be assimilated to that of a surety, he would, on paying his debt at maturity, have been subrogated to all the rights of the creditor, and to the mortgage and advantages attached to the said collateral, and could have sued Meyer & Co. C. C. 2061, 3057; 18 Ann. 652; 28 Ann. N. R.; see Louque's D., p. 702, § 7; 29 Ann. 844.

Mrs. Ewing did not change any of her rights, did not discharge her debtor by novation or delegation, and looked to the obligation of Meyer & Co. as an additional advantage of which she could avail herself as she saw fit. C. C. 1190, 2192.

The opinion of the Court was delivered by

FENNER, J. On July 16, 1884, Joseph H. Hynson executed and delivered to Mrs. E. J. Ewing his promissory note for \$7272 74, payable to her order on February 1, 1885, and pledged for its payment two mortgage notes of \$4500 each, of J. S. Butler, both dated December 18, 1881, and bearing 8 per cent interest from date, one of which had matured on February 1, 1884, and the other was to mature on February 1, 1885. The pledge conferred on the pledgee, in event of default in payment of principal note, authority to sell the pledged notes at public or private sale, without recourse to legal proceedings.

On the same day (July 16, 1884) the following agreement was executed between Hynson, Mrs. Ewing and V. & A. Meyer & Co., viz:

"NEW ORLEANS, LA., July 16, 1884.

"This agreement between Joseph H. Hynson, through his duly authorized agent, G. L. Hall, and Mrs. E. J. Ewing, through her duly authorized agent, Walter Pugh, as per power of attorney annexed, and V. & A. Meyer & Co., a commercial firm domiciled in this city, witnesseth:

"That said V. & A. Meyer & Co. agree to pay \$5270 on the 15th of January, 1885, for a note signed by John S. Butler, dated December 13, 1881, for the sum of \$4500, etc., maturing February 1, 1884, which note is secured by an act of mortgage, etc. * * *

"It is further agreed that Mrs. E. J. Ewing, through her said agent, Walter Pugh, shall hold the aforesaid note of John S. Butler, that fell due on January 1, 1884, under a pledge made to her to secure a debt by said J. H. Hynson, and present it to V. & A. Meyer & Co. on January 15, 1885, and deliver it to them upon payment to her of \$5270 on that date.

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"It is further agreed by J. H. Hynson that the sale and delivery of said note of John S. Butler, owned by him and pledged to said Mrs. Ewing is and shall be made on the terms and conditions herein stipulated.

(Signed)

J. H. HYNSON, *per pro.* G. L. HALL
V. & A. MEYER & Co.
WALTER PUGH, AGT."

The meaning of the contract and the character of Mrs. Ewing's obligations thereunder receive additional elucidation from the language of her special power of attorney to Mr. Pugh, which is as follows:

"I hereby authorize Mr. Walter Pugh to sign for me and in my stead a certain agreement to be entered into between Messrs. V. & A. Meyer, Jos. H. Hynson and myself, whereby the Messrs. V. & A. Meyer agree to pay on the 15th of January, 1885, the price and sum of \$5270, for a certain mortgage note for \$4500, etc. to Mr. Hynson, the owner of said note. or myself, the pledgee of said note, payment to be made on surrender of said note—my obligation in the premises being to withhold a foreclosure of the mortgage in consideration therefor, *and to hold until that time said note and tender the same to V. & A. Meyer, receive the said sum of \$5270, and credit Mr. Hynson's note with that amount.*"

Mrs. Ewing failed to present the note to V. & A. Meyer & Co. on the 15th of January, 1885, and only presented it several days after that date, when V. & A. Myer & Co. refused to pay the stipulated price, claiming that they were discharged from their obligation by reason of the failure of Mrs. Ewing to present the note at the time stipulated.

Thereupon Hynson made a legal tender to Mrs. Ewing of the difference between the \$5270 which should have been collected from Meyer & Co. and the amount of his principal note, and demanded the surrender to him of the said note and of the remaining mortgage note held in pledge therefor. Mrs. Ewing declined the tender, protested the principal note at its maturity on February 1 and 4, 1885, and immediately placed the two pledged notes in the hands of a broker for sale, which was effected on February 12, for a sum a trifle less than the amount due on the principal note. Hynson brings the present action against Mrs. Ewing and Walter Pugh *in solido* praying for judgment ordering them to return to him his principal note and the other mortgage note pledged therefor on his paying them the sum of \$2,002 or, in the alternative, to pay to him the sum of \$3,630, the difference between the value of the two pledged notes illegally sold and the amount of the principal note.

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So far as the claim against Walter Pugh is concerned, we may dismiss at once. The evidence does not satisfy us that he ever acted otherwise than as agent for Mrs. Ewing or that he ever assumed any personal obligation in the premises. We have carefully weighed the parol evidence on the question, and our conclusion is so clear that it does not require more particular discussion.

As regards Mrs. Ewing, on two points the evidence in this record presents no conflict, viz :

1st. That V. & A. Meyer & Co. would have paid the \$5270, as agreed by them, had the note been presented on the 15th of January, 1885.

2d. That the pledged notes were secured by first mortgage and vendor's lien on the Clio plantation in the parish of Rapides and that said property was worth more than the total amount due on said notes.

Hence, the fact and the exact measure of Hynson's loss are clearly fixed and ascertained.

The loss results directly from the non-fulfilment of the agreement of January 16. Had that agreement been executed, the \$5270 would have been paid on the principal note, leaving due thereon only \$2002, which Hynson would have paid, as he offered to pay, at its maturity, and would thus have received back his principal note and the unsold pledged mortgage note for \$4500 and interest, worth over \$5600. To make him whole he is entitled to be placed in this position, or to receive the difference between the \$2002 which he would have paid and the value of the mortgage note which he should now possess; and this is exactly what his petition claims.

Now as there is no pretense that Hynson has violated any of his obligations under the agreement, or has been guilty of any fault or negligence whatever, it follows that the damage must have been occasioned by the fault of one of the other parties, either Mrs. Ewing or V. & A. Meyer & Co., and the one in fault is bound to repair it. C. C.

If the time fixed for presentment and payment was of the essence of the contract, if Mrs. Ewing was bound to present it on that day and if, in default of such presentment, Meyer & Co., were discharged from the obligation to pay, it is obvious that she was in fault and is bound for the loss. If, on the contrary, Meyer & Co.'s obligation was a mere obligation with a term only relieving them from payment until its expiration, and leaving their obligation in full force thereafter, then the presentment of the note even after the term was a sufficient discharge

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of Mrs. Ewing's duty and their failure to pay was a breach of their obligation for which they would alone be liable.

We freely concede that if Meyer & Co., though bound to pay, refused to pay, there is nothing in the agreement which would affect or diminish Mrs. Ewing's right to demand full payment of Hynson's note at maturity and, in default thereof, to proceed to the enforcement of her pledge according to the terms of her contract. But if Meyer & Co. were discharged from their obligation to pay by reason of Mrs. Ewing's breach of her own obligation, she was bound to make good the loss to Hynson, and to credit on his note the sum which she should have received and had agreed to credit.

Now, when we analyze the agreement, we find the correlative obligations of the parties stated with equal distinctness, viz: 1st. V. & A. Meyer & Co., agree to pay \$5,270 on the 15th of January, 1885;" 2d. Mrs. Ewing agrees to "present it to V. & A. Meyer & Co. on January 15, 1885, and deliver it to them upon payment to her of \$5,270 on that date."

The language is too clear to require interpretation. Not only did Mrs. Ewing affirmatively bind herself to present the note on the 15th of January, but she confined and subjected her obligation to deliver the note to the condition of payment "on that date." Had she presented the note on that day, and had Meyer & Co. failed to pay, they could not have required the delivery of the note by offering payment on a subsequent day, because, by the express terms of her contract, she only consented to deliver the note "upon payment to her of \$5,270 on that date."

It follows inexorably that, as Meyer & Co.'s right to claim delivery of the note, would have been forfeited by their failure to pay on presentment of the note on the 15th of January, their obligation to pay equally expired with the failure to present on that day.

Not only is this the unequivocal import of the language of the agreement, but the situation of the parties affords an evident explanation of the reason for its adoption. The time fixed for the execution of the agreement was only fifteen days prior to the maturity of Hynson's note. Mrs. Ewing did not wish her right to proceed with the foreclosure of her pledge to be hampered or even shadowed by any inchoate rights of Meyer under a mere continuing obligation with a term. Hence she confined her obligation to deliver the note to the condition of payment on the day fixed so that, if not then paid, the matter would be at an end, and her right to proceed unquestioned. But, in thus protecting herself against Meyer & Co.'s default, she

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equally bound herself to comply with her own obligation and, in discharging Meyer & Co., she must do it at her own expense and not at that of Hynson.

Counsel for defendant insists that we should precise the legal principle under which Mrs. Ewing's right to enforce her pledge was lost.

It is very clear and simple. She had bound herself to receive from Meyer & Co. and credit on Hynson's note, \$5,270. She failed to receive it and discharged Meyer & Co. from the obligation of paying it, through her own fault.

This did not discharge her from the duty of making the credit any more than if she had taken the money from Meyer & Co. and then returned it to them.

Hence, when Hynson's note fell due, there remained unpaid on it only the sum of \$2,002. Of this sum, Hynson made a legal tender at the maturity of the note, and this had all the effect of full payment, and rendered her further proceedings in the sale of the pledged notes wanton and illegal.

Hynson is entitled to the exact judgment prayed for in his petition, as against Mrs. Ewing.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from, in so far as it is in favor of defendant, Walter Pugh, be affirmed, and that, in other respects, it be annulled, avoided and reversed, and it is now ordered that there be judgment in favor of plaintiff and against the defendant, Mrs. E. J. Ewing, condemning her to pay to plaintiff the sum of \$3,630 26 with interest at the rate of eight *per cent per annum* from February 1, 1885, or to deliver to him the note for \$4,500 made by John S. Butler, to his own order dated December 13, 1881, and payable February 1, 1885, secured by vendor's lien and mortgage on the Clio sugar plantation in the parish of Rapides, and also the note for \$7,272 74 made by plaintiff, on plaintiff's paying to her the sum of \$2,002 74. Said defendant to pay costs in both courts.

No. 9267.

JOHN CROSSLEY & SONS, LIMITED, vs. THE COMMISSIONERS OF THE
LOUISIANA SAVINGS BANK AND SAFE DEPOSIT COMPANY.

Conventional interest cannot be recovered without proof of a contract to pay such. Legal interest only can be allowed in the absence of such contract.

A claim to the ownership of securities pledged, cannot be recognized when it is apparent that the pledgor did not transfer them and the pretended conveyance was made by one who never had any title to the ownership thereof, to the knowledge of the pledgee.

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The value of stock cannot be recovered as the price thereof, where it is not shown that a contract to sell and purchase was entered into directly, or by an authorized agent.

The transfer of stock by a banking institution to one of its creditors, in part liquidation of his indisputable claim against it, does not justify recovery of the price value of the stock from one to whom such creditor subsequently conveyed it, in settlement of his indebtedness.

If the original transaction be null, because *ultra vires*, it is not enforceable against the transferee or his assigns.

The giving of a letter of credit to a bank to be used solely in case of an emergency, or of a financial panic and if necessary to maintain and restore the bank, does not authorize the use of it, unless in the cases stipulated.

Recalling such letter and declining to honor drafts under it, where the amount, if paid, could not possibly have saved the bank, gives no right to recover the same. Such recalling does not forfeit the right of preference which the pledgees have on the securities in hand.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

Miller & Finney and Blanc & Butler for Plaintiffs and Appellants :

I

1. Plaintiffs are entitled to judgment against defendants for \$187,510 36, with interest at five per cent per annum, from October 30, 1875, until paid, on \$45,485 36; like interest from April 15, 1879, on \$24,225 00; like interest from April 21, 1879, on \$24,250 00; like interest from May 5, 1879, on \$49,250 00, and like interest on \$24,000 00, from June 21, 1879, until paid for money loaned.
2. Recognizing them as pledgees of the \$214,208 80 of drainage warrants, and ordering the sale of the same, to satisfy the amount for which they were pledged.
3. Decreeing them to be the owners of \$130,000 of drainage warrants, turned over to them by E. C. Palmer, in part settlement of his indebtedness to them.
4. Commanding defendants to redeem and turn over to plaintiffs, as stipulated in the letter of credit, the drainage warrants pledged to the Fourth National Bank of New York, and to other parties, to be sold to satisfy the amount due plaintiffs under the aforesaid loan.
5. Rejecting the demand in reconvention with all costs.

II.

The demand in reconvention for \$350,000 00 on account of the conversion of the bank's indebtedness to Palmer to that extent, into 3500 shares of its capital stock, should be rejected.

1. The claim is barred by the lapse of time, more than five years having gone by before the institution of any proceedings for its enforcement. C. C. Att. 3542; 3 Rob. 318; 4 Rob. 8; 5 Rob. 83; 10 Rob. 425; 11 Rob. 302; 3 Ann. 328.
 2. Plaintiffs acquired the stock from Palmer as full paid stock, in perfect good faith and for value, and had no transaction with the bank in relation thereto.
 3. Palmer's acquisition of the stock was made for a valuable consideration in good faith, and in a way and manner which made the transaction equivalent to a payment in cash for the stock; under such circumstances his conditional subscription was valid; but, if it was invalid, the bank commissioners are estopped from questioning its validity.
- (a) Authority sustaining the conversion. Louisiana cases: 23 Ann. 732; 27 Ann. 118; 35 Ann. 276. Other State cases: 9 Ala. N. S., Cooper vs. Frederick; 16 B. Monroe 6, Wright vs. Shelby. It. R. Co (Ky.); 41 Miss. 188; 15 John's (N. Y.) 555; 2 Sandf. (N. Y.) 39; 1 Casey, (Pa.) 116; 4 Casey, (Pa.) 327; 27 Pa. State, 261; 9 Watts, 458; 41 Pa. State.

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54; 6 Ohio, 119; 1 Ohio, 22, 328; *Thrasher vs. Pike* R. Co., 25 Ill.: 38 Ill., 215; 39 Maine, 587; 63 Maine, 480; 44 Cal. 492; 43 Com. 86; 4 Greene. (Iowa) 42; 10 Ind. 539; 2 Duval, (Ky.) 242; 12 Wis. 512. Federal Court cases; 1 Dillou, 174; 16 Wal. 395; 17 Wal. 108; 22 Wal. 136. English cases: *Spargo's case*, VIII, Chancery Appeals, 407; *Ferrao's case*, IX, Chancery Appeals, 355; *Adamson's case*, Law Reports, Vol. XVIII, p. 670. *Carling's case*, Law Reports, 1 Chancery Div. p. 115; *Anderson's case*, Law Reports, 1 Chancery Div. p. 75.

- (b) Authorities in support of plea of estoppel. *Herman on Estoppel*, p. 337, and cases there cited; 5 Rob. 523; 1 Ann. 11; 4 Ann. 263; 5 Ann. 368, 108; 6 Ann. 276, 349; 9 Ann. 528; 12 Ann. 473; 15 Ann. 531; 28 Ann. 107; 32 New Hampshire, 295; *Bigelow on Estoppel*, 464; *Dillon on Municipal Corporations*, 375, 383, 385, 398; 23 Howard, 400; 2 Black, 722; 13 Wal. 297; 3 Otto, 13.
4. If the conversion was invalid and the commissioners are not estopped from questioning its validity, the only effect of that state of things is to strike the transaction with nullity; it does not create a new contract, nor authorize the court to hold plaintiffs to the performance of an agreement which they never assented to, and which, had it been proposed to plaintiffs, would have been rejected. C. C. Articles 1766, 1798, 1800, 1803; 6 La. 218; 5 Ann. 4; 11 Ann. 649; 15 Ann. 521; 11 Johns. (N. Y.) 100; 9 Johns. (N. Y.) 218; 8 Sargt. and R. (Pa.) 219; see also English cases above cited.
5. The attempts to compel plaintiffs to pay again for the stock, is not only illegal but, in view of their unparalleled liberality to the bank, and of the great losses they have been occasioned thereby, it is to say the very least of it, most inequitable and unjust.

The demand of the Bank Commissioners for the unpaid portion of the letter of credit amounting, as they allege, to the sum of \$78,712 50, should also be refused.

1. The letter of credit was given under express condition that it should not be drawn against except to sustain the bank in a real emergency or financial panic; and with the understanding that the cash arising from the loan of \$40,000, of which the letter formed a part, should be used and applied by the bank to the redemption of certain pledged drainage warrants which, when so redeemed, were to be turned over to plaintiffs; both of these conditions were shamefully violated by the directors of the Louisiana Savings Bank; and plaintiffs were, therefore, fully justified in recalling their letter of credit, and in refusing to honor any further drafts under it.
2. The bank was in such a state of collapse when plaintiffs withdrew their letter of credit, that it could not possibly have been sustained by further advances; and, as the object of the letter had thus failed, plaintiffs were at liberty to recall it.
3. As the bank paid nothing for the letter of credit, and failed to redeem and turn over any of the securities it had promised; plaintiffs, for such reasons, had a perfect right to cancel their letter.
4. As soon as Edward Crosley, acting for the plaintiffs, had given their letter of credit, and had advanced \$100,000 in cash, to the bank, he took his departure for England; his back was hardly turned on New Orleans when Conery and other Directors commenced withdrawing their deposits and, in less than (30) days, they, in that way, had unlawfully, and in bad faith towards plaintiffs, appropriated out of the cash thus put into the bank by plaintiffs, upwards of \$100,000; notwithstanding those directors had promised plaintiffs that they would do all in their power to maintain the bank, if plaintiffs would only lend the bank the \$100,000 in cash, and give the aforesaid letter of credit. Such conduct on the part of the directors, wholly exonerate plaintiffs, and amply justified them in recalling the letter of credit.

W. S. Benedict for Defendants and Appellees:

I.

As to the deposit in November, 1874: The depositary owes no interest for the money placed in his hands, except from the day he became a defaulter. C. C. 2048, (2919) 11 Ann. 199 and 200.

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II.

As to the drainage warrants claimed through manual delivery of E. C. Palmer: *Nemo plus juris ad alienum transferre potest, quam ipse habet.* Coke, Litt., 3 9; 2 Kent Comm., 324; Ventress & Smith, 10 Peters. 161-175.

- "A debtor may give in pledge whatever belongs to him, but with regard to those things in which he has an ownership which may be diverted, or which is subjected to encumbrances, he cannot confer on a creditor by a pledge any further right than he had himself. C. C., 3142.
- "The president was the trustee of the bank by law, and of the warrants by order of the bank.
- "Like a director he is absolutely prohibited from the performance of those questionable acts wherein his conduct may be wholly free from blame; but, where the bias of self-interest is strong, and may influence him even without his own recognition of the fact. The law, therefore, has with wholesome care declared that it is the duty of a director, resulting from the employment itself, not to acquire any interest in any matter adverse to that of the bank so long as he remains in office. Morse on Banks and Banking, 2d Edition, p. 114.
- "If the act is open to suspicion, he will, like a trustee, be held to have violated his duty, which is not to strive to do questionable things conscientiously, but wholly to refrain from all actions or intermeddling in them of what nature soever." Page 115, Id.

III.

As to liability to pay \$350,000 for stock.

AGENCY.

1. "The broker or intermediary is he who is employed to negotiate a matter between two parties and who, for that reason, is considered as the mandatory of both. C. C. 3016.
- "The obligations of a broker are similar to those of an ordinary mandatory with this difference; that his engagement is double, and requires that he should observe the same fidelity towards all parties and not favor one more than another. C. C. 3017.
- "An agency may be created by the express words or acts of the principal, or it may be implied from his conduct and acquiescence; so also the nature and extent of the authority of an agent may be expressly given by a solemn or an unsolemn instrument, or it may be implied or inferred from circumstances. Story on Agency, Sec. 45, 8th ed.
- "The nature and extent of authority in authorizing another to assume the apparent ownership, or right of disposing of property in the ordinary course of trade, will be presumed in such case. Strangers look only to the acts of the parties, and are not to be affected by mere private communications which pass between the principal and the agent. Sec. 93.

LIABILITY OF SHAREHOLDERS.

- "The obligation of payment upon a subscription of shares in a capital stock of a banking corporation is created and perfected by the act itself of subscription. The shifts to which shareholders who have only paid a portion of the par value of their shares, have resorted in order to avoid further payments after the corporation has proved unsuccessful, are very numerous. But they have uniformly met with well-deserved failure, at least so long as *bona fide* debts of the bank were outstanding. Morse on Banks and Banking, 2d ed. p. 488.
- "The doctrine that the stock subscriptions are in the nature of a trust fund for the payment of corporate liabilities is well established. Subscribers cannot avail themselves of the statute of limitation in bar of the claims of creditors to have full payment made. The collection in due season by a corporation, is a matter lying wholly between itself and the subscribers. Page. 490.
- "A subscription for bank stock cannot be diminished after it is once made. So soon as it is legally completed, it is an obligation from which even the directors cannot grant the

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- subscriber any absolution, either for the whole or for any part, which will avail him as against persons who were creditors of the corporation prior to the diminution. P. 491.
- "If persons have suffered their names to be entered as directors, though by virtue of some arrangement with the bank by which it is agreed that they shall only assume this appearance without making any payments, or becoming stockholders in fact, still they will be held to all liabilities of ordinary or regular owners for the benefit of creditors. P. 496.
- "Where one is a creditor, as well as a stockholder, he cannot avail himself of the debt owing to him by the bank, by way of set off to diminish his contributory share. His liability as a shareholder for the benefit of creditors must be distinct from his character as a simple contract debtor of the bank upon ordinary business transactions." P. 500.
- "The liability of each stockholder is precisely for the ratable proportion of the sum total of the indebtedness of the bank." P. 503.
- "One who agrees to take and fill a share in the capital stock of a corporation, is liable to pay all assessments legally made on that share." *Buckfield Branch R. R. Co. vs. Irish*, 39 Me. 44; *S. P. Fry vs. Lexington, etc. R. R. Co. 2 Metc. (Ky.) 314*; *City Hotel vs. Dickinson*, 6 Gray, (Mass.) 586; *Buffalo, etc. R. R. Co. vs. Dudley*, 14 N. Y. (4 Kern), 336; *Dayton vs. Borst*, 37 N. Y. 435; *Northern R. R. Co. vs. Miller*, 10 Barb. (N. Y.) 260; *Fort Edward, etc. Plank Road Co. vs. Payne*, 17 Id. 567; *Troy, etc. R. R. Co. vs. Tibbetts*, 78 Id. 298; *Merrimac Mining Co. vs. Levy*, 54 Pa. St. 227.
- "A subscription to the stock of a railroad company creates a debt against the subscriber from which he cannot relieve himself by an assignment or transfer, made without the sanction of the directors." *Graff vs. Pittsburg & Steubenville R. R. Co.*, 31 Pa. St. 489.
- "If a party admits himself to be a subscriber, and on the faith of such admission others have acted for his benefit, he will be estopped from subsequently denying that he did in fact subscribe." *Id.*
- "A subscription for shares was made by A for and in the name of B. Held, that B by accepting the office of director to which he was not eligible, if not a stockholder, had recognized the validity of the subscription." *Penobscot R. R. Co. vs. Dummer*, 40 Me. 172.
- "Agreements secretly made with sundry subscribers for stock in a company, that their subscriptions shall be merely colorable, or dischargable in property worth less than the face amount of such subscriptions, are a fraud upon other subscribers, and the written subscriptions should be enforced without regard to them." *Downey vs. White*, 12 Wis., 176.
- "A bank was fraudulently got up, under a lawful charter, by parties who induced the defendant to subscribe for a portion of the stock, representing to him that his subscription would be merely nominal, and that he would not be required to pay for the stock. The bank was organized, issued a large amount of bills, and soon after failed and went into the hands of receivers for the benefit of its creditors. In a suit brought by the receivers in the name of the bank against the defendant, upon his subscription, *held*, that he could not avail himself, in defense of the fraudulent character of the bank, or of the misrepresentations under which he had been induced to subscribe for the stock. He, with his associates, constituted the bank, and he therefore shared with them in the fraud of the bank on the public." *Litchfield Bank vs. Church*, 29 Conn., 137.
- "A discharge from a stock subscription on the ground of fraud cannot be obtained by one who was himself a party to the fraud." *Southern Plank Road Co. vs. Hixon*, 5 Ind. 166.
- "Specie, or its equivalent, current bills of specie-paying banks, can only be received in payment of the sum required to be paid at the time of subscribing the stock." *Crocker vs. Crane*, 21 Wend. (N. Y.) 211; *S. P. People vs. Troy House Co.*, 44 Barb. (N. Y.) 625; *Neuse River, etc. Co. vs. Newbern*, 7 Jones (N. C.) L. 275; *Henry vs. Vermillion, etc. Co.*, 17 Ohio 187.
- "To make one an owner of stock in a corporation, it is not necessary that a certificate should

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have been issued, or that the facts should appear on the books of the corporation. It may be proved by parol." *Chaffins vs. Cummings*, 37 Mo. 76.

"Where stock is taken, and the property turned in of less value than the price at which it was turned in, the stockholder may be charged with the full amount without any allegation of fraud." *Thompson on Stockholders*, sec. 127; *Boynton vs. Hatch*, 47 N. Y. 225; *Tallmadge vs. Fishkill Iron Co.*, 4 Barb. 382.

"Money, or money's worth, must be actually paid." *Thompson*, sec. 130.

"The obligation of actual payment is created." *Angell & Ames on Corporations*, sec. 519.

We beg to refer the Court to the case of *Griswold vs. Seligman*, reported in *Central Law Journal*, November 26, 1880, page 432. The Supreme Court of Missouri, in that case, says:

"The relation of stockholders may be created not only by the usual formalities of a subscription and the acceptance of stock, but other acts are, in contemplation of law, the legal equivalents of those just mentioned. That is to say, conduct on the part of the person sought to be charged is of itself sufficient to accomplish all that could be accomplished by the rigid observance of those formalities usually attendant on becoming a stockholder. 'A party cannot by his own conduct change his liability at pleasure.' The beneficial use of stock will also render the person so using it liable as a stockholder."

The Supreme Court of the United States, 91 U. S., p. 45, in the case of *Upton vs. Tribilcock*, says:

"The original holder of stock in a corporation is liable for unpaid instalments of stock, without an express promise to pay them; and a contract between a corporation or its agents and him, limiting his liability therefor, is void both as to the creditors of the company and its assignee in bankruptcy.

"Representations by the agent of a corporation as to the non-assessability of its stock, beyond a certain percentage of its value, constitute no defense to an action against the holder of the stock to enforce payment of the entire amount subscribed, where he has failed to use due diligence to ascertain the truth or falsity of such representation. The acceptance and holding of a certificate of shares in an incorporation, makes the holder liable to the responsibilities of a shareholder. The idea that the capital of a corporation is a foot ball to be thrown into the markets for the purpose of speculation, that its value may be elevated or depressed to advance the interests of its managers, is a modern and wicked invention. Equally unsound is the opinion that the obligation of a subscriber to pay his subscription may be released or surrendered to him by the trustees of the company. This has been often attempted, but never successfully. The capital paid in and promised to be paid in, is a fund which the trustees cannot squander or give away. They are bound to call in what is unpaid, and carefully to husband it when received."

In the case of *Sawyer vs. Upton*, 91 U. S., p. 56, it is held by the same court:

"That the capital stock of an incorporated company is a fund set apart for the payment of its debts. A resolution or agreement that no further call shall be made is void as to creditors. An agreement that a stockholder may pay in any other medium than money is also void, as a fraud upon the other stockholders and upon the creditors as well. The capital stock is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else and the same right to insist upon its payment as upon the payment of any other debt due to the company. As regards creditors there is no distinction between such a demand and any other asset which may form a part of the property and effects of the corporation."

In the case of *Webster vs. Upton*, 91 U. S., p. 65, the court says:

"If the law implies a promise by the original holders or subscribers to pay the full par

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value when it may be called, it follows that an assignee of the stock, when he has come into privity with the company by having stock transferred to him on the company's books, is equally liable. The same reasons exist for implying a promise by him as exist for raising up a promise by his assignor."

In the case of *Hawley vs. Upton*, 102 U. S., p. 314, decided by the Supreme Court, the Court holds:

"It cannot be doubted that one who has become bound as a subscriber to the capital stock of a corporation, must pay his subscription if required to meet the obligations of the corporation. All that need be done, so far as the creditors are concerned, is that the subscriber shall have bound himself to become a contributor to the fund which the capital stock of the corporation represents. If such an obligation exists, the court can enforce the contribution when required. After having bound himself to contribute, he cannot be discharged from the obligation he has assumed until the contribution has actually been made, or the obligation in some lawful way extinguished."

In *Pullman vs. Upton*, 96 U. S., 328, the foregoing doctrines are stated: *Griswold vs. Seligman*, Supreme Court of Missouri, November, 1880, *Central Law Journal*, p. 432, vol. 2, No. 22.

1. "One who accepts and holds certificates for unpaid shares of stock in a corporation, and votes such shares at annual elections, is estopped from denying his liability as a stockholder to a corporation or its creditors; although such shares were issued to him under an agreement in writing that they were to be held in trust, or as a security only, and were not subscribed for on the books of the company or otherwise in the usual manner of making such subscriptions. One may be constituted a stockholder by his conduct as effectually as by the rigid observance of the usual formalities in making subscriptions.
 2. "Parol evidence is not admissible to show that the stock was voted under an arrangement with the company, made outside of the written contract for a specific purpose, to the effect that such holder should have the privilege of voting the stock without attendant liability.
 3. "In a proceeding to enforce such liability, it is unnecessary to show that the creditor became such subsequently to the acquisition of the stock by the defendant, or in consequence thereof, or altered his condition by giving credit to the company on the faith of defendant being a stockholder. Under the Missouri statute the liability attaches to the holder of the stock at the date of the execution.
 4. "Parties dealing with a corporation are not affected with notice of entries made upon its corporate books, limiting the liability of holders of unpaid stock.
- "The creditors of the company have this whole stock as a security for any judgment against them, and the company cannot, by any act of theirs, liberate any of its stockholders from their obligations to pay the remainder of the price of their shares to the prejudice of the creditors." 10 Rob. 440.

To the same effect is the case of *Cucullu vs. Union Insurance Company*, 2 Rob. 571.

"One who assigns an agreement to take stock in an incorporated company, thereby promises to pay the full amount of every share thus subscribed for, and an action will lie to recover it, either for the purpose of carrying on the business of the company or of paying its debts. A stockholder will not be allowed to throw the loss upon the creditors, either by refusing to pay for their stock, or by forfeiting it, or by dissolving the corporation by non-user or otherwise. As to the responsibility of the stockholders towards the creditors, we have not a shadow of doubt."

In *County of Morgan vs. Allen*, Sup. Court, U. S., October term 1880, the court says: 103 U. S. p. 508.

"In *Sawyer vs. Hoag*, 17, Wall. 621, we had occasion to consider the question whether the creditors of an insolvent corporation were at liberty to assail a transaction between it

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and one of its debtors, whereby the latter's subscription of stock was withdrawn so far as general creditors were concerned, from the assets of the corporation. In that case we declared the doctrine to be well established that the capital stock of a corporation, especially its unpaid subscriptions, constituted a trust fund for the benefit of the general creditors of the corporation, and that the governing officers of a corporation could not, by agreement or other transaction with the stockholders, release the latter from his obligation to pay to the prejudice of its creditors, except by fair and honest dealing and for a valuable consideration. In the subsequent case of *Sawyer vs Upton*, assignee, 91 U. S. 60 we had occasion to consider the same question and there said:

"The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private co-partnerships.

"When debts are incurred a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demand, until such demands are satisfied. The creditors have a lien upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for a valuable consideration and without notice.

"It is publicly pledged to those who deal with the corporation for their security.

"Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as anything else, and the same right to insist upon its payment as the payment of any other debt due the company. As regards creditors, there is no distinction between such a demand and any other assets which may form a part of the property and effects of the corporation." *Upton vs. Tribblecock*, 91 U. S. 45; *Webster vs. Upton*, 1b 65; *Hatch vs. Dana*, 100 U. S. 210.

In no court have these doctrines been more distinctly approved than in the Supreme Court of Illinois, when considering the liability of "The county of Morgan to creditors of the Illinois River Railroad Company, arising out of these identical bonds. *Morgan Co. vs. Thomas*, 76 Ill. 141."

Plaintiffs contend that the case of *Burk vs. Smith*, 16 Wal., 395, establishes a different doctrine. It does not, for the court in that case specially lays down the general rules which we have cited, and says:

"And it must also be conceded that if the company has, in fraud of its creditors, released subscribers to its stock from the payment of their subscriptions, the release is inoperative to protect those subscribers against claims of the creditors. * * * Accordingly, it has been settled by very numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the State shall lose any of the benefit of his subscription. Every such arrangement is regarded in equity not merely as *ultra vires*, but as a fraud upon the other stockholders, upon the public, and upon the creditors of the company."

The case of *Cooper vs. Frederick*, 9 Ala., new series, does not touch the question at issue, because it was a question between the company and the stockholder, the company being in good standing and no question as to creditors arising. It was in the nature of a diminution of the capital stock.

It is contended that the case of the *Wescheater Railroad Company vs. Hickman*, 4 Casey Penn. 327, which states that a corporation had the right to accept payment of stock in labor or material, if carried out in good faith, justifies this bank in taking a check upon itself, which was not a good check, and totally worthless, as a full compliance with the law, and that it had the effect of releasing the shareholders from any payment of such stock thereafter, at the expense of the creditors. This authority does not establish that principle.

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Thos. J. Semmes on the same side:

1. Misrepresentations made by the officers or directors of a corporation are misrepresentations of the corporation itself and of its share-holders. *Litchfield Bank vs Church*, 29 Conn. 137.
2. Capital of a corporation is the stake held out to the public, upon the faith of which it obtains credit. *Thompson's Stockholders*, sec. 11, 91 U. S. 57.
3. A corporation cannot accept in payment of its stock any property which it is not authorized to deal in. 4 Ch. App. 779; 27 Ann. 118. Even then the arrangement must be embodied in the articles of association, as in *Pell's case*. 5 Ch. App. 11, 346; 6 Ch. App. 48; L. R. 15 Eq. 411.
4. Subscriber for stock cannot set off his liability for stock against a debt due to him by the corporation. 8 Ch. App. 262; 21 Ch. Div. 519; 7 Wall. 409; 17 Wall. 421.
5. The power to create preferred stock must be employed solely for the purpose of obtaining capital. L. R. 20 Eq. 64; 4 Kay & John, 1; *Green's Ultra Vires* (Brice), 145.
6. Where stock is issued on an agreement which is not lawful, the party receiving the stock can be made to pay for it, and the agreement will be disregarded. 1 DeGex & Jones, 377; 1 Ch. Div. 127; 17 Ohio, 187; 20 Ohio, 199.
7. Where misrepresentations of a stockholder of a corporation induce third persons to become creditors of an insolvent corporation, such stockholder being a creditor will not be allowed to participate in the assets of the corporation as a creditor, until the injured third persons are satisfied. *Colt vs. Woolaston*, 2 P're Williams, 155.

The opinion of the Court was delivered by

BERMUDEZ, C. J. It is essential for a proper understanding of this controversy that, at the threshold, a very concise statement be made of the most glaring facts which the trial has indisputably developed, as also of the pleadings which present the issues submitted. Otherwise, the mind left guideless in the labyrinth before it, could never see its way through.

Those facts are:

John Crossley & Sons had extensive financial relations with one E. C. Palmer and the Louisiana Savings Bank and Safe Deposit Company.

They deposited with the institution \$50,000, for which certificates were issued.

They made money advances to the bank for \$100,000 and subsequently granted to it a letter of credit for as much (£20,000) to be used only under certain terms and restrictions, receiving as collateral security for advances made and to be made, certain drainage warrants, in the possession of the bank, and besides, generally all other warrants belonging to it, and which had been pledged to other parties, but which were to be redeemed and then handed over.

Under this letter the bank drew some \$22,000.

Palmer was the president of the concern and its creditor for advances and loans really made, figuring to his credit on the books, for upwards of \$400,000.

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New or additional stock, to the extent of 3500 shares, having been authorized to be issued, it was agreed (as there was no disposition for outsiders to take any of it) between the bank, Palmer and the Crossleys, who appear to have had some title to the credit in favor of Palmer, that this indebtedness would be converted into the stock, in Palmer's name. Subsequently, with plaintiffs' assent, this stock was placed, part in the name of a number of the directors, part otherwise; some remaining in Palmer's name.

On the brink of the bank's failure and destruction, but before it had been used the letter of credit, as far as not made available, was recalled by the Crossleys.

Palmer had had extensive dealings with one VanNordan, who had under his control the drainage of the city, who became largely indebted to Palmer and the bank, and who, in a transaction between him and the city, was required, in order to give a clear title to the corporation, to turn over to Palmer a large amount of drainage warrants received from the city as the consideration of the contract between them; those warrants being important factors in this litigation.

The bank went into bankruptcy. Its affairs and business are now in process of liquidation.

The plaintiffs bring this action to recover the balance due on the certificates of deposit, the advances made aggregating, they say, \$167,510 36. They further claim conventional and legal interest on different portions of this amount.

The plaintiffs aver rights of ownership to the drainage warrants in their possession and to others, of the total face value of \$516,208; insisting in the alternative that, at worst, they have a lien, as *pledgees*, on \$334,208 thereof.

In answer the defendants plead the general issue and assuming the character of plaintiffs in reconvention, claim:

That the concern in liquidation owns drainage warrants amounting to \$569,982, to which plaintiffs have set up a similar title, although eventually as *pledgees*, whereof \$334,208 are presently in their possession.

That the plaintiffs are indebted unto the late corporation in the sum of \$350,000 with interest, being the price of the 3500 shares of its stock, subscribed for by them and still unpaid.

That the plaintiffs are further indebted unto the company in \$78,-712 50, as the balance due under the letter of credit issued by them to the bank.

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As defendants in reconvention, plaintiffs excepted and denying those claims, pleaded estoppel and prescription.

From a judgment allowing them less than they claimed, and the defendants more than they asked, the plaintiffs appeal.

The record in this case is unnecessarily voluminous, onerously encumbered with a mass of entirely irrelevant testimony and documentary evidence. Its imposing appearance and the representations of counsel as to the gravity of the controversy, exacted the toleration of an oral argument, which consumed four days of public time. Twelve elaborate briefs covering hundreds of pages of printed matter have been besides submitted.

It cannot be expected that the Court will state at any great length, all the facts from which the parties claim that the differences arisen between them have grown out.

In order to be intelligible, the statement would have to be chronological and methodical, and this is an impossibility. The facts advanced by each side are discordant, incongruous and irreconcilable. Such statements would necessarily embrace extraneous and cumbersome matters, the consideration of which would unavoidably confuse the mind and lead it astray.

It will suffice that the salient facts upon which the claims and counter claims are based be stated, as each matter in controversy is taken up.

There are four questions to be considered :

First—The money claims of plaintiffs.

Second—Their title to the warrants, viz : whether they are owners or pledgees and to what extent.

Third—Their liability for the price or value of the 3500 shares.

Fourth—Their liability for the balance not drawn under the letter of credit.

Those questions will be dealt with and decided in that order.

I.

The evidence indisputably establishes that the plaintiffs have deposited with the bank \$50,000, for which two certificates were delivered them and on which partial payments have been made.

It also shows that the plaintiffs advanced £20,000 to the bank and issued to it a letter of credit conferring authority to draw £20,000 on them, with certain qualifications.

There can be no real dispute as to the validity of the claim for the several items aggregating \$167,510, save as to the balance due on the certificates of deposit, and as to the rate of interest due on it.

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After allowing credit for partial payments, that balance appears to be \$41,714 77.

In the absence of any written evidence, showing an agreement to pay conventional interest, the plaintiffs can recover legal interest only on that balance and this from judicial demand.

The rest of plaintiffs' money claim is for a sum of \$100,000. and a further sum of \$220,250 advanced under the letter of credit.

The plaintiffs insist that the payment of these amounts is secured, at least, by a pledge of two sets of drainage warrants in their possession; the one of the face value of \$214,208, the other of \$120,000.

They go further, and claim to be the owners of those identical warrants and of another set of \$182,000, which, they say, after being pledged, were diverted and used for the purposes and benefit of the bank.

The plaintiffs further set forth, that after \$302,000 of those warrants had been thus pledged, they acquired them in full ownership for a valuable consideration.

They conclude by charging that, if they be not the *owners* they are at least the *pledgees* of all the warrants, which must be subjected by sale to the payment of their entire money demand.

On the other hand, the defendants contend that the \$302,000 of warrants in question never were the property of plaintiffs; that they always belonged to the bank, together with other warrants amounting to \$18,000, swelling the amount to \$320,000; that Palmer, from whom plaintiffs claim to have acquired title of ownership, never owned them.

They further charge that, if the plaintiffs ever had a right of pledge on the two sets of \$214,208 80 and \$120,000, they have forfeited the same, and have therefore no shadow of any claim, either as owners or as pledgees, to any of the warrants mentioned in their petition; that the same are the exclusive property of the bank, and that plaintiffs should be condemned to return those in their possession free from any encumbrance whatever.

This conflict of claims brings us to consider the validity of the respective pretensions of the litigants to the warrants in question.

II.

The evidence is clear that, at the date of the letter of credit, the plaintiffs had already advanced to the bank £20,000, or \$100,000, and that on their agreeing to make further advances, under certain stipulated terms and qualifications, the bank actually pledged to plaintiffs the set of \$214,208, which was physically delivered. All the other warrants owned by the bank, whether in its possession or not, were

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likewise pledged, though not delivered, with the obligation on the part of the bank of redeeming them and turning them over as soon as disencumbered.

If it be true that the set of \$120,000 was the property of the bank at the date of the letter of credit and of the resolution accepting the same, there is no room for doubt that, like the set of \$214,208, they are affected with a lien in favor of the plaintiffs to secure the reimbursement, if not of the balance due on the certificates of deposit, at least of the advances prior and subsequent to the letter, not exceeding twice £20,000, or \$200,000.

The resolution of the board accepting the letter of credit, and the receipt given for the warrants pledged, are conclusive of the fact and of the right of pledge.

The testimony and documentary proof offered by the plaintiffs do not establish that the warrants in their possession were pledged to secure the balance due on the certificates of deposit, and still less that they have become their property by any transfer from Palmer or the bank.

When they dealt with that person they knew they were treating with one occupying a double capacity and they should have required from him irrefragible title to the warrants, whether they were held by him individually or officially as president of the bank.

But he does not appear ever to have owned them. They were delivered to him by Van Norden, his debtor, to raise the encumbrance which the latter had placed on his rights of property in and to the drainage contract, which he was to transfer to the city free from any and all claim. The transfer or delivery of those warrants by Van Norden appears to have been designed and effected merely to secure the payment of the debt due Palmer.

When subsequently transferred to the bank, they passed in settlement of the indebtedness of Van Norden *cum onere*, burdened with Palmer's individual claim. So that Van Norden did not transfer, and Palmer did not acquire from him, the ownership. Hence, the latter could not and did not convey any such title to plaintiffs. Claiming to be the pledgees of the bank, plaintiffs cannot deny the latter's title, for that would be repudiating their own.

Although plaintiffs have failed to prove ownership, they have clearly established that their demand for the \$122,025 is secured by privilege, unless it be true, as is urged by the defense, that by their failure to make further advances for \$78,712 under the letter of credit, they have forfeited all their rights as pledgees over those warrants—a question

which is now pretermitted, but will be considered in its proper place in the latter part of this opinion.

III.

The defendants claim from plaintiffs \$350,000, as the amount due by them for 3500 shares of the stock of the company, subscribed for by them by their authorized agent, E. C. Palmer.

They aver that the subscription price of those shares was not paid in cash or in its equivalent, but in the check of Palmer for the amount, against a credit of \$405,000 figuring in his favor on the books of the bank as a real debt.

The evidence does not show that the plaintiffs ever intended to buy themselves any stock from the bank, or ever authorized Palmer or any one else to purchase any stock for their benefit and account, and to pay their par value in cash or to bind them to such payment.

Consent, express or implied, was an essential prerequisite for the recovery of the price of purchase. Failure to establish it is fatal.

It appears that there was an understanding between Palmer and the bank for the conversion of \$350,000 of the amount to his credit into the 3500 shares, and that this agreement was carried out by a funding of debt into stock, with the sanction of plaintiffs, whom Palmer considered as having some title to the credit standing in his name, as his creditors for a large amount.

It is not at all probable that the plaintiffs ever gave such power to Palmer, for they well knew of the tottering condition of the bank, and that taking such stock, for which no offer had been made by outsiders and which was of very little value, was not only forfeiting the preference enjoyed by creditors over stockholders, but actually to throw away to no useful purpose the amount of subscription. Such a transaction would have implied insanity.

If it were true, however, that plaintiffs did give the authority to acquire, there is nothing to show that they agreed to buy or pay cash for the stock.

The understanding was, explicitly, that the credit of \$405,000 would be debited with the \$350,000, and that the stock would thus then rest.

It may well be, as claimed, that under the circumstances surrounding it such a transaction was *ultra vires*, one not susceptible of ratification, and one therefore which is an absolute nullity, not binding on the creditors.

If such were the case the entire transaction would be irrevocably void, and neither the bank nor the stockholders could enforce it.

How then can the representatives of the bank be heard to demand specific performance of a contract which they have not proved?

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The conditions upon which the contract was founded would have to be expunged and replaced by others essentially different, which never entered into the minds of the parties at the time.

The contract was to give stock for credit, or credit for stock, and the Court is asked to say that the stock was given for money, or that money was to be given for the stock.

The Court cannot substitute to the contract made one which the parties never contemplated to enter into, and lend its aid to enforce it.

The plaintiffs, whom the defendants regard as the owners of the credit in favor of Palmer, had no interest, no benefit to derive by a conversion of the debt into stock, for by so doing the preference which a creditor has over a stockholder was to be irretrievably foregone.

It may, however, be surmised that the only good which plaintiffs expected to derive by the transaction was to put part of their claim against the bank, which the latter could not honor, in the shape of stock, might have been more available and more easily disposed of in the market, the proceeds to extinguish partly Palmer's debt to them; but if this were so, it would be a *non sequitur* to say that therefore plaintiffs are liable for the price which Palmer or they, had they *purchased*, might have then had to pay for the stock *bought*.

The inference, under the circumstances, that the bank, or its liquidators, has any right of action against plaintiffs for the price of the shares, is utterly unjustified.

This view of the case relieves us from the necessity of considering the plea of prescription which the plaintiffs have opposed to the claim of defendants, which they treat as being substantially an action of nullity of the transaction.

This demand of the reconvenors for the price of the stock must therefore be rejected.

IV.

The letter of credit to advance £20,000 more, which was accepted by the bank, was not an absolute obligation. On the contrary, it was a conditional one. The letter and the resolution of the board show that the advances would be made only to *restore* and *maintain* the bank in an emergency or financial panic, and this at the instance of a specially convened board. It rested on the contingent saving necessities of the moment and the entire good faith of the parties.

The evidence shows conclusively that at that time the tottering condition of the bank was such to the knowledge of her managers, that the balance which otherwise might have been drawn could, under no plausible hypothesis, have *restored* and *maintained* the bank.

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There was then no *special* emergency or financial panic which could authorize the board to demand the balance.

It clearly appears from the showing of the defendants themselves, that the bank was a still-born institution; that it continued to be thoroughly insolvent, and that at the date of the call it was so beyond the possibility of redemption.

Had not the plaintiffs countermanded the letter of credit, and had they paid what might have been drawn for under it, this payment would have benefited, as designed, neither the bank as an institution, nor the mass of the depositors and creditors and the stockholders, for it is manifest that it could not have saved the bank from impending collapse.

The plaintiffs were therefore right to have refused making further advance. To have acted differently would have been a piece of unqualified stultification.

Such refusal does not assuredly impair their rights as pledgees on the two sets of warrants in their possession and already mentioned. Such rights are therefore recognized, and remain in their integrity.

For these reasons:

It is ordered and decreed that the judgment appealed from be affirmed so far as it allows plaintiffs \$41,714 77, with legal interest from judicial demand; that the said judgment be so amended as to allow, instead of \$121,287 50, the sum of \$122,205, with legal interest as claimed, and that in all other respects it be reversed;

And proceeding to render such judgment as ought to have been rendered,

It is now ordered, adjudged and decreed, that said sum of \$122,205 and interest be declared to be secured by lien and privilege on the drainage warrants in the possession of plaintiffs, of the sum of \$334,-208 80, which shall be sold to meet said claim, which shall be satisfied by privilege and preference over all others out of the proceeds; that the pretensions of plaintiffs to the ownership of said other warrants described in their petition be rejected, and that said warrants be declared to be the property of the defendants.

It is further ordered and adjudged, that the claims of the defendants as plaintiffs in reconvention for \$350,000 and for \$78,712 50, be rejected, with judgment in favor of plaintiffs as defendants in reconvention.

It is further ordered and decreed, that the defendants and reconvenors pay the costs in both courts.

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ON APPLICATION FOR REHEARING.

MANNING, J. The single feature in the opinion attacked in the application for rehearing is that denying the defendants' demand of \$350,000, alleged to be owing by the plaintiffs for 3500 shares of the capital stock of the bank. The defendants allege that this stock was subscribed for by order of the plaintiffs, to be put in the name of Palmer, their agent, and was transferred by their instructions to these persons, Jackson 200 shares, Conery 200, Keller 100, Wing 100, Musgrave 2500, and 400 shares were left in Palmer's name. Musgrave's shares were afterwards transferred to Louis Crossley and Edward Crossley for Jno. Crossley & Sons—that on July 1, 1874, Palmer drew a cheque on the bank for \$350,000 in payment of this stock, and this cheque has never been paid—that the bank was then insolvent to the knowledge of Palmer and the plaintiffs, and that the latter are therefore responsible for the stock and owe the bank \$350,000.

The plaintiffs say this stock was not subscribed for by them nor by Palmer for them, but for himself, and to carry out his own plans and purposes, and after he had so acquired this stock, the plaintiffs bought 2500 shares of him in good faith, in due course of business and upon Palmer's representation that he was the owner of it and that it was full paid stock.

The whole argument of the defendants in controversion of this position of the plaintiffs is that it is in conflict with the allegations of the plaintiffs' answers to their demand in reconvention, and that these answers are inconsistent each with the other, and that the plaintiffs are bound by their judicial admissions. Then assuming that the fact of subscription by the Crossleys is proved, or rather admitted, they insist that the law is that the liquidators of the bank can enforce rights and claims that the bank could not, because they represent creditors of the bank.

Upon the question of fact, the Crossleys in one of their answers allege their purchase of the stock from Palmer in good faith and for a valuable consideration, and on his representation that it was fully paid for and he was the owner of it, and deny explicitly any subscription therefor, but this is said to be inconsistent with and contrary to their allegation in their supplemental answer, that the stock was not paid for. There is no inconsistency. In their answer in chief, they allege that Palmer represented it as full paid, and in the supplement that it was not in fact full paid, and both allegations are true.

The bank owed Palmer over \$400,000 in June, 1874, and he owed the Crossleys. They had deposited with the bank, at Palmer's instance,

State vs. Pierre.

\$50,000. and afterwards advanced \$100,000 to it, and gave it a letter of credit for \$100,000 additional, of which only something over \$20,000 was used. The directors issued additional stock and it was agreed that Palmer's credit at the bank, or \$350,000 of it, should be converted into this stock in Palmer's name, and it was done. Afterwards the Crossleys bought of Palmer 2500 of these shares. The bank paid Palmer its debt to him or the largest part of it with this stock, and he sold 2500 shares of it and extinguished his debt to the Crossleys *pro tanto*. The resolution of the directors explicitly states what was to be done and it was done, as was thus stated. It would have been insanity, as the opinion says, for the Crossleys to have acted otherwise. They had tried and were trying to prop up the bank and were assured by its president they could do it successfully. They lost money in the effort and it failed. Of all those who were deluded by the misrepresentations of the bank president of its condition, none suffered so disastrously as the Crossleys.

Upon the question of law the liquidators cannot enforce an obligation when none exists. Unless the Crossleys did the acts that are charged to have created the obligation, or made judicial admissions that bind them to the consequences of such admissions, they cannot be held liable as charged, and a review of the opinion of the Court and comparison of it with the evidence in the record shews that it rightly refused judgment against the Crossleys as the defendants demand.

The rehearing is refused.

No. 9592.

THE STATE OF LOUISIANA VS. JOE PIERRE.

38	91
48	134
48	295
49	272
38	91
52	212
38	91
120	689

In a criminal prosecution, the papers of which have been purloined from the clerk's office, the district attorney has the legal right to enter a *nolle prosequi* of the charge contained therein, and to present a new indictment or information on the same charge against the same party. To hold otherwise would render the State powerless against a criminal who had friends to purloin the papers of his case.

An indictment or information which in two separate counts charges the offence of putting out an eye with a club, and the crime of assault with intent to commit murder with a club, is not bad for duplicity. The two offences could grow out of the same act, hence they may be charged in the same indictment.

An accused whose case is fixed for the second week of the term has not the right to require service of the list of jurors drawn for the third week of the term.

In a case not capital the jury may be allowed to separate during the trial.

A PPEAL from the Twenty-first District Court Parish of St. Martin.
Gates, J.

State vs. Pierre.

M. J. Cunningham, Attorney General, and *Chas. H. Mouton*, District Attorney, for the State, Appellee.

Edward Simon for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Defendant appeals from a conviction of an assault with intent to commit murder.

He calls our attention to a motion to quash, and to three bills of exception involving matters connected with his trial.

His motion to quash the information filed against him presents two points:

1. The first is rather undefinable, but it seems to read as an exception of *lis pendens*.

The papers of a previously instituted prosecution against him were, together with many other files and records of suits pending in the district court, purloined from the clerk's office; whereupon the district attorney asked and obtained leave of the court to enter a *nolle prosequi* of that charge against this accused, and immediately thereafter, he presented an information on the same charge, which resulted in the trial now on appeal before us.

Defendant's contention that the *nolle prosequi* could not be entertained in the absence of the papers which contained the charge against him is without merit. The right of the district attorney to enter a *nolle prosequi* of a charge against any accused, under all circumstances has never been questioned, when the papers are in his possession, and the difference in law between that and the exercise of the same power, when the papers are missing, is not easily discerned.

The argument as to the alleged irregularity in the mode adopted by the district attorney to reinstate a cause when the papers have been lost, has no application to the state of the case as shown by the record.

In presenting the second prosecution, after a legal disposition by *nolle prosequi* of the previous charge for the same offence, the district attorney did not propose to reinstate a lost case, but he simply exercised his unquestioned right to prosecute a charge which he had previously withdrawn by a *nol pros*. Hence the previous prosecution was not a pending cause, and it was no obstacle to the prosecution under which the accused was tried. To deny the right to the State's attorney to follow the course which he adopted in this case would simply be tying the hands of the State in favor of any offender who could

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and willing tools to purloin the papers which made up the proposed prosecution of his offence.

2. The second point is a charge that the information is bad for duplicity, as containing two separate and distinct charges in the same information.

In one count the accused is charged with putting out an eye with a *club*, and in another count he was charged with an assault with intent to commit murder with a *club*.

It is true that the two offences charged are denounced in different statutes, but it cannot be denied that they could grow out of the same act, hence they were kindred offences; therefore they could be charged in the same indictment, provided they are contained in different counts. *State vs. Green*, 37 Ann. 382; *State vs. Gilkie*, 35 Ann. 53; *State vs. Johns*, 32 Ann. 812; *State vs. Depass*, 31 Ann. 487; *State vs. Malloy*, 30 Ann. 61.

These considerations are sufficient to dispose of one of the bills of exception, in which the same matters growing out of a charge to the jury, are raised and discussed.

3. The complaint of the accused, whose case was fixed for trial for the second week of the term, that the list of jurors drawn to serve during the third week had not been served on him, is too trivial to be seriously considered by this Court. He might with as much grace have complained that a list of jurors drawn for a previous term of the court had not been served on him.

4. The alleged error of the trial judge in allowing the jurors to separate during the trial is not an error.

This was not a capital case, and the jury could separate. *State vs. Dubois*, 24 Ann. 309.

We are satisfied from the record that the defendant has had a fair trial.

Judgment affirmed.

No. 9451.

WM. B. SCHMIDT VS. F. E. FOUCHER ET AL.

A member of an ordinary partnership, who contracts a partnership debt and who is the financier and business manager of his firm, and the only member having an individual credit, should he pay this debt with his own money or property, could not legally avoid such payment or the contract connected with it, on the ground of error, the error consisting in not knowing at the date of the contract that he was only bound for his virile share and not the whole of the debt.

Schmidt vs. Foucher et al.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

W. S. Benedict for Plaintiff and Appellee.

Chas. Louque for Defendant and Appellees.

The opinion of the Court was delivered by

TODD, J. On the 13th of November, 1882, the defendant, Frank E. Foucher, conveyed to the plaintiff, by an act of sale, the property described in the petition for the consideration therein expressed of \$6000—one-half cash and the balance in the assumption by plaintiff of a note in the hands of a third person secured by mortgage on the property.

The vendor remained in possession of one-half the property—being a double tenement house in the city of New Orleans—upon an agreement to pay a monthly rent therefor, the other half being under lease, the rental for which after the sale was paid to the plaintiff.

A short time thereafter, the defendant moved out of the part of the building occupied by him, and turned over the possession of the same to his wife co-defendant herein who had, in the meantime, obtained a separation of property from him—and she leased the same and collected the rents therefor for several months. This removal and lease was made without the knowledge of plaintiff who was absent from the city.

The plaintiff, after an unsuccessful effort to eject the tenant, placed there by Mrs. Foucher, through a proceeding before a city court, brought this present suit, wherein he enjoined Foucher and his wife from interfering with his tenants and collecting rents for the property, and asked to be declared the owner of it and judgment for the rents collected by the defendants or either of them.

Foucher, in defense of the suit, alleges substantially that the sale to plaintiff was made in error, induced by the fraudulent representations and devices of the plaintiff, and ask that the same be declared a nullity, and the plaintiff be compelled to account for the rents received for the property since the sale.

Mrs. Foucher, as an additional defense, claimed a right to the possession of that part of the property for which she was collecting rents, under an agreement with her husband, by which the property or its rents and revenues had been turned over to her by her husband in part satisfaction of her judgment against him.

There was judgment declaring plaintiff the owner of the property

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and perpetuating the injunction and condemning the defendants to pay the rents collected by them, and further decreeing that the sale in question was a sale with the right of redemption and requiring plaintiff to re-convey the property to Foucher upon the payment by him to plaintiff of a sum specified in the judgment.

From this judgment the defendants have appealed.

It seems to be conceded by both parties that the conveyance in question was a sale with the right of redemption. It would be difficult under the evidence to construe it otherwise. The circumstances giving rise to or preceding the contract were these:

The plaintiff was a member of the commercial firm of Schmidt & Ziegler, who were creditors of Downey, Foucher & Co., an ordinary partnership of which the defendant Foucher was a member.

When the debt of the latter had grown to be about \$3000, the creditors demanded security for their debt before further advances were made. Foucher first proposed to give them a mortgage on the property, the subject of this controversy, and with this understanding Schmidt & Ziegler furnished further supplies to Downey, Foucher & Co., who were at the time contractors for building the bridge across Lake Pontchartrain for the Northeastern Railroad Company, until the debt amounted to about \$6600. It was then ascertained by the plaintiff representing his firm that there was a mortgage on the property in question amounting to \$3000. Thereupon it was agreed by the parties that instead of a mortgage there should be a sale of the property, and plaintiff as part of the price which was fixed at \$6000, should assume the payment of the mortgage. This was carried out by the act in question with the understanding that upon the payment of the debt owing by Foucher's firm the property should be conveyed to him.

The error charged by the defendant Foucher as a ground for annulling the sale, consists in the fact that, as a member of an ordinary partnership, he was only bound for one-third of the partnership debt and his virile share thereof amounted only to \$2200, whereas he paid with his property by said sale \$3000, and the contract was based on the hypothesis that he was bound for the entire debt. That it was not until his firm was subsequently sued for the balance of this debt, that he was informed of his error. To this he swears as a witness on the trial and the plaintiff testifies also that such was his belief when the sale was made.

The evidence shows that Foucher was the only member of his firm that has a credit, that he attended chiefly to the financial affairs of the firm and in procuring the advances and supplies required to carry on its business, and that it was to him alone that plaintiff looked for the payment of his debt. That he gave repeated assurances that the debt should be secured and ultimately paid. Besides we are satisfied from the nature of the operations in which the defendants' firm was then

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engaged with the railroad company, and the necessity of sustaining its credit and obtaining the required help and until its contract could be completed and the work done, that he (Foucher) would not have hesitated to advance his own money and means to secure the accomplishment of an object of such vast importance to himself and his associates. In fact to maintain the credit of his firm till this object could be achieved was doubtless the main consideration for his contract. Besides he could legally mortgage or sell his own property to pay the debt of another even were he entirely without interest. Had he as the moneyed man and financier of the firm made this payment on the debt with his own money instead of his property, he could not, as we conceive, have recovered it back, and we can discover no difference between the two modes of payment.

Under the circumstances, we conclude that such alleged error was insufficient to avoid the contract.

Mrs. Foucher has no claim whatever on this property, either as to title or possession. It is not pretended that she had any mortgage or privilege on it when transferred to the plaintiff; and from the record of her suit against her husband, which is in evidence, we discover that the very foundation of her demand against him was that he had sold this identical property to plaintiff and used the money obtained for it, and that the lot on which the house was built belonged to her—thus asserting a claim in that suit which would exclude the right or interest in the property set up in this. If her husband had sold the property to plaintiff, as she alleges, how could he afterwards convey any right therein to her?

We are satisfied that both the title and actual possession of the property was passed by the conveyance in question to the plaintiff.

The counsel for defendants suggests an error in the judgment requiring him to pay to plaintiff, as one of the conditions to the reconveyance of the property, a judgment against him in favor of Schmidt & Ziegler, being for the balance of the same debt on which the payment was made by the sale in question, Schmidt & Ziegler not being parties to this suit. Plaintiff being a member of that firm, a payment to him would suffice to extinguish the judgment in favor of the firm and would fully protect Foucher, and we see no reason to change the decree in this respect.

We note that the appeal in this case is devolutive, and that the time allowed in the judgment of the lower court for the redemption of the property has expired. We think that it would be proper to grant a

State ex rel Halphen vs. Judges.

further term to the defendant to exercise this right. The time granted for that purpose is thirty days from the day this judgment, now rendered, becomes final.

It is therefore ordered and decreed that the judgment of the lower court be amended by extending the time therein allowed for the redemption of the property for the space of thirty days from the time this decree becomes final, and as amended it be affirmed.

Rehearing refused.

No. 9616.

THE STATE EX REL. J. O. HALPHEN VS. G. W. HUDSPETH AND C. DEBAILLON, JUDGES.

38	97
47	1523
38	97
48	1140
49	1687
38	97
107	476

The decision of questions of jurisdiction belongs necessarily to the court before which they are raised, and its decision is final unless reversed by an appellate tribunal.

Mandamus will not lie to compel an inferior judge to proceed to the trial of an appealable case which he has dismissed by sustaining a plea to his jurisdiction. The remedy is by appeal.

Our jurisprudence would be revolutionized if we should hold that every right that has heretofore been enforced by appeal, and every wrong that has heretofore been redressed by appeal, may now be enforced or redressed by mandamus whenever the necessities of a suitor appears to require or invite it.

APPPLICATION for Mandamus.

E. Simon, C. H. Mouton and Breaux & Renoudet for the Relator.

H. Garland, F. Voorhies and R. S. Perry for the Respondents.

The opinion of the Court was delivered by

MANNING, J. This is an application for a mandamus to Judge Hudspeth, the judge of the district court for St. Landry, and to Judge DeBaillon, of the twenty-fifth district, commanding both or either of them to proceed to the trial of the contested election case of J. O. Halphen vs. U. A. Guilbeau and T. L. Broussard.

The suit was filed in St. Martin parish, which belongs to Judge Gates' district, and he having recused himself, referred it to Judge DeBaillon, who dismissed it on an exception. We reversed his judgment last summer at Opelousas and remanded the case. Halphen vs. Guilbeau, 37 Ann. 710.

In September following, Halphen, claiming that nine months had elapsed since the recusation of Judge Gates and the reference of the case to Judge DeBaillon, and that it was still untried, applied to this

State ex rel. Halphen vs. Judges.

latter judge to transfer it to some other, and an order was accordingly made by him transferring it to Judge Hudspeth. This was done under sec. 5, of Act No. 40 of 1880. Sess. Acts, p. 39.

The application of Halphen was made in chambers without notice to his adversary, and the order was granted in chambers also, and thereupon the papers were transmitted to St. Landry. On September 15, Halphen entered a default before Judge Hudspeth in the St. Landry Court. Broussard had had no notice of the transfer of the case to St. Landry, but he appeared at the same term and asked that the default be set aside. He then pleaded to the jurisdiction of the Court on the ground that the order of transfer made in chambers and on an *ex parte* application was illegal; that the suit had not been reconstructed at all, notwithstanding our opinion at Opelousas *ut supra*, and that the Act of 1880 did not apply to such cases as this, wherein several pleas, motions, etc., had been made during the nine months of the suit's pendency before Judge DeBaillon, the reference judge, who had during that time acted on the case, and an appeal from his judgment had been brought before us.

Judge Hudspeth sustained this plea to his jurisdiction, dismissed the suit from his court, and ordered the papers to be sent back.

Judge DeBaillon, answering the alternative writ issued at the relator's prayers, says he transferred the suit at the relator's own demand, and that he could not do otherwise under the Act of 1880, and having transferred it he cannot take cognizance of it again until his order is annulled.

Judge Hudspeth answers that in sustaining the plea to his jurisdiction, he exercised a legitimate judicial function which is examinable on appeal therefrom, but that he cannot be compelled by mandamus to cancel and reverse it, and he is unquestionably right.

It belongs to a court to decide questions of jurisdiction arising before it, and its rulings thereon in appealable cases remain final unless corrected by the superior tribunal on an appeal taken therefrom. *State ex rel. McGee vs. Judges*, 33 Ann. 180. There is no pretence that this is an unappealable case, nor could there be. Nor is this application for relief made under Art. 90 of our present Constitution.

The remedy by appeal in this case would have been and is adequate. The relief sought could have been and may be as effectively administered by appeal as by mandamus. We could not grant the writ without first inquiring into the soundness of the judge's reasons for sustaining the plea to his jurisdiction. We are asked to do now precisely

Minor vs. Sheriff, etc.

what we should do if the case were before us on appeal, and however much the relator may complain of the delay to which he has been subjected, we cannot reverse the uniform and consistent rulings of this court to expedite a single suitor. We have before said it would revolutionize our jurisprudence if we should hold that every right that was formerly enforced by appeal, and every wrong that was formerly redressed by appeal can now be enforced or redressed by mandamus when an emergency seemingly requires or invites it. *State ex rel. Morgan R. R. vs. Judge*, 36 Ann. 394, and cases therein cited.

The writ is refused at the cost of the relator.

No. 9624.

HENRY C. MINOR vs. JOHN B. BUDD, SHERIFF, ETC.

When a tax payer enjoins the seizure and sale of his property for taxes, he occupies the position of a judgment debtor enjoining the execution of a judgment against himself; and the test of our jurisdiction is the amount of the taxes and not the value of the property. The Constitution does not vest this Court with jurisdiction, regardless of amount, of cases involving the legality of assessments, and we cannot assume it.

The ground of the injunction involving no question as to the legality or constitutionality of the tax, but assailing solely the legality of the assessment, the appeal is dismissed.

A PPEAL from the Nineteenth District Court, Parish of Terrebonne.
Goode, J.

L. F. Suthon for Plaintiff and Appellant.

Van P. Winder for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. The plaintiff enjoins the sale of his property for taxes aggregating the sum of \$1,566 60, on the ground that there has been no legal assessment of his property, by reason of the non-observance of certain duties prescribed by Act 96 of 1882, regulating assessments.

It is clear that the amount involved is below the lowest limit of our jurisdiction. Plaintiff stands in the position of a judgment debtor enjoining execution of a judgment against himself. *Aymar vs. Bourgeois*, 36 Ann. 392; *Shaunon vs. Lane*, 33 Ann. 491.

In such case, the test of jurisdiction as to amount is the amount of the claim and not that of the property seized.

The only other ground on which it is claimed that our jurisdiction attaches is, that the suit involves the constitutionality or legality of a tax.

No such question is presented.

38	99
45	723
38	99
52	833
38	99
107	99
107	573
38	99
108	688

Stockmeyer vs. Oertling.

It is not denied that the property is liable to taxation, nor that there has been an assessment of the property. Therefore, the case relied on of McGuire vs. Vogh, 36 Ann. 812, has no application.

The sole issue is as to the legality of the assessment.

The framers of the Constitution did not see fit to confer upon this Court jurisdiction of cases involving the legality of assessments of property for taxation, regardless of the amount in dispute. We, therefore, cannot assume such jurisdiction.

We have heretofore carefully considered and announced our conclusions on this subject. State ex rel. David vs. Judges, No. 9506, not yet reported; also, 32 Ann. 817; 33 Ann. 286; 35 Ann. 965; 36 Ann. 286, 364, 801; 37 Ann. 507.

It is therefore ordered that this appeal be dismissed at appellant's cost.

No. 9515.

E. F. STOCKMEYER vs. HENRY OERTLING.

A surety, sued for indemnity by a co-surety who has paid under judgment, has no interest to question the validity of the transfer by another surety to the plaintiff, where such transfer impairs no right of his against the transferor.

An illegal deduction contained in a judicial proceeding, and corrected by the court of last resort, cannot serve as a foundation for the plea of *estoppel* in a subsequent suit.

Evidence showing the signature of a bond by principal and sureties, suit against the sureties, payment by some of them under judgment, the insolvency of certain of them, and other material facts, authorizes recovery from a co-surety to a certain extent.

Articles 2,104 and 3,058 R. C. C. must be combined together. When thus construed, they mean that where loss is occasioned by the insolvency of one or more co-sureties, whether solitary or joint, it must be borne by the solvent sureties when called upon by the paying surety for indemnity or reimbursement of what was paid under judgment.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

E. W. Huntington and H. L. Dufour for Plaintiff and Appellee.

Braughn, Buck & Dinkelspiel for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This case was once before us on an appeal from a judgment sustaining an exception of no cause of action and dismissing the suit.

We reserved the judgment and remanded the case; 35 Ann. 467. The judgment of the lower court having gone for plaintiff, the defendant appeals.

Stockmeyer vs. Oertling.

It is an action by a surety who has acquired the interest of a similar obligor, (W. Bogel), against a like surety, (Oertling), for his proportion in the amount paid under judgment, in satisfaction of the principal's debt; the remaining sureties, who had signed the bond, being insolvent.

The defenses are:

1st. That plaintiff has failed to prove the alleged transfer of Bogel.

2d. That he is estopped from prosecuting this suit.

3d. That the evidence does not sustain any part of the judgment.

4th. If any judgment can be rendered against defendant, it should be for one-sixth or one-fourth of the amount paid by the plaintiff, according to the interpretation which the court may place on article 3058, R. C. C.

I.

The transcript contains the admission that the plaintiff is the transferee of William Bogel against Oertling.

The objection to this transfer appears to be, that it was made for purposes of suit without valuable consideration, as alleged.

The defendant has not averred that he has any claim whatsoever against Bogel, which is jeopardized by the transfer.

What is it to him, whether the transfer be with or without consideration? It is sufficient that it was made, particularly for the stated purpose, to authorize plaintiff to sue. A judgment on the merits, will bind both Stockmeyer and Bogel.

II.

The estoppel pleaded consists in averments in the answers made by Stockmeyer and Bogel in the suit of the Teutonia Bank against them, as sureties of J. M. Wagner, the defaulting cashier, and which was decided by this court in favor of the plaintiff. 33 Ann. 732.

In those answers, the appearers admitted having signed the bond of the cashier; but charged that the name of Charles Pothoff, having been erased therefrom, and that of H. Oertling having been substituted thereto, *without* the consent of the defendants, though with that of the Board of Directors, the bond was avoided.

The plaintiff in the present action does not aver any fact which is at variance with those stated in those answers in that case. They merely, from the condition of things, deduced (they thought legally), their discharge and non liability.

The court corrected their misconception of the law on such a subject, and condemned them to pay, under the obligation which they had contracted.

Stockmeyer vs. Oertling

The doctrine of *estoppel*, however apparently emphatic, is full of exceptions, which vary according to circumstances, and was never designed to apply to a case like the instant one, in which the declaration made, which is an illegal deduction from facts, has led no one astray and occasioned damage to nobody. 2 Wood, 435 ; 32 Mich. 336.

III.

The evidence shows the signature of the bond ; the suit and judgment against Stockmeyer and Bogel ; payment by them of \$8,080.21 thereunder ; the insolvency of the other sureties on the bond ; the non-payment by Oertling of any part of said amount ; in fact, the proof establishes the truth of the main averments, necessary for recovery.

IV.

It is true that article 2,104, R. C. C. is to the effect, that : "If one of the co-debtors *in solido* pays the whole debt, he can claim from the others no more than the part and portion of each ; and that, if one of them be insolvent, the loss, occasioned by his insolvency, must be equally shared among all the other solvent co-debtors and him who has made the payment."

It is likewise true that article 3,058, R. C. C. declares, that "when several persons have been sureties for the same debtor and for the same debt, the surety who has satisfied the debt, has his remedy against the other sureties in proportion to the share of each ; but this remedy takes place only when such person has paid in consequence of a law suit, instituted against him."

The defendant argues that, as the previous article authorizes the share of the loss occasioned by the insolvency of co-obligors, bound *in solido*, and as the last article which refers to joint obligors, in no way alludes to such insolvency and loss, the provisions of the former cannot, without violence, be extended to the latter. He concludes that the insolvency of the other co-sureties cannot be made to be borne by him, and that he can, at worst, be held responsible only for his aliquot part of the whole, regard being had to the number of sureties. This is an error.

Articles 2,104 and 3,058 correspond to articles 1,214 and 2,033 of the Napoleon Code.

The rights of a surety against his co-sureties for indemnity are the same in France in such instances under both articles. There is no reason why they should not be regulated and enforced in a like manner in Louisiana, under a similar legislation.

In the case of the Teutonia Bank vs. Wagner, et al., in which the plaintiff herein was a defendant, 38 Ann. 733, we held and reiterated the

Miller vs. Shotwell et als.

ruling in 35 Ann. 468, that the sureties on the bond sued on, though bound *in solido* with the principal, are *several* obligors *interese*, though the solidarity between themselves be not expressed. They bound themselves by different contracts, though the same be evidenced by one act only (the bond).

In the last case, the exception of no cause action, sustained by the lower court, was overruled by this court, the action being for *one-third*.

On this subject, Troplong, in his work on suretyship, says: (No. 440.)

“Lorsque l'un des cofidéjuseurs, contre lequel le fidejuseur payant a son recours, est devenu insolvable, l'art. 1214., avec lequel l'art. 2033 doit être combiné, veut que la perte se répartisse par la contribution entre les solvables et celui qui a fait le paiement.”

Also Duranton t. 18, No. 369, and M. Ponsot, No. 290—Del. vol. v. 2, 856-7; v. 3, 874, 881.

The district court decided correctly.

Judgment affirmed.

No. 9529.

CHARLES B. MILLER VS. R. H. SHOTWELL ET ALS.

The Supreme Court will not undertake to examine a cause on its merits if the transcript of appeal is too imperfect and incomplete to inform the court of the matters and evidence which were contested below.

But, if the shortcomings or imperfections of the transcript are not imputable to the fault of the appellant, and if the ends of justice require a review of the judgment appealed from, the appeal cannot be dismissed; but the case will be remanded to be tried *de novo*.

This relief will be granted in a case in which the papers were destroyed by fire together with the Court House after the appellant had perfected his appeal.

A PPEAL from the Civil District Court for the Parish of Vermilion.
DeBaillon, J.

Henry St. Paul and Jos. A. Breaux for Plaintiff and Appellant.

O'Bryan & White for Defendants and Appellees.

The opinion of the Court was delivered by

POCHÉ, J. This suit involves the title to a tract of land in the parish of Vermilion.

It appears that after trial and judgment, and after the plaintiff had obtained and perfected his appeal, the papers which made up the record

38	103
52	1939
38	103
119	227

Miller vs. Shotwell et als.

in the case were destroyed by fire together with the courthouse of that parish.

Hence the transcript of appeal, which had been made up and brought by consent between the parties, is very imperfect and incomplete. In fact, it is not in a condition to enable us to intelligently and fairly pass upon the issues involved in the controversy.

Among other elements missing, or not legally contained in the transcript, is the testimony of a very important witness, whose evidence as an expert is of vital importance in the cause.

After the destruction of the record, the witness wrote down his testimony at the joint request of both parties, and his statement is in the transcript, but it was not accepted by appellee's counsel, who contend that the testimony, as thus reproduced, does not agree with their recollection of the testimony as given at the trial. It was then agreed between counsel of both parties that the matter should be left to the trial judge, who was thus fully empowered to make a statement of the testimony as he remembered it.

But, in answer thereto, the judge stated in writing that he was unable to settle the question, as he could not remember the testimony with sufficient accuracy, so as to give even the substance of it.

Under this condition of things we are not furnished with a transcript sufficient to authorize us to examine the case on its merits. Under ordinary circumstances this conclusion would suggest a dismissal of the appeal, but this would be unjustly depriving the appellant of his appeal, when it appears clearly that he is not responsible for the destruction of the papers of the file. And, in addition, appellees do not complain of the condition of the transcript, and they formally consent to a trial of the appeal in its present shape.

But as consent cannot of itself give jurisdiction, neither can it impose on this court a task which it is powerless to perform, considering that the ends of justice require a trial of the appeal, and following wise and well established precedents, we conclude that the case must be remanded and tried *de novo*. Porter vs. Dugat, 9 Mart. 121. McDaniel vs. Ingall, 7 La. 245. Doliolo vs. Agenia, 3 La. 360. President, etc. vs. Douglass, 3 Rob. 169.

It is, therefore, ordered that the judgment of the district court, be reversed, and that this case be remanded to the lower court for a new trial according to law, all costs to abide the final determination of the cause.

State vs. Clark and Boyd.

No. 9565.

THE STATE OF LOUISIANA VS. WILLIE CLARK AND WILLIE BOYD.

In order that a party may contradict his own witness, a proper foundation must be laid therefor, by proper inquiry as to time, place and person involved in the supposed contradiction, putting him fully on guard. The subject-matter of the testimony to be contradicted must also be material and relevant to the issue, and the contradiction must be not merely for the purpose of discrediting his testimony generally, by showing that in immaterial matters, his statements were untrue.

38	105
45	757
38	105
47	1229
38	105
115	166

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee.

W. E. Whitaker for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The bill of exceptions which presents the only ground of error, arraigns a ruling of the judge refusing to permit a witness to be examined by the defense for the avowed purpose of contradicting the testimony of another witness who had also been called by the defense.

The judge, in signing the bill, states the reasons of his ruling as follows: 1st, that no foundation had been laid for the contradiction of the witness; 2d, that the testimony was irrelevant under the facts; 3d, that nothing coming from the witness justified counsel in assuming him to be an unwilling witness, and he could not contradict his own witness.

These reasons, on their face, are sound and sustained by authority. Wharton Cr. Ev. §§ 482, 483, 484; 1 Greenleaf on Ev. §§ 449, 462.

We are bound to assume that they are applicable to the circumstances of the case.

The learned counsel of accused has no doubt seen the impossibility of sustaining the charge of error, and has made no appearance by oral or written argument.

Judgment affirmed.

Miller vs. Shotwell et als.

in the case were destroyed by fire together with the courthouse of that parish.

Hence the transcript of appeal, which had been made up and brought by consent between the parties, is very imperfect and incomplete. In fact, it is not in a condition to enable us to intelligently and fairly pass upon the issues involved in the controversy.

Among other elements missing, or not legally contained in the transcript, is the testimony of a very important witness, whose evidence as an expert is of vital importance in the cause.

After the destruction of the record, the witness wrote down his testimony at the joint request of both parties, and his statement is in the transcript, but it was not accepted by appellee's counsel, who contend that the testimony, as thus reproduced, does not agree with their recollection of the testimony as given at the trial. It was then agreed between counsel of both parties that the matter should be left to the trial judge, who was thus fully empowered to make a statement of the testimony as he remembered it.

But, in answer thereto, the judge stated in writing that he was unable to settle the question, as he could not remember the testimony with sufficient accuracy, so as to give even the substance of it.

Under this condition of things we are not furnished with a transcript sufficient to authorize us to examine the case on its merits. Under ordinary circumstances this conclusion would suggest a dismissal of the appeal, but this would be unjustly depriving the appellant of his appeal, when it appears clearly that he is not responsible for the destruction of the papers of the file. And, in addition, appellees do not complain of the condition of the transcript, and they formally consent to a trial of the appeal in its present shape.

But as consent cannot of itself give jurisdiction, neither can it impose on this court a task which it is powerless to perform, considering that the ends of justice require a trial of the appeal, and following wise and well established precedents, we conclude that the case must be remanded and tried *de novo*. Porter vs. Dugat, 9 Mart. 121. McDaniel vs. Ingall, 7 La. 245. Doliolo vs. Agenia, 3 La. 360. President, etc. vs. Douglass, 3 Rob. 169.

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No. 9565.

THE STATE OF LOUISIANA VS. WILLIE CLARK AND WILLIE BOYD.

In order that a party may contradict his own witness, a proper foundation must be laid therefor, by proper inquiry as to time, place and person involved in the supposed contradiction, putting him fully on guard. The subject-matter of the testimony to be contradicted must also be material and relevant to the issue, and the contradiction must be not merely for the purpose of discrediting his testimony generally, by showing that in immaterial matters, his statements were untrue.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee.

W. E. Whitaker for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The bill of exceptions which presents the only ground of error, arraigns a ruling of the judge refusing to permit a witness to be examined by the defense for the avowed purpose of contradicting the testimony of another witness who had also been called by the defense.

The judge, in signing the bill, states the reasons of his ruling as follows: 1st, that no foundation had been laid for the contradiction of the witness; 2d, that the testimony was irrelevant under the facts; 3d, that nothing coming from the witness justified counsel in assuming him to be an unwilling witness, and he could not contradict his own witness.

These reasons, on their face, are sound and sustained by authority. Wharton Cr. Ev. §§ 482, 483, 484; 1 Greenleaf on Ev. §§ 449, 462.

We are bound to assume that they are applicable to the circumstances of the case.

The learned counsel of accused has no doubt seen the impossibility of sustaining the charge of error, and has made no appearance by oral or written argument.

Judgment affirmed.

38	105
45	787
38	105
47	1229
88	105
115	166

Beltran vs. Gauthreaux et als.

No. 9626.

RAPHAEL BELTRAN VS. CHARLES GAUTHREAU ET ALS.

In partition suits between co-owners, who are "of age and present," but who "cannot agree on the partition and mode of making it," the rules established by the Code relative to the partition of successions, are applicable, under the express terms of C. C. 1290.

Whether the judicial partition is made in kind or by sale, it is now settled that the mortgages and privileges created by one co-owner on his own undivided share, are transferred from the entire property to the share allotted to him, or, in case of sale, to his share of the proceeds.

After such a sale, when a rule is taken upon the mortgage creditor to show cause why his mortgage should not be cancelled and erased as affecting the property, the creditor cannot, in answer thereto, attack the validity of the judgment of partition, unless at least for absolute nullities.

The co-owners in partition suits have the perfect right to agree to submit the questions to the court, on issue properly joined, and the judgment of the court rendered, on such issue, according to law and evidence and not according to any consent, is not a consent judgment.

Parties have the right to waive delays with reference to submission of their causes and the signature of judgments therein, without impairing the validity of the proceedings. After judgment in partition and proceedings commenced in execution thereof by advertisement of the sale, a seizure under executory process by the mortgage creditor forms no obstacle to the sale, which proceeds, subject to the rights of the creditor, which, as shown, pass to his debtor's share of the proceeds.

There is nothing reprehensible in an agreement by which a party contemplating purchase at a judicial sale for cash, agrees with a third person that, if he acquires, he will sell to the latter on terms of credit—in absence at least of any evidence that the third person intended to bid at the sale or that the agreement was made with the purpose of preventing competition.

Where a man's wife has an interest in a suit, and where the husband has no separate interest therein, the latter cannot testify.

The share of the co-owner under a partition sale is only ascertained after deduction of his share of the costs of the proceeding, and the mortgage creditor must submit to such deduction.

A PPEAL from the Twenty-second District Court; Parish of St. James. *Duffel, J.*

James Legendre and St. M. Bérault for Plaintiff and Appellee.

Robt. G. Dugué for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The plantation involved in this controversy was owned in indivision by plaintiff, Beltran, owner of one-half, and by four Gauthreauxs, all present and majors, as joint owners of the other half. The undivided half belonging to the Gauthreauxs was encumbered by a special mortgage and vendor's privilege for \$8,500 held by Charles U. Gaudet.

38 106
47 1649
38 106
117 589

On the 27th of March, 1885, Beltran sued the Gauthreauxs for a partition, alleging the impossibility of a partition in kind, and praying for a sale. The Gauthreauxs joined issue denying the necessity of the sale, submitting the question to the court, and praying for such judgment as the law and the nature of the case may require. Experts were appointed and reported, in substance, that the property could not be divided in kind. Judgment was rendered on March 31, 1885, homologating the report of experts and ordering the sale to effect partition. The defendants thereupon filed a written acquiescence in the judgment and consent to its immediate execution, whereupon the judgment was immediately signed.

On the same day Gaudet sued out executory process on his mortgage, under which the sheriff seized the property on April 7th, following. In the meantime, in execution of the judgment for partition, on April 1st, the plantation had been advertised for sale on May 2d, following, and on that day the sheriff adjudicated it to Beltran at the price of \$11,000 cash. On the 4th of May, all the parties to the partition suit joined in a rule upon Gaudet, to show cause why the inscription of his mortgage and privilege as affect the property, should not be cancelled and erased, and why he should not be referred, for their satisfaction, to one-half the proceeds of the sale after deducting the costs and charges of the partition proceedings.

Gaudet opposed the relief sought, on the grounds :

1st. That the sale, even if a valid judicial sale, did not shift his rights from the property to the proceeds, but that the purchaser was bound to take the property subject to his mortgage and privilege.

2d. That the partition proceedings were consent proceedings, the sale a consent sale, and, on that ground, could not affect his mortgage and privilege.

3d. That, at the date of the sale, the property was under seizure on his executory process, which prevented any valid adjudication, because the property could not be delivered.

4th. That Beltran, the adjudicatee, was only a person interposed, the real purchaser being one Auguste Gauthreaux, who, owing to a previous agreement with Beltran, had been deterred from bidding at the sale, as he would otherwise have done.

5th. That he was not bound to bear any part of the cost of the partition proceedings, to which he was a stranger.

From a judgment making the rule absolute, Gaudet prosecutes the present appeal.

Beltran vs. Gauthreaux et als.

We shall consider the grounds of his opposition in the order above indicated.

I.

On the question of the effect of judicial partitions by sale, on mortgages upon the share of one co-owner, the following principles are apposite. Art. 1289 C. C. declares: "No one can be compelled to hold property with another, unless the contrary has been agreed on, any one has a right to demand the division of a thing held in common, by the action of partition."

The absolute right of Beltran to require the partition cannot, therefore, be questioned, and could not be, in the slightest degree, affected by any mortgage which his co-owners might have placed upon their interest.

Judicial partitions are ordinarily made in kind; but Art. 1339 provided that, "When the property is indivisible by its nature, or when it cannot be conveniently divided, the judge shall order, at the instance of any one of the heirs, on proof of either of these facts, that it be sold at public auction, etc."

The previous article 1338 had provided that, "In all judicial partitions where the property is divided in kind, the mortgages, liens and privileges existing against one of the co-proprietors, shall, by the mere fact of the partition, attach to the shares allotted to him by the partition, and cease to attach to the shares allotted to his co-proprietors."

It was not deemed necessary to provide that, in case of partition by sale, such mortgages should attach to the share of the proceeds coming to the co-proprietor liable for the same, because it seemed to be too clear a corollary of the foregoing principle. For why should a difference be made? At all events this *hiatus* in the code has been filled up by a long and consistent course of jurisprudence, holding that, at least in succession partitions by sale, the property passes free from mortgages affecting the shares of co-proprietors, and that such mortgages are transferred to the shares of the latter in the proceeds. Succession of Pignegny, 12 Rob. 450. Gilmore vs. Menard, 9 Ann. 212. Finley vs. Babin, 12 Ann. 236. Fabre vs. Hepp, 7 Ann. 9. Campbell vs. Woolfolt, 37 Ann. 320; 27 Ann. 125; 21 Ann. 253.

This is conceded, but it is claimed that the same rule does not apply to partitions between ordinary co-owners. But why? If the rule of Art. 1338 relative to partitions in kind applies, as has never been disputed, why should not its corollary just enunciated apply also?

Besides, Art. 1,290 prescribes that, "All the rules established in the present chapter (of the partition of successions), with the exception of

that which relates to the collations, are applicable to partitions between co-proprietors of the same thing, when among the co-proprietors any are absent, minors or interdicted, or when the co-proprietors of age and present cannot agree on the partition and the mode of making it;" within which last category, upon the face of the proceedings, the present case falls. It should seem, therefore, very clear that the same rule should apply to both cases.

In *Life Association vs. Hall*, 33 Ann. 53, we said: "Whether, in case of a sale to operate a partition among co-heirs or any class of co-owners, the mortgage creditors could be driven, against their will, to accept the proceeds, in order to clear the property and pass it unencumbered to the adjudicator, is a question that has not, that we know, been as yet clearly adjusted; but it does not now appear to us why it should not be so, if the sale was truly a judicial one, made after compliance with all legal requisites; for it is manifest that the creditors, having the ability to protect themselves by bidding on the property to its value, etc., could be required to confine their mortgage to the proceeds of sale."

It must be admitted that the opinion referred to contained other expressions seemingly in conflict with the foregoing; but in the later case of *Bayhi vs. Bayhi*, 35 Ann. 531, the foregoing quotation was referred to with approval, and it was then distinctly decided that in a partition suit between co-heirs, by judicial sale, the mortgages affecting the share of one of them, can, on rule against the mortgages, be relegated to the proceeds, and their inscriptions cancelled against the property. That case is conclusive on the point, because, although the parties were co-heirs, they were co-heirs in possession, and, therefore, simple co-proprietors, and the proceeding had no probate character. The same fact also existed in the case of *Finley vs. Babin*, 12 Ann. 236, which is a further authority directly in point.

We consider the conclusion thus reached, in thorough harmony with the textual provisions of our law, with jurisprudence, with public interest and with reason and justice.

We find no hostile authority. The cases relied on from 26 Ann. 690 and 31st Ann. 798, when analysed, are clearly inapplicable; and the dictum in *Freret vs. Freret* 31 Ann. 506 that "partition suits between co-proprietors, when they are present, or majors, or not interdicts, are not governed by the rules established in that section for the partition of successions," is *obiter* and evidently uttered with exclusive reference to the question of jurisdiction and is in conflict with the plain terms of

Beltran vs Gauthreaux et als.

Art. 1290, which expressly extended those rules to partition suits between co-proprietors of age and present, when they "cannot agree on the partition or on the manner of making it." We have thus taken occasion, very carefully, to again examine and settle this vexed question.

A contrary conclusion would have, in effect, paralyzed the right of the co-owner to terminate the indivision of property, guaranteed by Art. 1289 C. C., at least in every case where sale was essential and where the share of the other co-owner was burdened by mortgages exceeding its value. Nor can we see any harm accruing to the mortgage-creditor, from the partition by sale, since it gives him the advantage of having the entire property sold, which is much more likely to bring full value, than a sale of an undivided interest.

II.

The charge that the partition proceedings were collusive and, in their nature, mere consent proceedings, has no merit, and is fully disposed of by the Baylis case, which held, first that, in answer to a rule precisely like the one before us, the validity of the judgment of partition could not be assailed; second, that the parties, plaintiff and defendant, in a partition suit, had a perfect right to submit the issues to the determination of the court, and that, whatever might have been the common desire of the parties, yet, if the issue was properly formed and determined by the court, not according to consent of parties, but according to law and evidence, the judgment so rendered is not a consent judgment. Such was the case here; and it matters not what the relations of the attorney of defendants were to the other parties; if he had the authority of defendants to place the case at issue and if the judge decided it on the law and evidence, that is all that is required. What concern has the appellant with the waiver of delays made in the case, or with the rapidity with which the proceedings were conducted? The sale was made in full conformity to all the requirements of law, and that is the only matter with which he had any concern.

III.

The seizure under appellant's executory process, made after the court had rendered its decree ordering the property to be sold, surely could not interfere with the execution of that judgment, which was already in progress under pending advertisements. This would be a new mode of enjoining the execution of judgments.

Ownership and not possession is the basis of partition. C. C. 1324. The sale takes place subject to the rights of the seizing creditor, and

those rights we have just defined. See *Citizens' Bank vs. Ferry*, 32 Ann. 310.

IV.

We cannot see what concern the appellant has with the question of whether Beltran was the real purchaser or only a person interposed, since it is not pretended that he represents any of appellant's debtors. He would have no greater rights, under our law, against the adjudicatee, for whom he claims Beltran was interposed, than against Beltran himself.

So far as the evidence in the record is concerned, there is none establishing any combination between Beltran and Gauthreaux operating to prevent bidding at the sale. It does not appear that Gauthreaux ever intended, or was able, to bid at the sale, which was for cash. It is merely proved that Beltran had agreed with Gauthreaux (who had no connection with the parties to the partition suit) that, if he bought and his title proved good, he would sell to Gauthreaux at an agreed price and on terms of credit. There is nothing illegal in this.

The evidence of Poirier, the husband of one of the defendants in the partition suit, was properly excluded. His wife was a party to and interested in the issue, and Poirier had no separate interest therein. Therefore, under article 2281, he was clearly an incompetent witness.

V.

Finally, we see not how the share of appellant's debtors, which passes to the satisfaction of his mortgage, can be ascertained without first deducting their share of the costs of the partition suit and sale. The judgment so decrees, and these costs were necessary to realize the proceeds, which go to the satisfaction of his debt. Surely Beltran cannot be made to pay them either as party or as purchaser.

We find no error in the judgment.

Judgment affirmed.

No. 9528.

D. A. HANSON, TUTOR, VS. MANSFIELD RAILWAY AND TRANSPORTATION COMPANY.

Railroad companies are held to the greatest care and diligence both in regard to the machinery and equipments of the road and the conduct and acts of their officers, agents and employees.

One who goes on a freight train by permission of the conductor, or the engineer acting as conductor, and pays the usual fare, is entitled to the privileges and protection of a passenger, even though the officer has been forbidden to receive passengers on such trains; provided, such order was not known to the passenger.

38	111
47	1675
38	111
48	981
49	1197
38	111
105	455

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The going on a freight train and even taking a seat in the cab of the locomotive by the direction of the engineer in sole charge, is not contributory negligence *per se* on the part of the passenger, who has paid his fare, especially where persons are habitually or occasionally received on such trains and placed in the same or like places thereon.

Where the conduct of a passenger has contributed to the casualty, but such conduct has not been, *in a legal sense*, imprudent or negligent, he may recover if the defendant were in fault.

A PPEAL from the Tenth District Court, Parish of DeSoto.
Taylor, J.

J. M. Cunningham and J. S. Young for Plaintiff and Appellant.

C. W. Pegues and J. O. Pugh for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. This case was argued and submitted at the recent term of this court at Shreveport, and it was agreed that it should be decided at this place.

The plaintiff, as the tutor of his minor son, Charles Hanson, sues the defendant company for damages on account of personal injuries caused the latter by the explosion of the boiler of a locomotive, used on the company's road, and charged to have resulted from serious defects in the boiler, and the gross negligence of the engineer in charge of it.

The answer is, substantially, a general denial, coupled with an allegation of contributory negligence on the part of plaintiff's ward which, it was averred, relieved the company of any liability for the alleged injury.

There was judgment for the defendant and the plaintiff has appealed.

The facts are substantially these :

The defendant's railway, known as the Mansfield Transportation Road, extends from the town of Mansfield to its junction with the Texas and Pacific Railroad, a distance of nearly two miles.

At the time the casualty is alleged to have occurred, the company ran two passenger trains and two freight trains over the road daily.

On the 18th of January, 1883, Charles Hanson, a youth of about seventeen years of age, went to the depot of the company in the town of Mansfield, for the purpose of procuring a passage for himself to the aforesaid junction. There was a freight train at the depot, consisting of two cars which were loaded and locked. It was some hours before the passenger train would leave. Not wishing to wait, he spoke to the engineer and asked if he could go down with him to the junction. Permission was granted, and the engineer assigned him, together with a

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lady passenger, seats in the cab of the locomotive. This cab is described as a space three feet by four, where wood was stored for the running of the engine and for the accommodation of the engineer and fireman.

There was an order of the company against taking passengers on the freight train, but no notice of this order was posted at the depot or elsewhere, and young Hanson was not shown to have been cognizant of it. On taking the seat assigned him, the usual fare was demanded and paid to the engineer. There was no conductor on the train, the engineer being in sole charge. It was stated on the trial by one of the directors, quoting his language, "when there is no conductor on a freight train the engineer controls it in the running of it."

It appears that occasionally passengers were received on the freight trains, as in this instance, and sometimes paid their fare and sometimes did not.

After Hanson had been seated in the cab a short time, having had, it seems, some experience with steam engines, he noticed or discerned that the water was low in the boiler, he called the engineer's attention to the fact and told him that there was something wrong, and rose to get off the train, when the engineer laid his hand on his arm and told him there was no danger and that he knew what he was doing, and at that instant, as we construe the testimony, the explosion took place. By it the engineer and the lady passenger and the breakman and fireman on the car in the rear were killed, and Hanson seriously injured. He was senseless for several hours, had several gashes on his head, was badly scalded about the face and neck, and his collar bone broken. He suffered great pain from his wounds, was confined to his bed for nearly a month, and could neither speak nor see for several days. Though able to resume his work—being a telegraph operator—his sight remained somewhat impaired; there is a deformity in one of his shoulders, it being lowered from its normal position, and his sleep is disturbed by fits of nervousness and fright—alleged consequences of the shock he received.

1. The first question to be considered is whether the explosion was caused by negligence on the part of the company or any of its officers or agents.

We deem it unnecessary to enter into a detail of the evidence on this point. We have attentively examined the whole of it, and it conclusively shows that the direct and proximate cause of the casualty were

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the serious defects in the boiler and the want of skill or gross carelessness of the engineer.

This is the more appreciable in this case, when we consider that, under the well settled jurisprudence of the country railroad companies are held to the greatest care and diligence, both in regard to the machinery and equipments of the road, and the conduct and acts of their officers, agents and employees. 10 Ann. 38; 14 Howard, 486, Am. and Eng. R. R. cases, vol. 6, p. 592.

It is indisputable that the defendant company, in this instance, fell far short of these essential legal requirements.

2. The next inquiry is whether the plaintiff's son was a passenger and entitled to the privileges and protection extended to passengers on railroad trains, under the state of facts above set forth.

This is a question that admits of much discussion, and one in which the authorities are not entirely harmonious. We have diligently examined these authorities and have reached the conclusion that they greatly preponderate in support of the proposition, that in this instance the plaintiff's son stood in the relation of a passenger to the company.

He was either a passenger or a trespasser on the train. He could not reasonably be held to be the latter, in view of the fact that he boarded the train by the permission of the engineer then acting conductor and having sole charge of the train; that he was assigned a seat by him; that he paid him the usual fare—and, moreover, that his case was not an isolated one, but that he, the engineer, occasionally, if not habitually, received other persons on the freight train and assigned them at times the place to which Hanson was directed; and that, at that very time, he received a lady on board the train who, by his direction, occupied the same cab or seat with Hanson.

But it is urged that there was an order of the company, that persons should not be permitted to ride on the freight trains, and the engineer was forbidden to receive them. In the absence of the proper notice of such order, by being posted at the depot or otherwise, brought to the attention of the public, it remained a regulation solely between the company and its employees, and could have no effect upon the right of passengers, or the responsibility of the company.

Rorer, who is justly held as high authority on this subject, in his work on Railroads, p. 1113, thus discourses on this point:

"Where freight trains, or some of them, are accustomed to carry passengers for pay, and a passenger enters a freight train to be carried for pay, though he may have no ticket and though the course of such

trains as to carrying passengers may, as between the employees thereon and the company, be such that passengers are not allowed thereon, yet such person if ignorant thereof is entitled to be regarded as a passenger, and if injured the company is liable."

The author cites among other cases in support of this doctrine that of *Lucas vs. Milwaukee Railroad*, 33 Wis. In that case a person went to the depot and found the ticket office closed and a freight train about starting. He went aboard this train by consent of the conductor, who had been forbidden to take passengers on such trains, and it was held that he was a passenger; and in so holding and in discussing this question of persons boarding freight trains, where the company was not in the habit of carrying passengers on such trains, the Court used this language: "Especially will this be so if they are directed to go aboard by the conductor, although such conductor has in fact no such authority from the company for that purpose."

A leading case on this point is that of *Dunn vs. Grand Trunk Railway*, 58 Me. 187, from which we quote as follows:

"If a passenger enters the caboose car of a freight train and when the train starts, without being requested to leave, remains there as passenger, contrary to rules of the company, but with the knowledge of the conductor, who receives from him the usual fare of a first class passenger, the corporation incurs the same liability for his safety as if he were in their regular passenger car."

And again: "Every one riding in a railroad car is *prima facie* presumed to be there lawfully as a passenger having paid his fare, and the *onus* is upon the carrier to prove affirmatively that he was a trespasser
• • • • That the regulations of the defendant are binding on its servants. Passengers are not presumed to know them."

To the same effect are 3 Otto, 93 U. S. 1291; 14 How. 486; 1 Duer 578; 20 Minn. 125, 126; 43 Ill. 364; Am. and Eng. R. R. Cases, vol. 1, p. 257.

The learned judge of the district court in his reasons for judgment cites approvingly the case of *Easton vs. Delaware R. Co.* as opposed to the above authorities.

In that case the conductor of a coal train invited some boys to ride upon the train to a certain point, promising them employment. There was a printed regulation forbidding persons from riding on the train. It did not appear that passengers were ever allowed to ride thereon, and no fare in that instance was paid or demanded. In such features it differs from the instant case. Thompson in his work on Carriers, p. 344, thus comments on that case:

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"The foregoing decision (*Eaton vs. Del. R. Co.*) is strictly in accord with the circumscribed views of the courts of the State of New York, in regard to the scope of a servant's authority and the immunity of the master from liability for the results of acts for the doing of which the servant was not hired. But as courts in general are not disposed to thus limit the responsibility of the master for the acts of his servant, it will not be surprising to find that a contrary opinion is entertained upon this question. Thus the Supreme Judicial Court of Maine, in *Dunn vs. Grand Trunk R. Co.* have held," and quotes from the decision, and adds, "to the same effect is the decision of the Supreme Court of Pennsylvania, in the late case of *Creed vs. Penn. R. Co.* *These last two cases would seem to express the better view of this question, and they have the support of authority in analogous cases.*"

Under these circumstances we cannot accord the same weight to that decision that was given it in the court below.

3. This being as to the question of contributory negligence.

This is charged to have consisted in Hanson boarding the freight train and taking a seat in the cab of the locomotive; and again, his failing to leave the train on discovering the condition of the boiler or the low state of the water therein.

Much that we have said upon the question of his being a passenger will apply to the first branch of this inquiry, as to whether his acts in the premises, as stated, constituted negligence *per se*.

This Court in the case of *Knight vs. Pontchartrain R. Co.*, 23 Ann. 462 has laid down rules of contributory negligence, which we find have been quoted and approved as sound by Rorer in his work mentioned, page 1039.

These are substantially :

1. "Where the conduct of plaintiff has, as a matter of fact, contributed to the accident, but such conduct has not been in a legal sense imprudent or negligent. In such case plaintiff may recover from a defendant in fault.

2. "Where the conduct of plaintiff has been negligent or imprudent, but has not contributed to the accident. In such case the plaintiff may recover from defendant in fault.

3. "Where the conduct of plaintiff has been negligent and has contributed to the disaster. In such case the plaintiff cannot recover, even though the defendant be in fault."

It is not easy to perceive how, by any reasonable application of any one of these rules to the facts of this case or of the facts to the rule, the plaintiff could be considered as debarred from the right of recovery.

It is certain that the defendant was in fault with regard to this explosion which caused the injury, and that the fault of the company in providing a defective engine, and the fault of the engineer in not keeping a sufficient supply of water in the boiler, were the immediate and direct causes of the disaster.

It cannot be said that the plaintiff, by any act or omission, contributed to produce the explosion of the boiler, or that he, in any manner, contributed to the injury he sustained, unless indirectly and remotely by being on the train and in the place he occupied thereon. And if his presence there could be held as any kind of contributory negligence, he could not, under any rule or principle of law, be held guilty of negligence in a *legal sense*.

Negligence, in its common acceptation, is held to be the doing of something that a reasonable and prudent person would ordinarily not have done under the circumstances of the situation, or the omission to do something which a person of like character would have done under the circumstances of the case.

We incline to the belief that most any man of average prudence, situated as Hanson was at the time, would have acted just as he did in this instance. The road was a short one—less than two miles—he went on the train by permission of the person in charge of it, and took the place assigned him thereon—as an employee of a telegraph company he had often occupied a similar place on a train without harm.

Leaving out for the moment the question of an explosion, the only increased danger that would naturally suggest itself to his mind incident to his position on the engine, and that he would not be equally exposed to on a passenger train, was such as might result from a collision with another train or that of being shaken or jolted off from the rapid running of the train or meeting an obstruction on the track.

As to the danger from an explosion, he was just as safe where he was as he could be elsewhere on any kind of a train; provided the engine was sound and the engineer did his whole duty, and he had a right to expect a sound engine and a competent and careful engineer; and it argued no negligence on his part that he rested in security on this presumption.

And in this connection we may add that, as before stated, the proximate causes of this disaster were an unsound engine and the negligence of the engineer, and there is a high authority to support the proposition that, to defeat a recovery on account of contributory negligence, such negligence must be the proximate cause of the in-

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jury. Am. and Eng. R. R. cases, vol. 8, p. 480, citing Fowler vs. Balt. and O. R. R.; W. Va. R. R. and 9 W. Va. 253; 16 W. Va. 307.

It has also been frequently held, that taking an unusual place on a train, which ordinarily might be considered contributory negligence, cannot be so regarded where the place is occupied by the direction or a permission of the conductor.

Thus where he goes on the car-platform, 32 Barb. 397; 27 Ind. 59; 38 Ga. 409. Or in the baggage car: 59 Penn. State, 239; 1 Duer, 571; 20 Minn. 125. Or on the engine: Nashville & Chat. R. R. Co. vs. Erwin, (Tenn. R.) cited in 3d vol. Am. and Eng. R. R. cases, p. 465.

See also 1st vol. Am. and Eng. R. R., p. 82, citing Ky. R. R. vs. Thomas; 50 Mo. 139; 36 N. Y. 135; 3d Head, (Tenn.) 638; 14 How. 468.

We attach but little weight to the further contention of the defendant that contributory negligence was shown by Hanson in not leaving the train after he discovered the condition of the boiler or the insufficiency of the water in it, and after he was thus warned of his danger. Hanson's testimony, which is all there is on this point, clearly conveys the impression that the explosion instantaneously followed the discovery and his movement to leave the train. It is as follows:

After being there (on the engine) a few minutes, the engineer started toward the machinery, when witness glanced at the water gauge which was made of glass. (Being around machinery all of his life, he could tell that there was no water in the boiler, the gauge showed nothing but smulled foam and steam.) Witness told the engineer that there was something wrong with the engine. (He seemed then getting ready to start.) I told him I had been enough around machinery to know there was something wrong and I wanted to get off and started to get off. He told me that he knew what he was doing and to stay on, that he was running the engine. Witness knew nothing more until late that night, etc."

4. We have thus been brought to the conclusion from this review of the facts of the case and the legal questions involved, that plaintiff is entitled to recover.

His injuries were severe and his sufferings great, and the damages allowed should be commensurate with them. We think that he is justly entitled to two thousand dollars (\$2,000).

ON APPLICATION FOR REHEARING.

The inference which might be drawn from the original opinion that the court assumed a position on the vexed question of the liability of railroads for injuries happening to persons who assume unusual and dangerous positions on trains, with the consent of em-

ployees, but against the rules of the company, is repelled. Enough was said in the opinion to support the liability of defendant, independent of this question.

FENNER, J. Questions of negligence *vel non* depend upon the particular circumstances of the cases in which they arise; and general *dicta* must be confined, in their application, to particular facts.

On the general question of liability of railroad companies for accidents happening to persons who occupy unusual and peculiarly dangerous places on trains, even with the consent of employees, but against the rules of the company, authorities are conflicting and there are many opposed to those cited in our original opinion. See Beach on Contrib. Neg. p. 159; Pierce on Railroads, p. 317; Hutchinson on Carriers, p. 521.

The necessities of this case do not require us to assume any position on this question, and we now desire to repel the inference which might be drawn from the original opinion that we have done so.

It is sufficient to say that, under the peculiar circumstances of this case, and with reference to the particular fault here involved, plaintiff was guilty of no contributory negligence which legally debars him from recovery.

Enough was said in the opinion to sustain this view without reference to the general question above referred to.

We adhere to our conclusions and the rehearing is refused.

No. 9538.

THE STATE EX REL. BENJAMIN NEWGASS VS. THE CITY OF NEW ORLEANS.

38 119
107 225

A claim for reimbursement of money paid in error, even when reduced to judgment, does not arise from a contract, but from the law, and is not protected by the provision in the Federal Constitution, which prohibits States from passing laws impairing the obligation of contracts.

A State constitution when it does not conflict with that Constitution is omnipotent in its disposition and even destruction of private and social rights.

A State may divest vested rights without infringing the paramount law of the land.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Fred. D. King and Blanc & Butler for the Relator and Appellee :

A. The obligation of the city to refund a tax illegally exacted is an obligation of contract protected by the Constitution of the United States.

1. Municipal as well as private contracts may be expressed or implied. C. C. 1780, 1797, 1809, 1811, 2292, 2293; *Argenti vs. San Francisco*, 16 Cal. 255, 282; 12 Wall. 12; *Dillon Mun Corp.* §§ 459, 938.

 State ex rel. Newgas vs. New Orleans.

2. Wherever the law attaches a duty to refund money unduly exacted and paid by mistake, there results an implied *promise* to reimburse as in the case of a want of consideration. C. C. 2301, 2302; Hubbard vs. Brainard, 35 Conn. 561; Collector vs. Hubbard, 12 Wall. 12; Bradford vs. Chicago, 25 Ill. 423; Dillon, Mun. Corp. 5th Ed. §§ 459, 938; Argenti vs. San Francisco, 16 Cal. 255, 282.
3. The action in like cases is *assumpsit* and is *ex contractu*. Collector vs. Hubbard, 12 Wall. 12; 2 Metcalf 228; Am. Jurist, vol. 23, pp. 143, 271; Bradford vs. Chicago, 25 Ill. 423; Dillon, Mun. Corp. 3d Ed. 939, 940, 938.
4. The contract to refund money unduly exacted and paid in error is called a quasi-contract; so is the obligation to refund the purchase money under a void title; so is the duty to account for an estate managed by one person without the consent, as during the absence, of another; and so are the obligations of tutorship and curatorship, and yet it will scarcely be denied that all of these imply contract obligations protected by the Federal Constitution. C. C. 2293, 2305, 2301, 2302; Paul vs. Renosha, 22 Wis. 266.
5. It is the civil obligation of contracts which (the Constitution) is designed to reach; that is, the obligation which is recognized by, and *results* from, the law of the State in which it is made. Cooley, Const. Lim. p. 347, 5th ed.
6. The rate of taxation at the time the obligation arose, enters into and forms part of the obligation, and cannot afterwards be withdrawn to the prejudice of the obligee, without impairing the obligation of contract.
7. By Act No. — of 1872, sec. —, the rate of taxation was fixed at twelve and one-half mills, and to that extent relator is entitled to the exercise of the taxing power.
- B. Should the relator be denied the right of contract, then he says: As the city only needs, can only use, and has only appropriated, for alimony or government, nine of the ten mill tax it levied, relator can be paid from the revenue derivable from the surplus mill. Acts 1884, No. 88.
1. Relator registered his judgments pursuant to Act No. 5, Ex. Sess. 1870; he accepted its remedy, and he has no other. By that act he was entitled to have his registered judgments paid from the budget revenues, subject always to the preferred claims of the city's alimony.
2. The revenue not needed, nor appropriated, nor used for alimony is the ten per cent rebate on the whole budget estimate; this rebate includes one mill of the ten mills tax and much more than exceeds one hundred thousand dollars per annum.
3. Relator's acceptance of the only remedy offered him, that of Act 5 of 1870, Ex. Sess., and the only means of revenue for his payment being the aforesaid rebate, he has a vested right in this exclusive remedy and in the means of payment, which cannot be divested by the legislature, under the State Constitution. Shields vs. Chase, 32 Ann. 409; Copley, Const. Lim. p. 445; Hubbard vs. Brainard, 35 Conn. 563; Dillon Mun. Corp. 3d ed. § 445; Memphis vs. United States, 97 U. S. 294; Folsom case, 32 Ann. 714.
4. The attempt of the State by Act 88 of 1884 to wrest from creditors the said revenue, by appropriating it for unadopted and problematic improvements, occurring after the acquisition of said vested rights, must be disregarded and held void, as unconstitutional. See authorities cited above.

W. H. Rogers, City Attorney, for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The relator, who is a judgment creditor of the city, claims that an appropriation be made and revenue provided for his benefit in the next budgets or tax and revenue levies of the city,

and in all future budgets and levies until he be fully paid in capital, interests and costs.

He charges that the judgments in his favor have, as their consideration, amounts paid for licenses illegally exacted prior to 1874; that the obligation of the city to reimburse springs from a *contract* and cannot be impaired by the State; that the rate of taxation at the time was fixed at 12½ mills, which would have sufficed, but that the same has been since reduced to 10 mills.

He further argues that, if his claim is not based on a contract, the obligation of which cannot be impaired, he is entitled to be paid out of part of the 10 mills, only ninety-ninths of which constitutes the alimony of the city, the remaining tenth the *reserve fund*, not forming part of it and being a municipal asset out of which he can be satisfied.

The defense is that the judgments are not based on contract obligations; and that the same are payable only out of the usual and ordinary municipal revenues, which are limited to ten mills, which are necessary for the alimony of the city.

From an adverse judgment, the corporation has appealed.

I.

No principle is better recognized by law and jurisprudence than that he who receives what is not due to him, whether he receives it through error or knowingly, obliges himself to restore it to him from whom he has unduly received it, and that he who has thus paid through mistake, believing himself a debtor, may reclaim what he has paid. R. C. C., 2301-2.

This principle governs both natural and artificial persons.

It does not, however, follow that the right to claim reimbursement and the obligation to refund arise from a contract, express or implied, which is protected from impairment or invasion by the Constitution of the United States, which is invoked as a shield in the present controversy.

The contracts designed to be protected are such by which perfect rights, certain, definite, fixed private rights, are vested. *Butler vs. Penn.*, 10 How. 402.

There is a distinction between those rights which the law gives to, or obligations which it imposes upon, persons in certain relations, merely in carrying out its own views of policy and independently of any stipulations which the parties may have made, and those rights which the law itself, even in carrying out some matter of general policy,

authorizes to be made the subject of express contract between the parties.

In the former case, the rights being entirely derived from the law and not from the contract, laws changing them are not within the prohibition; but, in the latter case, although the law authorized the rights to be acquired, yet it authorized them to be acquired only by contract and when thus acquired the contract is within the pale of the protection.

"The doctrine of implied municipal liability," says Mr. Chief Justice Field, in a California case, invoked by relator and which was subjected to a thorough examination," applies to cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same.

"If the city obtain money by mistake, or without authority of law, it is her duty to refund it, *not from any contract*, entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial," etc. The *italics* are ours.

The obligation to refund the money illegally received by the city, for the licenses subsequently declared to be illegal, does not arise from any contract between the city and the parties paying, any more than does the obligation to repair damage caused by the fault of another.

In the case of *Folsom vs. New Orleans*, 32 Ann. 714, decided by the present Court, whose conclusions were affirmed by the Supreme Court of the United States, we had occasion to review fully the principles and the jurisprudence on the question of the protection which the Federal Constitution awards to contracts by prohibiting States from impairing the obligations of the same, and following in the line of well established precedents, we held that the right to claim damages, occasioned by the commission of a tort, even when reduced to judgment, did not arise from a contract and was not, therefore, within the constitutional protection.

We further declared that a State Constitution, when it does not conflict with that of the United States, is omnipotent in its disposition and even destruction of private and social rights, and that a State may divest vested rights, without infringing the paramount law of the land.

It is manifest in the case at bar, that as the right to claim reimbursement does not arise from any contract, but is recognized by law only, the relator has vainly invoked the constitutional protection.

 Succession of Gaines.

II.

The relator, however, claims that, if his case does not present the features of a contract shielded from invasion, he had a vested right which could not be divested by the reduction of the *quantum* of taxation.

This may well be otherwise, but were it not so, the relator would not, on that account, be entitled to be paid out of the tenth remaining; after deduction of the nine-tenths, from the ten mills taxation, authorized by the Constitution, for the obvious reason that he has set forth and established no special valid ground, on which to predicate a diversion of that tenth from the object contemplated and appropriation made by the legislature under Act 88 of 1884, and to justify a payment in full to him, by preference over other municipal creditors who may have as well founded claims against the city.

It is, therefore, ordered and decreed, that the judgment appealed from be reversed and that plaintiff's demand be rejected with costs.

Rehearing refused.

 No. 9450.

SUCCESSION OF MYRA CLARK GAINES.

In a contest over an olographic will, the probate of which has been resisted as soon as the instrument was presented, on the ground that said will is not in the hand-writing of the deceased, and is therefore a forgery, the burden of proof of the validity of the will is on the party who presents the same for probate.

The proof of the writing and signature of the testator by at least two credible witnesses, which is considered sufficient under the laws of Louisiana, applies only to wills which are not opposed or contested.

In contestations which involve the validity of wills, as regards the genuineness of the same all legal modes of proof, including the testimony of experts, and comparisons of writings are admissible, and all such evidence must be considered by the courts.

In such cases the alleged physical incapacity of the testator, at the date of the instrument, to write a will or to date the same, is a legal element of proof to be considered. So is the mode of acquiring possession of the will by the party who presents it for probate, an element to be considered; and in case that a mysterious or unnatural manner is indicated by the party, the burden of proof is on him to show the actual delivery of the will to him as alleged.

The court will also consider the character of the dispositions contained in a contested will, as a means of testing the validity of the will, by the probabilities of such donations.

When the evidence in a cause is sufficient to justify a final judgment in the case, courts of justice would be derelict to their duty in refusing to give it legal effect and to thus end the litigation.

Evidence and considerations which, in a contest over a will in the olographic form, would justify that the will is not genuine, must carry with them the conclusion that the will was not written by the deceased and is therefore a forgery.

38	123
45	1241
38	123
46	256
38	123
52	1195

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An amendment on appeal, which does not alter the practical result flowing from the judgment of the court *a qua*, but merely strikes out some irrelevant matters, will not visit costs of appeal on the appellee.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Breaux & Hall and A. H. Leonard for Mrs. Evans, Appellant :

The following legal propositions are elementary :

1. La date ne doit pas être mise le jour même où le testateur écrit ses dispositions. Laurent, XIII, p. 1700, No. 204.

2. "On admet que le testament olographe fait foi de sa date." Laurent, XIII, 269, 274, Nos. 242, 243; Demolombe, Dou. IV, p. 158; Gilbert (Codes), 429.

Un testament olographe est regardé comme un acte solennel qui fait foi de sa date. Toullier, III, p. 210; Cassation, Juin, 1810; Sirey, p. 210.

So that if the writing be proven, the date will be assumed to be made as indicated. This is not a presumption *juris et de jure*, but it is sufficiently strong to control in cases of conflicting testimony.

3. L'obligation de dater le testament n'emporte pas l'obligation d'indiquer le lieu où a été fait." Gilbert, p. 428.

4. "The presumption of innocence is too strong to be overcome by an artificial intendment of law." Starkie on Evidence.

5. The proof by witnesses who have not seen a person write or sign, and who only express their belief or knowledge of the genuineness of the signature in dispute, from its similarity and likeness to signatures of the same person which they have seen, has always, in itself, something rather vague and unsatisfactory, if not corroborated by circumstantial evidence." 15 La. p. 264.

6. "We would have been better satisfied with some evidence explanatory of the conduct of plaintiff, so little in accordance with the usual springs of human action, at least with that most powerful of all, self-interest! We concede the suspicions which may attach to the appearance of this small scrap of paper as the title to a large fortune. But, after all, suspicions are not permitted to counterbalance, in the judicial mind, the testimony of numerous and uncontradicted witnesses. It is in the recollection of some of us, that a dirty fraction of a half sheet of foolscap, was the vehicle for the devise of the large fortune of the late Chief Justice Martin." Penn vs. Cities, 13 Ann. 87.

T. J. Semmes & Payne and A. Goldthwaite, for Hilder and others, contra :

1. When the genuineness of a last will and testament in the olographic form is denied, evidence as to handwriting and comparison of same may be introduced and made, together with all the circumstances attending the alleged making of the will. C. C. Art. 2245; C. P. Art. 325; 9 La. 560-2; 18 Ann. 445; 2 Ann. 667.

2. The finding of a will and the history of its possession are material facts to be considered, and should be satisfactory and occasion no distrust in the mind of the court. 13 Ann. 86; 18 Ann. 445; Williams on Executors, vol. 1, p. 292, 4th Am. Ed.; 2 Haggard Eng Ecclesiastical Rep. 531; 1 Addams Eng. Ecclesiastical Rep. 162; 2 Addams, 53; 1 Haggard, 60.

3. A person who accounts for the finding by saying a neighbor, or third person, gave it to her, may be believed; but when the neighbor, or third person, is produced and denies the statement, the presumption is that the statement of the finding is untrue.

4. A person offering a will for probate, which is denied to be genuine, and alleged to be

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forged, has the burden of proof upon her; she must make her case not merely probable but legally certain. 18 Ann. 449.

5. Any evidence that will aid the trial judge, sitting as a jury, in comparing and examining different specimens of hand-writing, such as photographic copies, a stereopticon to enlarge and magnify true copies, is admissible. Lawson on Expert and Opinion Evidence, 414-15; 16 Gray, (Mass.) 160; 2 Baxter, (Tenn.). 231.
6. An appellate court may make the comparison for itself. Lawson on Expert and Opinion Evidence; 6 Court of Claims, 421.

The opinion of the Court was delivered by

POCHÉ, J. On the 12th of January, 1885, Mrs. Marie P. Evans presented for probate, as the olographic will of the deceased, the following instrument:

"New Orleans, January 8, 1885.—I, Myra Clark Gaines, being of sound mind, bequeath to my excellent friend, Mrs. Julietta Perkins, as a token of my esteem and love, that part of my estate known as the Fuentes property, and to my friend, Mrs. Marie P. Evans, one-third of the remainder of my entire estate, the balance to be divided equally between my grandchildren. I appoint Mrs. Marie P. Evans, my testamentary executrix and detainer of my entire estate, without bond."

(Signed)

"MYRA CLARK GAINES."

In connection therewith, she exhibited another document, in the shape of a letter, and which reads as follows:

"*Confidential*.—Washington, D. C. August 23, 1884.

"My dear Mrs. Evans—I have been very unwell but am quite well again. I am pleased to learn the news of the bank suit, but feel most anxious about your success. With love, I bequeath to your excellent mother that portion of my estate known as the Fuentes property; and to you, dear Mary, one-third of the remainder of my whole estate. As you are the friend I trust above all others, I appoint you my testamentary executrix and detainer of my entire estate, without bond. With love to your excellent mother and the kindest regards to to your husband,

I am ever your friend,

MYRA CLARK GAINES.

"Excuse this scrawl, my hand trembles and I am very weak.

"Adieu again,

MYRA."

To these two documents, she supplemented another instrument, indicating similar testamentary dispositions, and which is in the following words:

"Washington, D. C., November 10, 1881.

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"I, Myra Clark Gaines, bequeath, in this, one-third of my estate to Mrs. Marie P. Evans, and my Fuentes estate to her mother, Mrs. Perkins, in token of my love for them.

"I, Myra Clark Gaines, sign the above most heartily.

(Signed)

"MYRA CLARK GAINES.

"New Orleans, December 18, 1884."

On the same day, the court was asked to probate a will in nuncupative form under private signature, purporting to have been executed by the deceased Myra Clark Gaines on the 5th of January, 1885. This will was presented by W. H. Wilder and I. Y. Christmas, who had been therein appointed as executors, and who, on the same day, resisted and opposed the probate of the will presented by Mrs. Evans on the ground that it was not a genuine will written by Mrs. Gaines.

Probate of the nuncupative will of the 5th of January, was resisted by Mrs. Evans on the ground that it had been superceded by the will of January 8, and of non-observance of legal formalities.

Further opposition was made to the alleged will of January 8, by I. Y. Christmas in his capacity of natural tutor of his children, who are the grandchildren and heirs at law of the deceased.

By agreement of counsel, the issues presented under these several pleadings, were tried and determined together. The result was a judgment which rejected the nuncupation will of January 5, as defective in form; and decreed that the instrument purporting to be the olographic will of Mrs. Gaines, was fraudulent and forged, and not entitled to probate as a will.

No appeal was taken from the judgment in so far as it annuls the nuncupative will, hence that question is eliminated from the present discussion.

This appeal is prosecuted by Mrs. Evans, and it presents the question of the validity of the alleged will of January 8, 1885.

The undisputed facts of the case are as follows:

Mrs. Myra Clark Gaines died in the city of New Orleans, on Saturday the 9th of January, 1885, at two minutes past eleven o'clock at night, at the age of 78 years, after a lingering illness, (capillary bronchites), of twelve days, at the house of L. L. Davis, No. 150 Thalia street.

Her disease progressed steadily, without any reaction, her condition growing worse day after day, until death ensued.

During her illness, she was attended to and nursed by Mrs. Virginia Davis, the wife of L. L. Davis, by the latter's niece named Adolphine

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Case, by Mrs. I. M. Walsh, a near neighbor and a relative of Mrs. Davis, and by a Mrs. Letitia Bringier Gonzales, a life-long friend of Mrs. Gaines, who became afterwards Mrs. Bradley. Her physician was Doctor W. H. Holcomb, from whose testimony it appears that on the 5th of January, 1885, Mrs. Gaines was unable, through weakness and exhaustion, to sign her name to the will made on that day, and that in order to affix her cross thereto she required his assistance to hold and guide her hand.

It also appears that, between that day and the day of her death, Mrs. Gaines signed several documents in the presence of witnesses, and that in each case she made her cross with the assistance of some one of the persons present, after declaring that she was too weak to sign her name.

All other facts connected with the case are disputed and very warmly contested. Hence the truth had to be searched through a mass of conflicting testimony, composing an enormous record, and by means of comparison of the hand-writing in the three documents which are hereinabove transcribed, with the hand writing admitted to be that of Mrs. Gaines, in some eighty documents, mainly letters which, by consent of counsel, have been brought up in their original form.

In the performance of our painful task, we have divided the subject into four different branches of inquiry :

1. The alleged inability of Mrs. Gaines, on January 8, 1885, to execute in whole or in part, the will of that date, on account of her great weakness and exhaustion, through sickness, and of other surrounding circumstances.
2. The manner by which Mrs. Evans claimed to have obtained possession of said will.
3. The alleged improbability of the dispositions contained in said will.
4. The genuineness or forgery of the hand-writing of the body and of the signature of said will, and of the two documents presented therewith.

We must, however, first lay down the rules by which our courts should be guided in the investigation of such cases.

We note in this connection that appellant's counsel urge the rule that after proof of the signature of the testator by at least two credible witnesses, under the requirements of Article 1655 of the Civil Code, the burden of proof is on the party who opposes the execution of the olographic will.

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We understand that rule to apply to the probate of a will which is not opposed, as a part of the mortuary proceedings looking to the settlement of the succession of the deceased. When the olographic will is presented and due proof is administered of the genuineness of the testator's hand-writing and signature, the will is ordered to be probated and executed. If thereafter any party seeks to annul or set aside the will on any legal grounds, he is met by these preliminary proceedings which have established the *prima facie* validity of the will, and under the effect of which he is charged with the burden of proof in support of his attack. But a different rule applies when the probate of the will is opposed *ab initio*, on the ground that it is a fraud and a forgery.

In such a case the denial of the genuineness of the will removes the contest from the domain of Article 1655 of the Code, and it presents an issue which must be determined under the rules which govern all contests involving the genuineness of a signature which is denied, and in such a case the burden of proof is on the party who relies on the genuineness of the proffered signature. C. C. 2245; Code of Practice, art 325.

Under such an issue the doors of justice are opened for the introduction of legal evidence, under all the forms which prevail in all contested facts or cases; and the textual provisions of the law recognize the mode of testing signatures by a comparison of the writing. 9 La. 559, Plicque and LeBeau vs. Labranche; 2 Ann. 724, Sophie vs. Duplessis et als.; Aubert vs. Aubert, 6 Ann. 104; Pence vs. New Orleans, 13 Ann. 86; Fox's Case, 18 Ann. 448.

Satisfied with the wisdom and with the absolute correctness of these rules, which were pointedly and practically enforced in Fox's case, 18 Ann. 448, we have felt authorized to consider all the legal evidence which the record affords, and which could throw any light on our path, including the testimony of seven respectable and credible witnesses, who testify to their belief in the genuineness of the writing and of the signature in the contested will, including also a minute comparison, with the aid of a powerful magnifying glass, of the hand-writing of the proffered will, with that in the original documents which have been brought up as containing the genuine writing and signature of Mrs. Gaines.

I.

The subject of our first inquiry involves the physical and mental condition of Mrs. Gaines on the 8th of January, 1885; and other cir-

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cumstances connected with the possibility of her having made a will on that day.

The weight of the evidence has served to convince our minds of the following facts on this point :

The last time that Mrs. Gaines affixed her signature to any instrument or wrote any word or words in her own hand was on Sunday the fourth of January preceding her death.

On that day, with the assistance of three persons, two of whom lifted her up in her bed, and one of whom held a small board on which was laid the paper, she signed a nuncupative will under private signature, which she supplemented on the next day by the will which was annulled in this case as defective in form.

From that day on to the day of her death, she sank continuously and gradually without any perceptible improvement or reaction, and she never more attempted to sign her name. Whenever she desired to sign any instrument after that day, it was done by means of a cross, which she made with the greatest difficulty, and with the indispensable assistance of some person to hold and to guide her hand.

In the morning of the 8th, the very day on which she is represented to have made her olographic will, or at least to have written the words "Jan. 8th, 1885," her physician gave up all hopes of her recovery, and for that reason alone he allowed her nurses and attendants to humor her in one of her sick and dying fancies—to be given a steam or vapor bath.

From that operation she was replaced in her bed, materially weakened and alarmingly exhausted; her feet and hands began to swell, her ears grew black, and her condition gave unmistakable signs of a rapidly approaching dissolution, which occurred the next night at 11 o'clock.

Up to that time she had been able to hold a glass in her hands and to drink therefrom; from that time she lost even that faculty, and the only refreshments which she could take were in the liquid form, and these had to be administered by her nurses with the use of a spoon.

These facts are gathered in the main from the testimony of Mrs. Davis, her niece Miss Case, and her relative and neighbor, Mrs. I. M. Walsh, to whose testimony we attach great weight and importance mainly because it emanates from persons entirely disinterested, also because their respective statements are mutually corroborative, because their answers are given without hesitation, without unnecessary explanations and without deviation, and because their whole testimony leaves the unmistakable impression of candor and truth, a character-

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istic unfortunately not found in the testimony of several other witnesses in the case.

These three witnesses agree in the statement that from, and including Sunday the fourth of January, to the time of her death, Mrs. Gaines was never left alone a single moment; that one, at least, of these three ladies was constantly present and awake night and day in her room, and that neither of them ever saw her handle a pen or write a word in her own hand after that day. It would be next to impossible to establish a negative proposition with more certainty than is done in this instance.

A rather hazardous attempt is made to break down the testimony of these witnesses by that of one Florentine Pierce who swears that on one occasion she went up to Mrs. Gaines' room during that interval of time and found her absolutely alone. But we do not believe her. Her whole testimony is devious, tortuous, very unsatisfactory, and not in the least clad in the livery of truth. We deem it unnecessary to analyze her testimony in greater details.

We are thoroughly convinced that on the 8th of January, Mrs. Gaines was physically unable to write a single word, and that she did not write the will in question or any portion thereof on that day.

II.

Our next inquiry is directed to the alleged manner in which Mrs. Evans obtained possession of the proffered instrument. Her theory is in substance as follows:

Having been informed through newspapers that her intimate friend, Mrs. Gaines, was lying very ill at No. 150 Thalia street, she left her own sick bed, to which she had been confined since the 24th of December, 1884, in the morning of Saturday, the 9th of January, 1885, and came down for the purpose of paying her a visit. She called at the house, but was refused admission to Mrs. Gaines' room by the latter's son-in-law, Mr. Christmas. She then came down to her lawyer's office, where she spent the better part of the day, in great distress of mind over the occurrence of her defeated visit to her bosom friend. From there she took a car on her return home at about four o'clock, p. m., but on reaching the corner of Thalia street, she left the car, with the intention of making another attempt to see Mrs. Gaines. In a disturbed state of mind, creating indecision of purpose, she passed by the house three times, when she was spoken to by a woman "dressed in shabby black, with a black veil tied on her head," who stood in the doorway and who asked her if she was Mrs. Evans.

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On an affirmative answer the person "in shabby black," who looked very much confused and manifested great nervous excitement, handed her a handkerchief containing a paper folded therein, remarking to Mrs. Evans that it was sent to her by Mrs. Gaines. She did not know the woman in "shabby black," and she was not known to her. She then walked away without asking any questions, and on opening the bundle she found the paper in question, of which she then read but one line, refolded it, and taking a car, returned home without reading said paper before she reached her house.

Dealing with such a statement counsel for appellant can hardly expect but one answer from a court of justice. The explanation makes confusion worse confounded.

But on attempting to further explain, Mrs. Evans states that she subsequently ascertained the name and identity of the woman who had handed her the mysterious bundle, and that it was Mrs. Letitia Bringier, now the wife of J. S. Bradley; and that in a subsequent conversation, the woman had admitted that much to her.

Called in as a witness by the opponents, Mrs. Bradley flatly denied the whole statement, and emphatically declared that she knew nothing of the pretended will or of the mysterious bundle.

Appreciating the very damaging effect of that testimony, appellant's counsel devote a large portion of their brief to show that Mrs. Bradley is not a credible witness, and that she made numerous contradictory and glaringly untrue statements in the course of her testimony.

But conceding the full force of that line of attack, can we be expected to construe her denial into an affirmative statement?

Eliminate her testimony altogether, and the case is left with the uncorroborated narrative of Mrs. Evans.

Her unsupported evidence would tax the court to believe a romantic story, which finds no reason in any of the springs of human action, and to which no court of justice can conscientiously give credence.

In Fox's case the party charged with having delivered McDonogh's will to Fox was produced as a witness, and his testimony went to the support of the latter's theory. But weighing his testimony in the scales of surrounding circumstances, with the improbabilities of the case, the court refused to believe him.

In this case we are called to uphold a mysterious delivery of a will unsupported by the testimony of a single disinterested witness, and to that end to actually discard plausible testimony for the purpose of giving effect to an improbable theory. No court would undertake to go to that length.

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We find no evidence in the record to justify the conclusion that Mrs. Gaines, who died in the belief that her estate would amount to two millions of dollars, and who left two sets of grandchildren for whom she had always shown the warmest attachment and manifested the utmost solicitude, would deliberately disinherit them of more than one-third of her estate for the benefit of any living being. This brings us to the consideration of our third inquiry, which involves the alleged improbabilities of the dispositions made in the pretended will.

III.

In addition to what we have already said on this point, the record shows that Mrs. Gaines and Mrs. Evans were not related either by blood or affinity, and that their acquaintance dated only from the year 1870. It further appears that after an intimacy of several years with Mrs. Evans, the deceased had gradually become estranged from her and had lost all confidence in her.

The evidence is, perhaps, more conflicting on this than on any other point in the case. Hence we have analyzed it with more than ordinary care and attention, and the result of our examination is the conclusion that Mrs. Gaines had gradually withdrawn her friendship from Mrs. Evans. It is useless, and it would be a tedious labor, to go into details on that point. But the following facts cast a very significant light on the subject of this inquiry :

From the testimony of Mrs. Evans it appears that to her knowledge Mrs. Gaines had been in New Orleans at Mrs. Davis' house since the 8th of October, 1884, and that she also had been in the city during all that time, and they had not yet exchanged visits, or even the courtesies of the slightest correspondence.

The attempted explanation of that fact by Mrs. Evans is not satisfactory. Again, it does not appear that during her whole illness, Mrs. Gaines had requested any message for Mrs. Evans, or made any inquiry about her, while it is shown that she had been thus concerned about other persons. During the last days of her illness, Mrs. Gaines made several donations *inter vivos* and made two nuncupative wills, and in no instance did she make the slightest allusion to Mrs. Evans.

In this connection, counsel for appellant contend that the wills of the 4th and of the 5th of January, were not the result of Mrs. Gaines' voluntary desires, and that far from manifesting any wish to make a will, she had always expressed a decided aversion thereto.

It is shown, however, that she made several special legacies in both of these projected wills, and from the testimony of both sets of attesting witnesses it appears that she signed both wills without undue

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persuasion, and without the slightest coercion. But in their zeal in that line of argument, intended to show that Mrs. Gaines had a great aversion to making a will, and that she did not, at any time, believe that she was about to die, counsel lost sight of the effect of such contention on the very will which they are endeavoring to probate.

And thus it appears that appellant gathers no strength from the consideration of the alleged probabilities of the testamentary dispositions as supporting the validity of the will.

IV.

We now reach our fourth and last point of inquiry, and that involves the test of the hand-writing and the signature of the alleged olographic will and incidentally of the two other documents connected therewith.

Our researches on this branch of the case include the testimony of experts and of persons familiar with the hand-writing and signature of Mrs. Gaines, and a comparison made by ourselves of the hand-writing of the three instruments now under discussion with the admitted writing and signature of Mrs. Gaines in original documents which have come up with the record.

In this connection, it is contended by counsel for Mrs. Evans, that comparisons of hand-writings with each other and expert testimony on the same subject find little favor under the laws of Louisiana, and are very often precarious and dangerous; that experts may give opinions, but they must state the facts on which they are based, and that in verifying a signature the expert cannot refer to extraneous facts established in the case.

Counsel are mistaken in the proposition that such modes of verifying signatures have but little force in Louisiana. Both modes are recommended by the very text of our law. C. C. art. 2245; C. P. 325. It is undeniably true that such testimony must yield when pitted against positive testimony. 15 La. 263, *Robinson vs. Arnet*. We find no fault with the other legal proposition advanced by counsel, and we have been guided by them in our consideration of the testimony on this branch of the case.

Hence we have given no weight to opinions expressed by some of the experts as to the impossibility of Mrs. Gaines writing as plain as was done in the will of January 8, on account of her physical weakness.

But we have given due weight to the facts recited by them as the basis of their opinion that the writing and signature of the will and of the confidential letter were not the genuine writing of Mrs. Gaines.

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These experts were subjected to a very rigid cross-examination, under which it was ascertained that they had been mistaken in some of their elements or modes of comparison ; but it is nevertheless true that in the leading facts their testimony is correct as shown by the very thorough examination which we ourselves have made.

Besides the testimony of four experts, three of whom had been selected and appointed by the district judge, we find in the record the testimony of Mr. Christmas, of Mr. Wilder and of Mrs. Whitney, who have been familiar with the hand-writing of Mrs. Gaines for upwards of twenty years, and who fail to recognize her genuine writing in either of the instruments in question.

We were very much impressed with the testimony of Mrs. Whitney, the daughter-in-law of Mrs. Gaines, who, in the course of a rigorous cross-examination, was put to the test of verifying the signature of Mrs. Gaines, without the opportunity of seeing the writing to which the signature was attached, made but very few mistakes in testing more than sixty signatures.

As stated by the experts, the hand-writing in these two documents has a general resemblance, and bears a striking similarity to that of Mrs. Gaines. But, notwithstanding this remarkable imitation, the forgery can be safely detected by considering certain striking features and peculiarities in the genuine writing of Mrs. Gaines, which were not successfully imitated in the two documents.

All the experts agree that the two documents, the will of January 8 and the confidential letter, as well as the words "I, Myra Clark Gaines, sign the above most heartily, New Orleans, December 18th, 1884," and the signature thereto in the third document, were written by the same person.

Now, the most striking feature in the writing of Mrs. Gaines was the uniformity of her signature, in the imitation of which the forger signally failed in the three instruments.

A careful study of the documents containing the admitted signature of Mrs. Gaines, shows that she has two styles of forming the capital letter "G ;" one of which is to be found in all documents signed previous to the year 1880, or thereabout, and another form prevailing from that time on, even to her signature on the fourth of January, 1885, which we think is her last genuine signature ; and that neither of these forms is found in the three documents now under inspection, and it also appears that Mrs. Gaines has never made the capital letter "G" in the manner adopted in either of the documents in question.

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In the will, as well as in the confidential letter, the letter "a" in Myra, ends with a loop or flourish, a feature which is never found in the genuine signature, unless it be when Mrs. Gaines signs "Myra" alone in a post-script. In the genuine signatures of the deceased, the letter "k" in "*Clark*" invariably ends with a loop, resembling the letter "e" as though she intended to write "*Clarke*," it even appears that she thus turns the letter "k" whenever it ends any word such as "*clerk*" "*ask*," etc., and in the two signatures under examination, the absence of the loop in finishing the letter "k" in *Clark* is signally apparent.

In her letters, Mrs. Gaines had two peculiarities in writing the word "friend," one in the letter "f" and the other in the letter "d" the attempt in the spurious will to imitate her form of "f" is quite palpable, but is an awkward failure, and the same may be said of the letter "d" in the same word, which terminates with a graceful loop, when Mrs. Gaines almost always terminated in the letter "d" with a downward stroke, and never with a loop.

In not a single word in all of the documents before us which were written by Mrs. Gaines have we found a capital letter "J" even resembling in form or character, the well defined, well shaped and elegantly finished "J" in the words "*Jan. 8th*," etc., in the heading of the will of that date; the same may be remarked of the word "*August*" in the heading of the confidential letter.

In every letter which we have seen from the pen of Mrs. Gaines, the date thereof and the name of the place whence written, are placed on the extreme right edge of the paper, so close thereto, as to leave barely enough space to write the necessary words. In the confidential letter, the words "*Washington, D. C.*" are placed near the middle of the line, more to the left of the paper; and in the spurious will, the words "*New Orleans*" are located on the extreme left edge of the paper.

We might go on in this way and establish a difference between the characteristic features and peculiarities of every word in the forged will and the peculiarities in shaping the same words in the genuine hand-writing of Mrs. Gaines. But this would be work of supererogation, and would serve no useful purpose. It is sufficient to say that we have made that identical comparison with the result as above indicated.

Our solemn conviction is that the will propounded by Mrs. Evans, is not in the hand-writing of Mrs. Gaines, and that it is manifestly a forgery, and that therefore the judgment of the lower court is correct.

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It will be noticed from the tenor of this opinion, that the conclusion reached by us on the first point of our inquiry would, perhaps, have been of itself decisive of the whole controversy.

Under ordinary circumstances we might have been disposed to close the discussion at that point, but considering that the whole case was discussed by counsel in subdivisions which differed from those which we have adopted, and that all the points of investigation were very closely blended together, we have concluded to review the entire field of discussion, while we restricted our reasons to elucidate only the salient facts or features of the case.

Our study of the evidence has been exceedingly laborious and our comparison of hand-writings quite prolonged and very thorough; hence we leave the case with the absolute conviction that our painful task has been faithfully and conscientiously performed.

The judgment appealed from is therefore affirmed.

CONCURRING OPINION.

FENNER, J. I do not profess to be an expert in hand-writing, and the document propounded as the will of Mrs. Gaines is too skillful an imitation of her writing to enable me to pronounce from mere inspection and comparison that it is a forgery. Nor would the testimony of the experts serve, unaided, to convince me of the fact. I discern differences between specimens of Mrs. Gaines' writing and signatures admitted to be genuine, quite as marked as those signalized in the evidence of the experts and in the opinion of the court.

Still, the contradictory evidence on the subject of the apparent genuineness of the will is of a nature to leave the question in serious doubt on this point, and to justify and require a resort to other circumstances for the purpose of determining it.

For, after all, the *factum probandum* is that this instrument is the veritable will of Myra Clark Gaines, and however perfect the resemblance to her writing, yet if the other proof in the case is of a character to satisfy the judicial mind that she did not execute it, the probate of the will must be denied.

Now in this case, I discover the following circumstances, several of which are adverted to in the majority opinion, but which I prefer to recapitulate and group together, in order that their collective weight, as operating on my mind, may be appreciated.

1st. There exists no bond of blood or affinity between the beneficiaries under the will propounded and Mrs. Gaines, while she left direct descendants, who were the natural objects of her affection and who

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had done nothing to forfeit her bounty. It is difficult to conceive why she should divert from her grandchildren to these persons so large a share of her estate.

2d. The evidence leaves no doubt on my mind that the friendship which Mrs. Gaines had at one time felt for Mrs. Evans had suffered a great change during the latter years of her life. This appears from her letters and conversation, as well as from the greatly diminished intercourse between them. The change may have been wrought by the influence of others, but this does not negative its existence. Nor is it contradicted by the expressions of formal regard contained in contemporaneous letters to Mrs. Evans, written generally on business; and the nature of that business is itself a strong negation of the existence in the mind of Mrs. Gaines of any such benevolent sentiments towards Mrs. Evans as are evinced in the will. It related to hard and usurious bargains which Mrs. Gaines was then driving with Mrs. Evans under the convenient guise of a fictitious third person, repeating the trick of the usurer in Sheridan's immortal comedy, pretending to get the money loaned from another lender who was "an unconscionable dog." Her whole conduct in the premises displayed an eager desire to get the better of Mrs. Evans—certainly not natural towards one whom she contemplated as her intended legatee of so large a share of her estate.

In this connection I attach no weight to the curious documents produced and foreshadowing this will, because these and the will must stand or fall together as parts of one whole, all of which or none are genuine.

3d. The wills of January 4 and 5, four days preceding the date of the will propounded, though invalid for defects of form, were undoubtedly the free and genuine expression of the testamentary wishes of Mrs. Gaines, and are absolutely inconsistent with the existence in her mind at that time of any wish to make a disposition in favor of Mrs. Evans or her mother. Nothing occurred to the knowledge of any one having access to her, before or after the making of that will, indicating dissatisfaction with their dispositions, at least so far as her grandchildren were concerned, or any desire or intention to change it then.

4th. It is certainly a significant circumstance that Mrs. Gaines had made a conveyance of the Fuentes property, which was bequeathed to Mrs. Perkins in the pretended will, to Wilder, which was extant and unrevoked; and though it may have been a simulated title, Mrs. Perkins might have been unable to establish the simulation, and it is

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strange that in making such a bequest she should not have alluded to the condition of the title, or left some clue for the legatee.

5th. The mode in which the will came into the possession of Mrs. Evans, according to her own account, is mysterious and extraordinary. As she had had no access to Mrs. Gaines, the will must necessarily have reached her through some third person; and the person named by her absolutely denies any connection with it and contradicts the whole statement of Mrs. Evans.

I have duly considered the commentaries upon the character of this person's testimony and upon various significant circumstances which cast suspicion upon it. While they raise a doubt as to its entire truthfulness and a suspicion that she had had some connection with the paper and some kind of dealing with Mrs. Evans in relation to it, they do not convince me that she spoke falsely in denying that she ever received the paper from Mrs. Gaines.

At all events, the statement of Mrs. Evans as to the manner in which the paper came into her hands is entirely unsupported and is denied by the only witness who could have confirmed it.

6th. To cap the climax, the evidence places it beyond belief that Mrs. Gaines could have executed the will propounded on January 8. That evidence is stated with great force in the majority opinion and need not be repeated.

Conceding it to be possible that Mrs. Gaines, by a tremendous exertion of will power, might have written the words "January 8th, 1885" on that day, in the firm and shapely characters presented in this paper, yet it is manifest that, in order to do so, she must have either had assistance, or, at least, that the paper, the pen and the ink should have been at her hand. The evidence leaves it doubtful whether she was ever, for a moment, alone on that day. It is conclusive that no one assisted her to write any part of the document, and that she did not so write in the presence of any of her attendants; and that the pen, ink and paper were not together at her hand in such manner that she could have used them unassisted. Unless some dark perjury lurks in the testimony of her attendants, it is humanly impossible that Mrs. Gaines executed that will or any part of it on the 8th of January, 1885.

Taking all the foregoing circumstances together, my mind is unable to resist the conviction that the document propounded is not the will of Myra Clark Gaines.

The evident sincerity of proponent's counsel and the signal skill with which they have arranged the lights and shadows of their case, so as to throw its strong points into bold relief and to obscure its

Succession of Gaines.

weaknesses, have at times in the course of my investigation engendered doubts and staggered the firmness of my conviction; but when I revert to the overwhelming array of circumstances above detailed they leave my mind in no doubt that the strength of proponents' cause lies in the argument of counsel and not in the cold facts of the record.

I concur in the decree.

ON APPLICATION FOR REHEARING.

POCHÉ, J. The main object of appellant is to induce us to modify our decree from a final judgment to one of non-suit only.

The principal reliance is on the uncertainty of human testimony, especially in matters of handwritings. Such an argument might apply to all convictions of the human mind, based on extraneous proof, and to all human judgments.

But the issue presented by the pleadings was the genuineness of the will propounded by Mrs. Evans, and having reached the conclusion that the will was not genuine, we can find no logical middle-ground on which to rest a judgment of non-suit.

The evidence and the considerations which convinced us that the document propounded as the olographic will of Mrs. Gaines, was not genuine, in other words, that it was not in the hand-writing, either in the body or in the signature, of Mrs. Gaines, logically carries with them the conclusion that the pretended will was in the hand-writing of some other person, or, in other words, that it was a forged document.

There is no perceptible difference between the two propositions; the only distinction being that one proposition is couched in negative words, and the other in affirmative terms. Hence our decree, if it had been restricted to the declaration that the will was not genuine, and that therefore it could not be probated, would not in substance have differed from the judgment which refuses the probate because the will is a forgery.

To have said less would not have been consistent with the conclusions forced on our minds by the record, and would not have done justice to the force of the evidence which it was our duty to examine and to consider.

Our solemn conviction is that, not only has Mrs. Evans failed to show that the will which she propounds is in the hand-writing of Mrs. Gaines, but that the opponents have succeeded in demonstrating that the document is not in the hand-writing of the deceased.

The legal deduction from that fact is that the instrument is a forgery it therefore became our duty to so declare and to adjudicate ac-

Succession of Gaines.

cordingly. There must be an end to litigation, and when the evidence is sufficient to justify a final judgment, courts would be derelict to their duty in refusing to give it all the legal effect it is entitled to.

But we are charged with error in simply affirming the judgment of the lower court, on the ground that the judge committed a palpable error in adjudicating that the confidential letter of August 23, 1884, is likewise a forgery.

Our attention had not been previously drawn to that feature of the judgment, and on close examination of the pleadings, we think that such an adjudication is not indispensable to the ends of justice and strictly speaking, perhaps not covered by the issue as narrowed down by the pleadings.

But we understand the reason which led the judge into that slight error; it was superinduced by the following language in appellant's first petition. Referring to the will which was presented for probate, counsel said:

"That petitioner herewith presents said testament for probate; that she likewise produces another testament of decedent of anterior date," and the prayer of the petition is for probate of "said last will and testament," without reference to the dates of either of the wills.

The judge may therefore have had reasons to suppose that the genuineness of both wills was at issue.

But on close examination we find that Mrs. Evans did not ask for probate of a will of the confidential letter of August 23, 1884, and hence it is proper that it be not dealt with as a testament, or as an issue for adjudication.

What was said on the subject in our opinion is purely argumentative, and we had not then considered the fact that the district judge had treated the matter as an issue in the case. This is shown by our concluding language, which says: "Our solemn conviction is that the will propounded by Mrs. Evans is not in the handwriting of Mrs. Gaines." * * * Hence it is clear that our intention was not to declare any other document to be a forgery, in our decree. We therefore consider that those expressions in the judgment appealed from are mere surplusage.

But to remove all doubts on the subject, we shall amend the decree in that particular. But as the proposed amendment does not alter the practical result of the litigation as settled by the judgment appealed from, it is not of the nature of amendments which in law usually entail the costs of appeal on the appellee.

 Succession of Bright.

A second examination of the case has satisfied us that all the conclusions of law and on the evidence contained in our opinion are supported by the record, by sound reason and by authority.

It is therefore ordered that our former decree be amended so as to read as follows :

The judgment appealed from is therefore amended by striking out of it that portion which adjudicates that the confidential letter of August 23, 1884, purporting to have been made by the deceased, Myra Clark Gaines, as a last will and testament, be rejected as false, fraudulent and forged and not entitled to probate, and as thus amended said judgment be affirmed. Costs of appeal to be paid by appellant.

Rehearing refused.

No. 9540.

SUCCESSION OF MRS. LAURA E. BRIGHT.

38	141
46	337
46	921
38	141
114	389
38	141
120	40

A judicial sale made without an order of court, or in contravention of the terms of such an order where one exists, is an absolute nullity, and no resort to a direct order is necessary to have it declared.

And even where the nullity is relative only, if asserted by reconventional demand in the answer, and all the parties in interest with respect to the sale are before the court, such nullity may be determined and decreed.

A judgment or judicial order must be construed in connection with the averments and prayer of the petition therefor. And where the averments of a petition presented by the surviving partner of a community administering the succession of the deceased spouse, are to the effect that a sale of the community property is essential to pay the community debts, and the prayer of the petition is in conformity therewith, the order of sale rendered on such petition will be construed to require the sale of an immovable belonging to the community in its entirety and to confer no authority to sell only the undivided interest of the deceased therein; and a sale of such interest would be null.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lasarus, J.

H. L. Edwards and Geo. L. Bright for the Tutor, Appellant.

E. T. Merrick, Sr., A. H. Wilson and E. T. Merrick, Jr., contra.

The opinion of the Court was delivered by

TODD, J. Louis J. Bright, as natural tutor of his minor children, issue of his marriage with Laura E. Merrick, his deceased wife, filed an account of his administration of the succession of said deceased, and in liquidation of the community that existed between them resulting from their marriage.

Succession of Bright.

The account was opposed by the under tutor of the minors, and judgment was rendered sustaining the opposition in part; from which the tutor and accountant has appealed.

1. The sole complaint of the appellant before this Court relates to that part of the judgment appealed from, declaring the nullity of the sale of the community property, and rejecting the item representing the price at which it was adjudicated from the account.

This sale was made upon the application of the tutor. In this application he represented that, to pay the debts of the community, it was necessary to sell all the movable and immovable property belonging thereto, and described in the inventory, and the prayer of his petition was that the under tutor show cause why all the property movable and immovable of the community should not be sold.

The order of sale granted on this petition was to the effect "that the movable and immovable property belonging to the succession of Laura E. Bright, be sold at public auction."

Under this order the tutor caused to be sold one undivided half of certain community property—consisting of a lot and buildings in this city—described in the inventory of the succession, and appraised therein for \$5000, which he purchased himself for \$1670. With this sum he credited the community in his account.

The opponent objected to this sale and asked that its nullity be declared on the ground that the sale of the undivided half of this property was illegal, and unwarranted by the order under which it purports to have been made.

This order must be determined as to its scope and effect in connection with the petition to obtain the sale and the prayer thereof; and when we consider that the petition alleged that a sale of the community property was necessary to pay the community debts and the prayer was for the sale of the community property, and that this property was placed on the inventory of the succession, the conclusion is irresistible that the true purport and meaning of the order was to direct and require that this property be sold in its entirety.

The sale was for the purpose of paying the debts of the community, and there is no authority for selling either the separate property of the deceased or her separate interest in the common property for that purpose. Besides it is manifest that a sale of an undivided interest in such property as the property in question could only result in its sacrifice.

Moreover the tutor by asking that the entire property be sold for the purpose stated in his petition, gave his consent to the sale not only

Succession of Bright.

of the undivided interest of his deceased wife therein, but of his own half thereof; and in effecting the sale, he was entirely without warrant to depart from the plain intent and meaning of the order, as construed by his own acts and averments and the prayer of his petition. The sale, therefore, of the undivided interest was in contravention of the order and rendered the sale a nullity.

2. But it is contended by the counsel for the tutor, that this nullity could not be propounded in an opposition to the account, and could only be asserted in a direct action. If, as we have stated above, there was no order or judgment that justified the sale, then the nullity was absolute, and such nullity could be declared, though pleaded in an answer or an opposition and without resorting to a direct action.

Moreover the opposition in question, by its very terms, was an answer and a reconventional demand; and as the purchase had been made by the accountant himself, and all the parties in interest were before the court, the nullity, even if not absolute, could have been properly declared under the demand in reconvention, and the special prayer therefor contained in the opposition.

3. Finally, it is urged with much earnestness that the record shows that the succession of Mrs. Bright is wholly insolvent, and the community is greatly indebted, and that the minor heirs of the deceased are without interest in this opposition, and that, even if the property in question were sold again and brought its full appraisement, they would not be in the least benefited thereby, since it would not pay the community debts.

This may be so, but if so, it does not authorize this Court to decline considering the legal questions presented by the record.

There was no motion to dismiss the opposition for want of interest in the opponents; no objection to evidence in support of the opposition. Moreover, the proceedings for a liquidation of the community, and for the sale of its property and the settlement of the tutor's account were conducted contradictorily with the minors through their under tutor and were predicated on the existence of an interest in them in the succession and the property, the subject, the order and the sale, and were inaugurated by the tutor, and therefore we are compelled to determine the legal questions that have arisen in these proceedings, however this determination may affect the parties, or whether it affects them at all, and however much we may deplore useless and fruitless litigation, such as this is charged to be.

4. There is a motion made on the part of the appellee to amend the judgment, which we have attentively considered.

State vs. Brabson.

In the condition of the account as affected by the judgment, and in the absence therefrom of one of the most important items, representing the immovable property or the proceeds of its sale, it would be impracticable to make a complete or satisfactory adjustment of the accounts, and besides not being satisfied that the evidence in the record warrants the amendments or any of them asked for, we have deemed it best not to disturb the judgment appealed from, which, considering some of the reasons assigned for its rendition by the judge *a quo*, evidently contemplates another account after the sale of the property ordered thereby has been effected.

Judgment affirmed.

Rehearing refused.

No. 9640.

THE STATE OF LOUISIANA VS. BEN. E. BRABSON.

The State can appeal in criminal cases after verdict rendered and judgment has been arrested.

In an indictment for murder it is not essential that the name of the deceased should follow the word "murder." If it be in another part of the sentence so that it certainly appears to be the object of that verb, and there can be no doubt upon whom the crime is charged to have been committed, it is sufficient to answer the requirements of our statute.

If the prisoner is fully informed by the indictment for the murder of what person he is accused, so that if he had been acquitted he could plead *autrefois acquit* to another indictment for the murder of the same person, the indictment is good.

A PPEAL from the Twenty-seventh District Court, Parish of West Carroll. *Williams, J.*

M. J. Cunningham, Attorney General, for the State, Appellant

H. P. Wells for Defendant and Appellee.

The opinion of the Court was delivered by

MANNING, J. The defendant was indicted for murder, was convicted of manslaughter, and moved in arrest of judgment, which motion being sustained the State appealed.

The prisoner moves here to dismiss the appeal on two grounds:

1. That the State cannot appeal in criminal cases after verdict rendered.

We have recently held that the same reasons that entitle the State to an appeal when the indictment has been quashed and the prosecution has thus been prevented, apply when the prosecution has been

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successful and judgment thereon has been arrested. *State v. Robinson*, 37 Ann. 673.

2. "That there has been no final settlement of the case in the lower court, the accused being still held for trial for the same offence."

The object of the appeal is to make final the trial already had.

The motion is denied.

The ground of the motion in arrest is, "it is not charged in the indictment that the accused did make an assault, nor is it charged that the accused did feloniously and of his malice aforethought kill and murder John F. Webb."

The indictment charges that the prisoner "with force and arms in and upon the body of one John F. Webb, a person in the peace of the State, then and there being feloniously, willfully, and of his malice aforethought did kill and murder contrary, etc."

The objection appears to be that the name of Webb is not repeated after the word "murder."

By our statutes nothing more is required in an indictment for murder but to charge that the accused did feloniously, willfully and of his malice aforethought, kill and murder the deceased. Rev. Stats., sec. 1048. It is not sacramental that the name of the deceased shall follow the word "murder." If it be in another part of the sentence, so that it certainly appears to be the object of that verb, and there can be no doubt upon whom the crime is charged to have been committed, it is sufficient to answer the requirements of the statute. *Wharton Cr. Pl. and Pr. § 760.*

The prisoner is fully informed by this indictment for the murder of what person he is charged, and if he had been acquitted could have pleaded *autrefois acquit* to another indictment for the murder of the same man. *State v. Frances*, 36 Ann. 336; *State v. Simien*, Ibid, 923.

The motion in arrest was improperly sustained and the case must be remanded for sentence to be passed upon the prisoner for the crime of which he has been convicted.

It is therefore ordered and decreed that the ruling of the lower court sustaining the motion in arrest of judgment is avoided and reversed, and the case is remanded with directions to the judge below to pass sentence upon the prisoner according to law.

Trezevant vs. Sheriff et als.

No. 9656.

MRS. JULIA TREZEVANT AND HUSBAND VS. H. B. HOLMES, SHERIFF ET AL.

A wife enjoining the seizure and sale of movables seized under executory process against her husband as part of the mortgaged property, on the double ground that they belong to her and were not covered by the mortgage, because not attached to the mortgaged property, has no interest in the last question, because, if they do not belong to her, it is not her concern whether they were covered by the mortgage and were properly seized or not; and if they do belong to her, it is of no consequence whether they were attached to the property or not. The question of title is the only material issue.

Although we have held that the agency of the husband is not incompatible with the wife's separate administration, yet such agency must be clear and certain, and the administration must be distinctly conducted in her name and for her account.

Under the circumstances of this case, where the husband conducted, as one plantation, three adjoining places, one belonging to his wife and the others to himself, carried on the whole business in his own name, shipped the crops, obtained advances and supplies, and received credits on his own account, such administration is that of the husband and the fruits belong to the community.

Movables on such places, destined to the use of the whole property, purchased during the existence of the community and found in the husband's possession, are presumed to belong to the community.

These presumptions can only be rebutted by clear evidence establishing that they were purchased by the wife with paraphernal funds under her separate administration and control.

The evidence in this case fails to establish the wife's title, and as she has no authority to vindicate rights appertaining to the community, her claim is rejected.

A PPEAL from the Eighth District Court, Parish of Madison.
Delony, J.

A. L. Slack and E. C. Montgomery for Plaintiff and Appellee.

Stone & Murphy and W. S. Benedict for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. At the date of her marriage with Geo. T. Trezevant in 1871, Mrs. Julia Trezevant held, under an agreement of purchase afterwards perfected, a plantation in Madison parish. Subsequently her husband bought two tracts of lands, adjoining the wife's property, one on each side. From the date of said purchases, the three tracts were embodied and administered as one plantation under the control of the husband.

Since 1880, the commercial firm of Nugent & Lallande and, after its dissolution, John B. Lallande, had been the factors of the entire plantation, the business being conducted exclusively with the husband, in whose sole name the accounts were kept, upon whose credit the supplies and advances were furnished, who shipped all the crops in his own name and received credit for all proceeds of sale.

Trezevant vs. Sheriff et als.

The planting operation resulted disastrously and, in 1884, being indebted to Lallande in the sum of \$8700, Geo. T. Trezevant executed in his favor an act of mortgage upon the tracts of land belonging to himself.

In December, 1884, Lallande took out executory process under which the sheriff seized the mortgaged property and also twenty mules and one wagon claimed to be attached thereto.

Thereupon Mrs. Trezevant instituted the present injunction proceeding enjoining the sale of the mules and wagon on the ground that they are her separate paraphernal property and were not attached to the mortgaged property or covered by the mortgage, and praying for judgment perpetuating the injunction, decreeing her to be the owner of said mules and wagon, and awarding her damages against Lallande and the sheriff.

An attempt is made to raise a double issue, viz: 1st. That she is the owner; 2d. That, even if the husband was owner, yet the seizure was wrongful, because the mules and wagon were not attached to the mortgaged property.

The last question is irrelevant. If Mrs. Trezevant is the owner, it matters not whether they were attached to the property or not. If she is not the owner, they belong to the husband or to the community, and she has no authority to vindicate rights appertaining to either.

We have, therefore, nothing to decide but the question of title.

We have read and weighed the whole evidence with great care, and we are satisfied the wife's claim of title is not sustained.

The pretension that the wife retained the administration of her plantation and conducted the same through her husband, merely as her agent, is at variance with the law and with all the facts. It is true we have held that such agency is not incompatible with the wife's separate administration; but we were careful to emphasize the circumstances which should characterize such administration. Thus we said: "Mrs. Jackson administered the plantation in her own name, her husband acting as her agent by virtue of procurations which she was always careful to prepare and to deposit with her merchants, who are shown to have recognized her authority as principal in all transactions. The accounts with her successive merchants were always kept in her name; she was credited with all its revenues and charged with all its expenses. Her husband, who conducted other plantations for his own account, kept his own accounts with the same merchants entirely separate from the wife's plantation accounts." And we said: "So long as the acts of the spouses make it clear and certain that the

Trezevant vs. Sheriff et als

wife intends to reserve the administration to herself and the husband does not assume to interfere in the administration except as the express and open agent of the wife, we can see nothing to prevent the administration as being that of the wife, 'separately and alone' in the sense of the law." *Miller vs. Handy*, 33 Ann, 160.

With regard to the facts of this case, it suffices to say that they are marked by a conspicuous absence of every feature above indicated, and that to permit the wife to claim the benefit of separate administration under such circumstances would be to nullify the law and to enable the spouses to assign the fruits to the wife or to the community in their own option as their convenience might require. Hence, we are bound to hold that the plantation was under the administration of the husband and that the fruits thereof fell into the community.

Thus, every presumption of law is against the wife's ownership. The mules and wagon were purchased during the existence of the community, and the presumption is that they were community property.

They were in possession of the husband, who possessed and administered the plantation, and this gives rise to another presumption of community ownership. *Bostwick vs. Gasquet*, 11 La. 537.

They were destined to the use of the three plantations as a whole; but even were they considered as attached to the wife's plantation, (which we do not decide) that would not convert them into immovables by destination as part thereof, if they belonged to the community and were placed thereon by it. *Hall vs. Wyche*, 31 Ann. 734.

It does not clearly appear that the wife had paraphernal funds, or any funds not derived from the revenues of this plantation which belonged to the community.

So far as the origin of the price paid for the property is concerned is clearly traced, it is shown to have been paid by the husband out of funds under his own control, and most of it by drafts upon Lallande, which form part of the indebtedness for which the mortgage was taken.

The property was assessed as that of Trezevant and wife.

The husband represented to Lallande that he owned all the mules and movables on the places.

The mules were all branded with his initials.

The confused and contradictory evidence of the wife is totally insufficient to overcome all these powerful presumptions; and, indeed, upon the face of her own statements, taken as a whole, we should conclude that her claim of title was not sustained.

Police Jury vs. Hubbs, etc.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now ordered, adjudged and decreed that there be judgment rejecting plaintiff's demand and dissolving the injunction issued herein, reserving to defendant, John B. Lallande, his rights against the principal and surety on the injunction bond—plaintiff to pay costs in both costs.

No. 9659.

POLICE JURY OF EAST BATON ROUGE VS. WM. HUBBS, CLERK, ETC.

The Supreme Court has no jurisdiction over suit by mandamus to compel the clerk of a district court to give access to an employé of the police jury in his office for the purpose of transcribing mutilated archives, when the petition contains no moneyed demand, and the record fails to disclose any pecuniary interest exceeding \$2000 in any of the parties to the suit.

A PPEAL from the Seventeenth District Court for the Parish of East Baton Rouge. *Burgess, J.*

Beale & Buckner for Plaintiff and Appellant.

Robertson & Russell for Defendant and Appellee.

MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. This is a proceeding by mandamus to compel the defendant to give access to his office and its archives, to a person authorized by contract with the police jury to transcribe portions of the archives which are mutilated.

The only jurisdictional allegation in plaintiff's petition is that plaintiffs have an interest in the suit exceeding one hundred dollars; this may have been sufficient to give jurisdiction to the district court, but evidently not sufficient to vest jurisdiction in this tribunal.

We find nothing in the record sufficient even to justify a strained supposition of jurisdiction over the case in this Court, and we are at a loss to conceive by what process of reasoning appellants may have been led to bring their appeal to this tribunal.

The question is entirely covered by the decision in the case of *State ex rel. Police Jury of Livingston parish vs. F. W. Miscar, Sheriff et al.* 34 Ann. 834, in which we refused to entertain an appeal in a case involving the right of the police jury to compel the sheriff and the clerk

Hutchinson vs. Jamison et als.

of that parish to remove the archives of their respective offices from one place to another.

But it is useless to argue on a self-evident proposition.

The motion to dismiss based on our want of jurisdiction *ratione materiæ*, is eminently proper, and it must be sustained.

It is, therefore, ordered, that this appeal be dismissed at appellant's costs.

No. 9484.

THOS. HUTCHINSON, TUTOR, VS. MRS. ANN JAMISON ET ALS.

One who claims property by inheritance from his mother and at her death goes into possession of the same under an honest belief that he is the sole heir, a belief founded on the fact of his brother—the only other child of his mother—having joined the army in the war between the States, and not being heard from thereafter up to the death of the mother, an interval of many years, is a possessor in good faith. As such possessor, he can only be made liable for rents from judicial demand, if evicted, and the party evicting must pay him for improvements, to extent of the price of the materials and the workmanship, or the enhanced value of the soil, and if the latter is not proved, the measure of reimbursement must be controlled by proof of the former.

APPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

W. S. Benedict and J. Timony for Plaintiff and Appellant.

T. J. Semmes & Payne for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. The plaintiff, as tutor of his two minor children, owners of 13-96 of certain city property known as No. 200 Camp street, and 1-16 of other property known as No. 198 Camp street, of this city, seeks to effect a partition of the same by this suit, and also to recover their share of the revenues of the last mentioned property from the 1st of January, 1865.

The defendant, Mrs. Jamison, in her answer, asserts ownership of the entire property by inheritance and prescription; resists the demand for rent in any event, and reconvenes for the value of the improvements made by her on the property, 198 Camp street, as a possessor in good faith, should plaintiff's alleged interest in the property be recognized and its partition ordered.

The other defendants, the Blakeleys, answer by general denial, but otherwise make no defense.

There was judgment recognizing plaintiff's interest in the property as claimed, ordering its partition, decreeing the payment of rent from

38	150
552	243
38	150
1117	221

Hutchinson vs. Jamison et als.

judicial demand only, overruling the pleas of prescription, and allowing to the defendant, Mrs. Jamison, the value of her improvements on property 198 Camp street.

From this judgment the plaintiff has appealed. The defendant and appellee, Mrs. Jamison, acquiesces in the judgment as rendered, save as relates to the value of the improvements, which she seeks to increase by a motion to amend.

The only points of contention left for our determination relate solely to the matter of rent and the value of the improvements—all other issues being eliminated under the pleadings.

For a clear understanding of this controversy, it would be well to state that the minors-plaintiffs and the defendants are all the descendants of one Thomas Stackhouse, who died in 1848. He was twice married. The issue of his first marriage were two children, Margaret and Reynolds, and of his second marriage, three children. Of the latter, one died in infancy, leaving Ann (Mrs. Jamison) and Thomas Stackhouse, Jr., as the only issue of the second marriage.

Margaret, daughter of the first marriage, became the wife of John A. Turnell, and died leaving two daughters. One of these daughters married Thos. Hutchinson, and died subsequently. The issue of that marriage are the two minors, plaintiffs herein, represented by their father and tutor. The other daughter of Mrs. Turnell married one Blakeley, of which marriage the Blakeleys, co-defendants herein, are the issue.

The property, 200 Camp street, belonged to Thomas Stackhouse, Sr., at his death.

The property, 198 Camp street, was purchased by Rebecca Johnson, his surviving widow, after his death.

Mrs. Jamison, defendant, went into possession of this property at the death of her mother in 1864, claiming to be her sole heir.

After the death of Thomas Stackhouse, Sr., there was a settlement among his heirs, in which the entire property of his estate, which included 200 Camp street, purported to have been conveyed to his surviving widow, the mother of Mrs. Jamison. This property, Mrs. Jamison, on the death of her mother, claimed to inherit as her only heir.

All these facts are fully set forth in the case of Jamison vs. Smith, decided by this Court and reported in 35 Ann. p. 609, but are again recited for the elucidation of the present case.

In that case the title of the minors Hutchinson, the plaintiffs herein, to an interest in the property above mentioned as 200 Camp street,

Hutchinson vs. Jamison et als.

and sought to be partitioned in the present suit, was finally adjudicated. We held that Mrs. Jamison was not the *sole* owner of this property (200 Camp street) as she claimed to be, by virtue of the conveyance to her mother, Widow Stackhouse, in the settlement of 1849, and her (Mrs. Jamison's) inheritance from her mother, but that the said settlement was void as to the descendants of Margaret Stackhouse (Mrs. Turnell), for the reason that John A. Turnell, as tutor of his minor children, issue of his marriage with Margaret Stackhouse, was without authority to convey the interest of said minors in the property. Hence, that the title of the heirs of Margaret Stackhouse and of their descendants—among whom are the plaintiffs—was not divested by said settlement.

Neither did Mrs. Jamison inherit from her mother the entire property known as 198 Camp street, for we held in the same case that Thomas Stackhouse, Jr., her german brother, survived his mother; and he, therefore, inherited jointly with Mrs. Jamison this property, and at his death his interest in the same passed in part to the descendants of Margaret Stackhouse (Mrs. Turnell) his half sister.

This brings us at once to the question of the rents of this property, 198 Camp street, as claimed in the present suit—no claim being made by the plaintiffs to the rents of other property, No. 200 Camp street. This question of rent is dependent on the fact whether Mrs. Jamison was a possessor in good or bad faith. If in good faith, rent can only run from judicial demand. If in bad faith, from the death of Thomas Stackhouse, Jr., which is presumed to have occurred in 1865.

Mrs. Jamison went into possession of this property on the death of her mother in 1864. She claimed to be the owner of it by inheritance. She was an heir of the deceased and assumed, at the time, to be the sole heir. There were good reasons to induce an honest belief on her part that she was the only heir of her mother.

Her brother, Thomas Stackhouse, Jr., had been absent several years, had joined the army during the late war between the States, and had not been heard from for some time previous to his mother's death. There were just grounds for the conclusion that he had died before his mother, in which case Mrs. Jamison would in truth have been the sole heir.

In point of fact, Thomas Stackhouse, Jr., never returned to his home and has never been heard of since. This Court held in the case of Jamison vs. Smith, above referred to, that from these circumstances there was a legal presumption that Stackhouse, Jr., was dead, but that this presumption did not extend so far as to support the conclu-

sion that he died before his mother; and thus holding, the Court decided that Stackhouse survived his mother and inherited jointly with Mrs. Jamison her property. Plaintiffs, therefore, as the descendants of his half sister, Margaret Turnell, became vested at his death with an undivided interest in his estate with Mrs. Jamison.

This conclusion of the Court does not, however, place Mrs. Jamison in the attitude of a possessor in bad faith. As said before, there were sufficient reasons for an honest belief on her part that she was the sole owner of the property.

"Article 3451 declares that "the possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact."

Another article defines the possessor in good faith as one "who possesses as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant." C. C. 503.

This article is a reproduction of Article 550 of the Napoleon Code, and a text writer commenting on this article (550) says :

"Le titre translatif de propriété s'entend du titre héréditaire comme de tout autre titre." 6 Laurent, No. 208, Journal du Palais, 1848, p. 218.

And further: *"Peu importe d'ailleurs que le titre dont se prévaut le possesseur soit nul et que celui-ci ait pu facilement reconnaître cette nullité, si en fait il l'a ignorée."* Journal du Palais, 1863, p. 133.

We have no doubt that under these authorities Mrs. Jamison was a possessor in good faith, and was properly condemned to pay rent only from judicial demand.

As such possessor, Mrs. Jamison claimed and was allowed reimbursement for the improvements placed by her on this property to the extent proportioned to the interests of the plaintiffs therein, under Articles 508 and 3452 of the Civil Code.

This latter article substantially provides that the person evicted, if a possessor in good faith, must be reimbursed the value of the materials and the price of workmanship, or a sum equal to the enhanced value of the soil.

In the judgment of the lower court, the former, that is the value of the materials and the price of workmanship were allowed, as estimated by the judge *a quo*.

Of this the plaintiff complains, claiming that he had the option of paying the enhanced value of the soil resulting from the improvement.

This is true, but we have closely examined the evidence on this point and we do not find it sufficient to give anything like a clear idea

Crozier vs. Ragan.

touching the enhanced value of the property. In fact, only one witness testifies on this point, the one who did the brickwork in remodeling the old house, and he deposes only as to the value of his work and not to the comparative value of the entire building, before and after its reconstruction.

The value of the materials and workmanship was shown by a detailed bill, purporting to contain the charges and items of expenditure, made contemporaneously with the progress of the work. The lower court based its judgment on this point on the evidence afforded by this bill, and it was impossible to reach a satisfactory or reasonable conclusion with respect to the reimbursement in any other way.

The defendant and appellee, through a motion to amend, seeks to increase the judgment in her favor by a further allowance for improvements made subsequently to the rebuilding of the house.

We are not disposed to disturb the judgment in this particular. We think the amount allowed for improvements was liberal enough. Besides, there is some evidence in the record that detracts to some extent from the weight of that afforded by the bill of expenses referred to. The charges therein for workmanship does not altogether comport with the oral testimony of the persons called as witnesses, by whom some of the work was done; and we think that substantial justice has been done without allowing anything for these subsequent improvements as claimed.

For these reasons the judgment of the lower court is affirmed, with costs.

Rehearing refused.

No. 9623.

L. A. CROZIER vs. W. H. RAGAN.

The conveyance of property in the form of a sale does not vest the ownership in the apparent buyer if the deed was really intended by both parties to be a mortgage.

The answers of one of the parties to interrogatories on facts and articles propounded by the other, are equivalent to a counter-letter and have the same force and effect. They are unquestionably admissible in evidence.

A PPEAL from the Nineteenth District Court, Parish of Terrebonne.
Goode, J.

John B. Winder, L. F. Southon and T. Gibson for Plaintiff and Appellee.

John S. Billiu for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. On December 4, 1882, the plaintiff conveyed to the defendant certain property in the parishes of Lafourche and Terre-

38	154
46	343

38	154
50	1125

38	154
106	470

38	154
114	823

38	154
125	936

bonne. The conveyance was in the form of a sale, the consideration being \$9050, but the plaintiff alleges that it was really a mortgage, or as he called it in his petition, a pledge, and the object of his suit is to have it so adjudged. The prayer is "that the plaintiff be declared the owner of the property alleged to have been sold, that the act of sale of December 4, 1882, be declared not a sale but a mere pledge, and that he be quieted in the possession and ownership of the property."

Crozier remained in possession after the sale, managed it as he had done before, and exercised the same rights of proprietor after as before the sale. The plantation was run at his risk. The losses of its cultivation fell on him. He owed Ragan about six thousand dollars at the time of the conveyance. How much he owes now is not definitely shewn. Ragan says it is \$20,000.

Interrogatories on facts and articles were propounded to Ragan and in one of his answers he says: "The sale was made to secure me for the then existing debt and such future advances as I might make him." To another of the interrogatories he answered: "I may have declared to Oscar Crozier, agent of L. A. Crozier, that I held the title as security for such outlays and the original indebtedness and may have written him to that effect."

It is manifest that the conveyance was intended and understood by both parties to be a security for an existing and an anticipated indebtedness. The use of a form of sale to accomplish that object has not been infrequent, and in *Parmer v. Mangham*, 31 Ann. 348, where a number of decisions on such cases are grouped, it was held that such conveyance does not vest the ownership of the property in the creditor.

Strenuous opposition was made to the reception of any testimony other than a counter-letter to contradict or vary the act of sale. There was no counter-letter, but the answers of the defendant to the interrogatories on facts and articles have all the effect of a counter-letter. They are the contradiction of one of the parties to the act of sale of the recitals therein made and the confirmation by him of the truth of the allegations of the other party as to the real nature and character of the act, and are as much admissible in evidence as a counter-letter. *Newman v. Shelly*, 36 Ann. 100.

The judgment below was for the plaintiff. We understand that judgment to be in accordance with the prayer of the petition, merely declaratory of the real nature of the conveyance. It does not accord the plaintiff the ownership of the property freed of the debt he owes the defendant, if he does owe anything now. It merely declares that the conveyance was not a sale, but was a mortgage or pledge, and therefore if any part of the mortgage debt exists, the act secures its payment. And with this understanding and construction of the judgment,

It is affirmed.

 Wallis vs. Railroad and Steamship Company.

No. 9606.

 MORLEY H. WALLIS VS. MORGAN'S LOUISIANA AND TEXAS RAILROAD
AND STEAMSHIP COMPANY.

A servant who assumes the discharge of duties, the nature and mode of performance of which are fully known to him, voluntarily subjects himself to risks necessarily incident thereto, and unless such risks were increased by some other fault or negligence of the master, injury resulting therefrom will not be the subject of reparation by the master.

In the operation of coupling trains the relation between engineer and brakeman is that of fellow-servants and subject to the rule that the master is not liable for injury occasioned to one servant by the fault of another servant, in absence of proof of fault in the master in the employment or retention of the latter.

In this case the evidence fails to establish any fault or negligence for which defendant is responsible but shows that the injury resulted from the mischievous act of an unknown third person, for whose act the defendant was not responsible.

A PPEAL from the Nineteenth District Court, Parish of Terrebonne.
Goode, J.

L. F. Suthon for Plaintiff and Appellee :

1. In actions of damage for trespass, the Morgan's Louisiana and Texas Railroad Company is amenable to the jurisdiction of the Court where the trespass occurs. Act No. 37, Session Acts of 1877, page 37, section No. 12; 33 Ann. p. 955; 36 Ann. 186.
2. Where an employe is injured by a railway accident, and the act that caused the damage could have been prevented by the railroad company, it is liable for damages under positive provisions of the Civil Code. E. C. C., art. 176, 2320.
3. The conductor of a train, who has control of its movements and of the employes of the train, is the representative of the company and not an ordinary employe. Decision of S. C. of U. S. in Chicago, M. & St. P. R'y. Co. vs. Ross, reported in American Law Reg., February 1885; also in Chicago, L. N. & Albany L. J., 1885.
4. In the assessment of damages the verdict of the jury is entitled to great respect.

Leovy & Leovy for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The plaintiff claims damages for injury suffered by him incurred in the process of coupling cars while he was acting in the capacity of brakeman on defendant's road.

The issues will be much simplified by quoting that portion of plaintiff's petition relating to the accident, its causes, and the grounds on which defendant's liability is charged.

After reciting his employment as brakeman on that portion of defendant's road known as the "Houma Branch," the petition proceeds: "that the train runs over said road four times a day; * * that the main business of said branch road in the winter season is the transportation of sugar and molasses, which is loaded in cars left at the different plantations on the route, the empty cars being brought down from Terrebonne station by the last train for the day from said station

38	156
107	731
107	732

28	156
108	30

38	156
121	184

Wallis vs Railroad and Steamship Company.

and distributed on the route; that said empty cars are left in charge of the planters and laborers on plantations who load them over night, and they are taken up the next morning by the first train from Houma which conveys them as far as Terrebonne station, where they are transferred to the main line of said company.

That, at most of the plantations on the Houma branch, switches or side-tracks have been constructed, on which to leave the cars for the purpose of being loaded, but that at some of the plantations, there are no side-tracks and notably at what is known as the Isle de Cuba plantation, about two miles from Terrebonne station; that at said plantation the empty cars when needed are left in the evening by the train from Terrebonne station on the main line of said branch road and are taken up, when loaded, in the morning and coupled on ahead of the engine and are thus pushed up to Terrebonne station ahead of the train, a distance of about two miles.

Petitioner alleges that it was his duty as brakeman to stand on the flange of the cow-catcher of the engine and couple the cars to the engine; that on the morning of the 30th of November, 1883, at the Isle de Cuba plantation, there was a car loaded with sugar to be coupled ahead of the engine, and your petitioner was at the post of duty to make the coupling; that said car had its brakes off, they having been taken off during the night of November by some person unknown to petitioner, and said car was only held in position by a large stick of wood back of its wheels across the track; that, as the train approached the car, one of the laborers on the plantation removed the stick of wood, and the said car began moving down the track towards the train, there being a grade or incline at that point; that the train moved on towards the advancing car, the result being that, though petitioner stood at his post in the prudent discharge of his duty and made the coupling, the iron bar snapped in two like a brittle stick from the weight of the two meeting bodies, a collision took place and your petitioner was caught between the loaded car and the engine, and was injured as fully described in the petition. It then further proceeds: "Now your petitioner charges that the injuries received by him as aforesaid, are directly attributable and due to the fault and negligence of the defendant company: *First*, because they failed or neglected to construct a proper switch or side-track at said Isle de Cuba plantation on which to place the cars left to be loaded; and *secondly*, because it was gross and repeated negligence on the part of said company to leave cars on their main line in the hands of planters and ignorant plantation laborers, who know nothing about hand-

Wallis vs. Railroad and Steamship Company.

ling cars and especially so at a point where there is a grade or incline in the track as at the Isle de Cuba plantation as aforesaid.

Your petitioner further alleges that the injuries received by him as aforesaid were due, in addition to the causes above alleged, to the negligence, unskilfulness and unfitness of the engineer in the employ of said company and in charge of the engine at time of said accident; that said engineer, George Williams by name, is habitually careless and unskilful, and by reason of his defective vision and nervousness is altogether unfit for the duties imposed on him by his position. That the unfitness of said Williams as an engineer, was well known to the defendant company prior to the accident aforesaid or could have been found out by said company by the use of due care, so manifest was his said unfitness, and said company is responsible for all damages resulting from his incompetency. That, at the time of said accident, though he was signalled to reverse his engine in time to prevent the accident, he did not do so until it was too late to prevent the collision and nearly kill your petitioner.

Petitioner alleges that, for the causes above set forth, the defendant company is justly liable to him in the sum of \$25,000 damages for the excruciating pains inflicted upon him, etc.

From a verdict and judgment for \$12,500 in favor of plaintiff, this appeal is taken.

The foregoing extensive extracts from the well-drawn petition in this case should serve to abbreviate, rather than to lengthen, our opinion, since it places the whole case of plaintiff in full view.

It will be observed that the grounds of fault or negligence on which the alleged liability of defendant is based are distinctly set forth and are as follows:

1st. Failure to construct a switch or side-track at the Isle de Cuba plantation on which to place cars left there to be loaded.

We fail to perceive any fault in this. The "Houma Branch" was a short road built for local accommodation with a single track, on which only one train ran which passed back and forth.

The only difference between leaving cars to be loaded on a switch and leaving them on the main track, was that, in the former case, they could be coupled to the rear of the train while, in the latter, they were coupled to the engine in front and pushed to their destination.

The latter mode of coupling and moving cars for short distances is shown to be frequent and common on railroads, when circumstances require it, and the proof establishes that, so far as the mere operation

of coupling is concerned, which is the only matter here involved, it is rather less, than more, dangerous than the ordinary mode of coupling in the rear.

Moreover, the petition specifically alleges that such was defendant's customary mode of operation at this particular plantation, and defines his own habitual duties in connection therewith. Having assumed and continued in the discharge of said duties, with full knowledge of their nature, he voluntarily subjected himself to the risk necessarily incident thereto, and unless that risk was increased by some other fault or negligence of the master, the law will not allow him to hold the latter responsible therefor. *Satterlee vs. Morgan Co.* 35 Ann. 1166; *Rover on Railroads*, p. 1198; *Pierce on Railroads*, p. 379, 380; *Wood on Master and Servant*, p. 698, and numerous authorities cited in above treatises.

2d. The next fault charged consists in leaving cars on their main line, to be loaded, in the hands of planters and laborers, especially at a point where there is an incline in the track as at Iale de Cuba plantation. But the petition had already alleged that such was defendant's habitual mode of conducting its business at sundry plantations and especially at this particular one, to plaintiff's full knowledge, and the principle and authorities just cited apply equally here.

Nor do we perceive the existence on any fault or negligence in the above conduct. A car on a railroad track with no engine attached is not like a wild and dangerous animal, but is ordinarily as innocent and incapable of harm as any inanimate object. Nor was there anything in the incline, about which so much is said, to suggest the necessity of any particular care. The incline was only 156 feet in length; the fall in that distance was but six or eight inches; and a heavily loaded car started down it, if its running gear were in the best possible condition, would only attain at the bottom a maximum speed of three and one-half miles per hour, not greater than that of a man walking rapidly.

The existence of such inclines is not ordinarily attended with danger, and they are so common and often necessary in railroad construction that this cannot be attributed to the company as negligence *per se* or as a fault in the construction of the road.

The leaving of a car, with brakes down, on such an incline, was, under all ordinary circumstances, perfectly safe and no reasonable prudence or foresight could have anticipated any injury likely to result therefrom.

We must therefore acquit defendant of any negligence on this score.

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3d. It is next charged that the injury was caused by the habitual carelessness and unskillfulness of the engineer and by his unfitness resulting from defective vision and nervousness, all of which defects were known to the defendant or, with the use of due care, should have been known.

The evidence wholly fails to sustain this charge. On the contrary it establishes, for the engineer, the highest reputation, earned by long service, for skill, competency, carefulness and firmness in the discharge of the duties of his profession. It is true he was affected to a slight extent, with *strabismus*, commonly known as squint-eye, but the medical testimony shows that it did not exist in a degree to interfere appreciably with his power of sight, and it is otherwise proved that he possessed normal acuteness, correctness and range of vision.

4th. It is finally urged that the accident resulted from the negligence of the engineer who, "though signalled to reverse his engine, in time to prevent the accident, did not do so until it was too late."

If this were true, it would not avail plaintiff. We had occasion very recently to say: "in the particular operation of coupling trains, doubtless the relation between engineer and brakeman have all the features of fellow-service, and if the engineer's negligence were the sole cause of the injury, the overwhelming weight of authority would exempt the company from liability." *Towns vs. R. R. Co.* 37 Ann. 632.

The general principle that the master is not liable for injury occasioned to a servant by the negligence of a fellow-servant, in absence of proof or fault or negligence in the employment or retention of the latter, may now be considered as firmly settled in Louisiana. *Hubgh vs. Carrollton*, 6 Ann. 495; *Satterlee vs. Morgan*, 35 Ann. 1166; *Poirier vs. Carroll*, id. 699; *Towns vs. R. R. Co.*, 37 Ann. 632.

We must add, however, that the charge of negligence against the engineer is not sustained by the proof. The allegation that he failed to reverse his engine when signalled, is contradicted by plaintiff's own evidence, which admits that he reversed as soon as plaintiff signalled him to do so, but says it was then too late and that it should have been done sooner. Why plaintiff did not signal sooner is not explained. But the engineer's testimony shows that he had reversed the engine before any signal was given and as soon as the danger was apparent, but the distance was so short that the only effect was to bring the train to a standstill, without causing it to retire from the approaching car. The result was that what is called the "slack" was taken out of the train; all the cars being jammed together, and thus opposed as a solid dead-weight, which increased the violence of the collision and caused the

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breaking of the coupling bar, which is shown to have been, in every respect, of proper size and quality.

We believe the engineer did everything that was possible under the circumstances.

The true cause of the accident was that, as the train was moving up prudently and properly to make the coupling with the stationary car, some person unknown removed the stick of wood which chocked the wheels of the latter, which started it down the incline at a time when it was too late for the train to avoid the collision. The identity of this person is not established. One witness says it was a white, another that it was a colored, man. He may have been a mere mischief-maker. At all events, there is no pretence that he was an employee of the company, or that the latter is in any way responsible for his wanton act.

We feel great sympathy with plaintiff because he was injured in the discharge of his duty, and especially on account of the courage with which he kept his post in the presence of impending danger. The suggestion that this was to be imputed to him as contributory negligence would find no favor at our hands.

But we are bound to hold that this record establishes no fault on the part of the defendant company which obliges it to repair the damage which plaintiff has suffered. We will not say that different principles might not have applied had the person injured been a passenger.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now decreed that there be judgment in favor of defendant rejecting plaintiff's demand at the latter's cost in both courts.

Rehearing refused.

No. 9641.

MRS. CELIA WILLIAMS VS. DENNIS McMANUS.

In an action in damages for slander, the only possible defenses are : either a *denial*, or a *justification*, or a confession, under mitigating circumstances. There is no such thing in law as a half-way justification. An answer which sets forth all these defenses equivocates and is inconsistent.

Drunkenness is not a defense to such an action, though it may perhaps be a matter in mitigation.

Neither is apology, unless accepted, to operate a release from responsibility.

Whatever be the provocation under which one acts, who utters abusive and defamatory epithets, it cannot be imputed to the party injured, who did not participate or is not connected with it.

38	161
44	938
38	181
47	254
38	161
52	1374
38	161
104	505
104	507
38	161
109	703
38	161
111	336
38	161
118	1005
38	161
123	52

Williams vs. McManus.

The unauthorized use of opprobrious epithets which reflect upon and bring into contempt and disrepute the honor of a female of good social standing, implies malice, as slanderous *per se*, and suffices to maintain an action in damages without proving special damage.

Although injuries to the feelings, and to one's social position, be not susceptible of precise adjustment, still they are recognized as a legitimate ground for the recovery of reasonable indemnity, under the exceptional features of each case.

Where excessive damages are allowed, they may be reduced on appeal.

A PPEAL from the Twelfth District Court, Parish of Rapides.
Blackman, J.

M. and Jno. C. Ryan for Plaintiff and Appellee.

R. J. Rowman for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant appeals from a judgment, based on the verdict of a jury, sentencing him to pay to the plaintiff \$2,500 damages, for slandering her.

The charge is that the defendant publicly denounced the plaintiff, on the streets of Alexandria, in the hearing of a number of witnesses, as a *damned whore*, her daughters as *damned sluts*, and her sons as *bastards*; that these epithets were repeated at least half a dozen times; that they are false, wilful, malicious and slanderous; that they were uttered without cause, and have injured the good name and character of plaintiff.

The defendant, after a general denial, answered that, if he used any such epithets, he has no recollection of it; that at the time he was so intoxicated as to be utterly unconscious of anything he said or did; that, when informed of the charge, he offered an apology which was declined; that he was not actuated by malice; that, if he uttered the epithets, they were the mere ravings of one too intoxicated or insane to know what he was doing.

The defendant specially denies that the plaintiff or her daughters were or could be defamed by the said insane ravings and that, so far as their fair name is concerned, no one is more ready to admit, or to sustain it, than himself.

In an action of this character, the only possible defenses are: either a denial, or a justification, or a confession, under mitigating circumstances. R. S. 3640; 14 Ann. 406; 15 Ann. 166; 36 Ann. 469.

The answer includes them all. It equivocates, and is utterly inconsistent. 10 Ann. 231; 28 Ann. 238.

There is no such thing in law as a *half-way* justification. Townshend on Libel and Slander, § 212 and note (2d ed.).

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The defendant has not at all undertaken to justify his conduct. He pleads exoneration from liability, because at the time of the occurrence he was beastly drunk, saying that he was not moved by malice, that as soon as he recovered his senses and was informed of his ravings he sent a letter of apology, and that he acknowledges the respectability of the plaintiff and her family, which could not be and was not injured by his defamatory language.

Subterfuges of that description cannot avail him.

The evidence establishes conclusively the facts charged, which may even be considered as admitted by the tergiversating answer.

Drunkenness is not a defense to an action of slander, though it may perhaps be a matter of mitigation. Townshend on Libel and Slander, § 249; Odgers on Libel and Slander, p. 169 (n.); 5 Ill. (4 Scam.) 30; 25 Iowa, 87.

Apology implies a fault, whatever merits it may have; it surely does not release from liability, unless where accepted with that intent, otherwise it would place in the power of one to do injury and then discharge himself by an apology. Townshend, § 250; 27 Ann. 219.

In the present instance the amend proposed was a mere letter to plaintiff, which did not even offer to recant or make retraction before the persons in whose presence the offense was perpetrated.

The evidence shows that on the night of defendant's marriage a crowd went to his house and commenced a *charivari*, blowing horns and beating tin pans, and that the defendant, who had become drunk and furious, came out pistol in hand commencing firing or trying to, and calling the plaintiff, her daughters and sons the villainous names already stated.

However lawless the crowd and great the provocation offered defendant may have been, surely the plaintiff, who was not present and who is not shown to have had anything to do with the disturbance, cannot be imputed with any fault, the less so, as her good character and social standing are well established.

The use of the opprobrious epithets employed implies malice, where these are slanderous *per se*. It suffices to maintain an action to recover damages without proving special injury. N. S. Dig., 1st series, vol. 12, p. 488, No. 67; 14 L. 198; 12 Ann. 894; 23 Ann. 280; 36 Ann. 469.

Every person has a right to enjoy that degree of respect, good will and social or business distinction to which his own acts and his social or business habits entitle him, and any one who unlawfully interferes

Payne vs. Railroad and Steamship Company.

with this right by circulating slanderous reports renders himself liable for consequent damages. Folkard's Starkie on Libel and Slander, p. 99, n. § 2.

The plaintiff necessarily must have been and certainly was intensely mortified in her feelings, though she suffered no actual damages assessable in dollars and cents.

It is true that injuries to the feelings and to one's social standing are not susceptible of precise adjustment, but such injuries are recognized as a legitimate ground of action for reasonable indemnity. 17 Ann. 64; 19 Ann. 322; 23 Ann. 280. *Vox semel emissa, non revertit.*

The acknowledgment which defendant makes of plaintiff's respectability, in his answer, is sheer justice, but it cannot be invoked successfully in complete vindication of plaintiff's reputation or in full atonement for the injury inflicted. Defendant must be held to further reparation.

Considering that the defamatory language used was uttered on one occasion only, on which it is easy to conceive that defendant could quickly inflate into a passion; that the occurrence took place in the night time, before a crowd not large; that the actor was in great ebullition and not in the full control of himself; that he is a laborer of general good demeanor and of limited means,—we think that the jury did not make a proper and commensurate allowance and went beyond the limits to be observed in such cases.

It is therefore ordered and decreed that the judgment appealed from and the verdict whereon it rests, be amended by striking therefrom the words "*two thousand*," so that the verdict and judgment be for *five hundred* (\$500) only, and that thus amended the same be affirmed, the plaintiff to pay the costs of appeal, the defendant those of the lower court.

No. 9524.

HENRY M. PAYNE VS. MORGAN'S LOUISIANA AND TEXAS RAILROAD
AND STEAMSHIP COMPANY.

An amended petition which purports to supply omissions in general allegations contained in the original petition, and to correct clerical errors in other allegations, and which concludes with a prayer for the same amount of money, based on the same cause of action, does not alter the substance of the demand, and is therefore admissible.

Touching the corresponding rights and duties of railroad companies in constructing their works, the rule of law requires that a railroad company, in enforcing its right of way over the lands of others and in constructing its road, should leave the adjoining lands and

38	164
43	1574
38	164
51	673

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fields which it crosses, in the same condition as regards the facilities of cultivation and as concerns the utility of those lands to their owners as they were before the entry of the company.

Hence a railroad company which constructs an embankment on the lands of a planter, and thereby stops up his ditches and other artificial drains, is responsible to such owner for all losses of crops and other damages occasioned by such interruption of his drainage.

A PPEAL from the Civil District Court for the Parish of Orleans,
Houston, J.

Henry C. Miller and Branch K. Miller for Plaintiff and Appellee.

H. J. & G. J. Leovy, J. P. Blair and E. B. Kruttschnitt for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff's demand is for the sum of \$12,800 as damages for the loss of a crop of sugar cane and stubble, and for amount of labor used thereon, occasioned by the act of the defendant, while constructing its railroad bed across his plantation, in doing which the company stopped the ditches and other drains necessary to the proper cultivation of his aforesaid crop, which had been put in the ground in the fall of 1881, for harvest during the following season.

The defense is a general denial, and this appeal is taken by the company from a judgment of \$6020 in favor of plaintiff.

A preliminary question grows out of a supplemental or amended petition filed by plaintiff with leave of court.

In his original petition plaintiff, basing his main cause of action on the alleged illegal act of the defendant in interrupting his drainage, had subdivided his demand in three elements of damages, loss of a crop of sugar and molasses for the year 1882, loss of stubble cane for the years 1883 and 1884, and loss of labor expenses necessary to plant eighty acres of land in sugar cane, for all of which he claimed the aggregate sum of \$12,800.

In that petition, as he alleged subsequently, he had erred in the statement of the value of the lost crop, and of the value of the stubble cane—and in omitting to specify the amount expended for labor on the same.

The purport of his amended petition was to supply the omission and to correct the errors, the prayer being for the identical sum of \$12,800 on the identical cause of action.

The objection that the supplemental petition alters the substance of the demand, and the plea of prescription of one year in bar of items not included in the original petition, have therefore the appearance of

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being strained and very far sought; hence they fall under their own weight. The supplemental petition merely amplified the allegations contained in the original petition, but it added no new cause of action; hence it was properly received. C. P. 419.

Defendant's contention seems to be that an amended petition is admissible only in so far as it amends nothing.

A proper investigation of the case presents two questions:

1st. Whether the defendant is legally responsible for the loss of plaintiff's crop.

2d. If so, what is the amount of the loss to be accounted for?

1. The record is very voluminous and the testimony is conflicting, but after a careful analysis of the same, we find the following facts to be established by the record:

The Barbreck plantation involved herein is situated on both sides of Bayou Bœuf in the parish of St. Landry, and the crop in discussion had been planted on that part of the plantation which lies on the east bank of the bayou. The fall of the land there is from the bayou towards the low lands or swamp in an eastern direction. Hence the drainage of that part of the plantation was operated by means of a large number of ditches of various sizes, some twenty-six in number, beginning near the bayou, and ending mostly in the low lands on the eastern limit of the plantation.

There was in addition a large canal, which begun in the northern limit of that field, and crossing it diagonally, emptied into the Bayou Bœuf, at a bend formed by that stream in the southern extremity of that part of the place. The defendant's road bed crosses the plantation from south to north, almost parallel with the bayou, and intersects the twenty-six ditches referred to at right angles or nearly so. It crosses the main ditch known as the "Graveyard canal," in a diagonal line.

In throwing up the embankment, which is several feet above the level of the soil, the contractors of the defendant company closed up nineteen of the plantation ditches, and in leaving openings for the eight others, thus placed defective and insufficient culverts or boxes, in consequence of which the waters accumulating from frequent and heavy rains in the ensuing winter, being thus without draining facilities, stagnated on the planted lands between the bayou and the embankment, rotted and destroyed the cane therein planted.

It is shown to our entire satisfaction that the land had been carefully and skilfully prepared for planting purposes; that the seed cane used was good and sound, and that the planting had been skilfully done,

neither too shallow nor too deep; that the soil was fertile and had heretofore always produced good crops, and that under ordinary circumstances, plaintiff would have realized a handsome crop from that field.

The drainage of the plantation had been intelligently conceived and thoroughly executed, and presents as complete a system of drainage as could be found any where in the State. Previous to the construction of the defendant's embankment, the crops cultivated in that field had never lingered or suffered from the action of rain water, which had always been regularly and safely carried off by means of the efficient drainage which we have described.

Throughout the summer and during the fall and winter of 1881, while the embankment was being constructed, and after its completion, plaintiff in person and through his agents made numerous protests against the invasion of his private rights by the wanton stoppage of his drains, but he could obtain no redress, and a suit in damages was his only alternative.

The crop planted in that field was an entire failure, only five or six acres of scattered cane grew up in the field, representing little or no value to the despoiled planter. And in the face of such a showing the defendant resorts to the very aggressive argument that plaintiff was not a careful or skillful planter; that his cane had been planted too deep, and that his drainage, which was hitherto deficient, had been substantially improved by the company's system. That system involves the proposition that more water will pass, and will run more rapidly through eight ditches or canals than through twenty-seven, and that an opening of five feet is sufficient to freely pass the water which fills a canal fifteen feet wide and seven feet deep.

The argument might be considered sarcastic if it had the slightest reason either in fact or in experience for its support. But it can make no impression on the judicial mind, which must trace proven effects to rational causes.

No argument can be invoked to show that a railroad company, in entering the lands of another for the purpose of building its road-bed, can legally alter the system of drainage adopted by the owner, or dictate to the latter the mode of cultivation which he must follow.

Under our jurisprudence, which has been in accord with the adjudications of the Supreme Courts of the leading States of the Union, the corresponding rights and duties of railroad companies, in making the works necessary for the construction of their roads on lands legally expropriated therefor, are clearly defined.

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"The rule of law requires of a railroad company, in enforcing its right of way over the lands of others and in constructing its road, to leave the adjoining lands and fields which it crosses in the same condition as regards the facilities of cultivation and as concerns the utility of those lands to their owners, as they were before the entry of the company." *Bourdier & Bellieinn vs. Morgan's R. R. Co.*, 35 Ann. 947; *V., S. & Pacific R. R. Co. vs. Dillard*, 35 Ann. 1045; *Railway Company vs. Murrell*, 36 Ann. 346.

This plain rule which finds its sanction in common sense as well as in justice, and which imports the reasonable exercise of all rights of property, was not heeded by the defendant company, which left plaintiff's field practically stripped of its indispensable drainage, thus destroying its utility for cultivation to the owner.

We are not now concerned with the works and other improvements subsequently made by the railroad company on plaintiff's lands as regards his drainage. Defendant's responsibility must be tested under the condition, as shown by the evidence, in which it left plaintiff's lands in the summer of 1881, and in which the field remained throughout the ensuing winter, at least to the middle of January.

Our conclusion is that he lost his eighty acres of cane through the stoppage of his draining canals and ditches by the contractors and other agents of the defendant company, and that for such losses the corporation is plainly, justly and legally responsible.

2. The evidence is equally conflicting on the question of the amount of losses sustained by plaintiff in consequence of the destruction of his crop.

But, in comparing the crop realized by Payne on other portions of his plantation, not similarly affected by the railroad embankment, with the testimony of numerous experts as to the probable yield of the eighty acres of cane, we have become satisfied that the amount allowed by the district judge is not excessive but, if anything, under the amount which could have been legally allowed.

From the preponderance of the testimony, we are satisfied that the area of the field under discussion, is eighty acres, and not seventy-four and a fraction as contended for by the defendant. We must be guided by the testimony of the owner, of his overseer and other employees, and of other parties who are familiar with the ground, and who swear that eighty acres of cane had been planted therein.

The weight of evidence shows that the expenses for labor in preparing the lands and planting the cane, were reasonably worth \$10 an acre which makes up \$800.

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From the record it appears that the year 1882 was unusually fertile in cane—and hence the testimony satisfies us that a profit of \$40 per acre was a very reasonable expectation for plaintiff out of the eighty acres of cane in question, which makes up the sum of \$3,200 on that score; we are also satisfied that, for the lost value of the first year stubble, the sum of \$2,400 would be a very reasonable allowance, as it is the lowest estimate of the same by the experts; and it appears that these three amounts are in excess in the aggregate of the amount allowed in the judgment of the lower court.

We are not informed by the district judge of the nature of the details which make up the amount which he allowed; the aggregate of ours would be slightly in excess of his; but no motion was made for an increase, hence we have no authority to disturb his finding.

Judgment affirmed.

Mr. Justice Fenner recuses himself on the ground of affinity.

No. 9562.

THE STATE OF LOUISIANA VS. F. S. HAHN, *alias* F. HAHN, *alias* MEYER.

Where the name forged to an instrument is, or is supposed to be, fictitious, and not the name of any real person, and inquiry is to be made of the residence or existence of such person, it is proper to call the police officers or other persons well acquainted with the place where this person is supposed to live, or is said to live, in order to show whether he does live there. And even if inquiries have been made in the place by a stranger, his testimony as to the fact of inquiry and the result of it is admissible, though it may not be satisfactory proof of the non-existence of the person in question.

If the forged name be that of a fictitious instead of a real person, the offense of forgery is complete if the instrument has the appearance of being valid on its face.

By our statute the trial judge is expressly forbidden to give the jury in a criminal case any opinion as to what facts have been proved or disproved.

Where the forgery is of a fictitious name, it would be error to charge the jury that there must be some evidence of similitude to the signature of a real person, because when there is no original there can be no similitude.

It is not necessary to prove that an accused forged an instrument in order to constitute the crime of uttering or publishing a forged instrument. The two offenses are distinct.

To constitute the crime of uttering a forged instrument, it is not essential that a fraud has been actually perpetrated by it. It is sufficient that there is the intent to defraud, and this intent may be inferentially proved.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee:

1. Where the prisoner was acquitted of the charge of forgery, it is unnecessary to determine whether evidence to establish his connection with the forgery was improperly

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- admitted. The remedial interposition of courts in granting new trials is wholly for the benefit of parties, and not to compel the good conduct of judges. 3 Gra. & Wat. on N. T. 717; 2 Caines, 85; 3 Gilm. 202; 2 Tenn. R. 5; 9 Cowan, 680; 1 Scam. 18; 1 Gilm. 475; 2 Ib. 185; 11 Conn. 342; Greenl. R. 442; 4 Day, 42; 10 Ga. 429; 1 Brev. 109; 7 Wend. 79; 1 Neo. & Man. 598; 4 B. Monroe, 386; 24 Vt. 252.
2. On a trial for uttering and publishing a forged check, evidence is admissible (to show the *scienter*) that another check passed by defendant was a forgery. 1 Greenl. on Ev. § 111; Ros. Cr. Ev. (6 Am. ed.) pp. 88, 89, 90, 91; Whart. Cr. Ev. §§ 39, 40, 42; Whart. Cr. Law, § 1733 (8 ed.); Taylor on Evidence, § 322.
 3. It was competent to prove that "J. L. Miller" was a fictitious person by establishing that no person of the name kept an account or had funds or credit in the bank upon which the check was drawn. 3 Greenl. § 109; 5 C. & P. 118; 49 Ala. 16. The City Directory, when offered in evidence, would permit it to be established whether in it appeared the name of "J. L. Muller." When inquiries are made as to the existence of any supposed party to a forged instrument, it is usual to call police officers or other persons well acquainted with the place and its inhabitants, and if inquiries have been made in the place by a stranger, his testimony as to the fact and its results is admissible to the jury. 3 Greenl. on Ev. § 109.
 4. The expression of any opinion by the district judge, as to what facts were proved or disproved, is expressly prohibited. R. S. sec. 991; 11 Ann. 395, 535; 12 Ann. 195; 10 Ann. 271, 799; 15 Ann. 498; 22 Ann. 43; 30 Ann. 49.
 5. Where the forged writing is not of a nature to be familiar to the public, or to the particular individual to be defrauded, the rule of similitude cannot prevail. If a fictitious name be forged, there can be no similitude, since there was no original. 2 Bish. Cr. Law § 593.
 6. To constitute the offense of uttering, it is in no case requisite to show that the defendant had been implicated in the forgery. R. S. sec. 833; 1 Whart. Cr. Law (8th ed.), § 712.
 7. Where the appellate court has jurisdiction over questions of fact, it will not grant a new trial: (1) unless the whole of the evidence is shown in the record; (2) unless there be a great preponderance of evidence against the verdict. 3 Gra. & Wat. N. T. 1230, 1213, *et seq.*
- At common law, the trial court alone has authority to grant new trials. In most of the States, however, provision is made for a revision by the appellate court, where the evidence is either heard *anew verbatim*, or that heard at the trial is brought up as taken down by the stenographer, or as contained in the trial court notes and those of the counsel on both sides. Whart. Cr. Pl. and Pr. § 897.
- In this State, the jurisdiction of the Supreme Court is restricted to questions of law only. Const. Art. —. And an unmixed question of fact is an insuperable objection to the exercise of that jurisdiction. 4 Ann. 438; 6 Ann. 311, 593, 651; 7 Ann. 47, 122, 531; 8 Ann. 114; 10 Ann. 501; 14 Ann. 79, 673, 785; 26 Ann. 383; 20 Ann. 236; 23 Ann. 149; 22 Ann. 9; 35 Ann. 254.
8. The uttering of a forged instrument, the forgery of which is *only a forgery at common law*, is an offense even in England, although no fraud was actually perpetrated. It is only requisite that there should be an intent to defraud, which is to be inferentially proved. 1 Whart. Cr. Law (8th ed.), § 705.
 9. Although the person whose instrument the forgery purports to be is a mere fictitious person, yet, if the instrument appear valid upon its face, the offense is complete. 2 Bish. Cr. Law, § 543; 1 Whart. Cr. Law, § 660; 3 Greenl. on Ev. §§ 103, 109.

Defendant and Appellant *in propria persona*.

State vs. Hahn.

The opinion of the Court was delivered by

MANNING, J. The defendant was prosecuted on an information containing two counts: 1st, for forgery; 2d, for publishing as true a forged order for the payment of money, and upon conviction on the second count was sentenced to imprisonment at hard labor for five years. He has appealed, and relies upon eight bills of exception for reversal.

The instrument charged to have been forged or published is as follows:

No. 302.

NEW ORLEANS, February 18, 1885.

Germania National Bank—Pay to the order of F. Hahn, twenty-five dollars.

\$25 00.

J. L. MULLER.

Endorsed—F. HAHN.

1st. The prosecutor offered in evidence an affidavit signed by the prisoner and made by him *in forma pauperis* in the earlier stage of the proceedings, in order to show that the signer of the affidavit was also the signer of the forged cheque. He also offered in evidence another cheque on the same bank, payable to bearer, and signed Rudolph Schaad, upon which the prisoner had obtained money from one Williams.

The affidavit was objected to because it "was a part of the record of the court and required no proof," and the Schaad check was objected to as "irrelevant, immaterial and inadmissible."

As the prisoner was acquitted of the charge of forgery, and the evidence offered had for its object to sustain that charge, the objections need not be considered.

2d. Experts in handwriting were examined to prove that the blanks of the Muller and Schaad cheques for date, amount, etc., were filled by the same person who wrote the signature to the affidavit *in forma pauperis*, and the same objection of irrelevancy, etc., was made, and the same disposition is made of it as of the first bill. The conviction is not of forgery.

3d and 4th. Portions of the City Directory were offered to show that no such person as J. L. Muller is mentioned therein, and was objected to on the ground of irrelevancy, and further because Muller had not been represented to be a resident of New Orleans. Two detectives were also offered to prove that they could not find that Muller was or had been here.

The prosecutor's belief was that Muller was a fictitious person. The cashier of the Germania Bank testified that no person of that name kept an account there. This was *prima facie* proof that Muller was not

a real person until the prisoner should produce him or give other proof of his existence. 3 Greenleaf Ev. § 111. The court, in permitting the introduction of the Directory, warned the jury that it could show no more than that Muller's name was not in it; and Greenleaf says where inquiries are to be made in regard to the residence or existence of any supposed party to a forged instrument, it is proper and usual to call the police officers, penny postman, or other persons well acquainted with the place and its inhabitants, but if inquiries have been made in the place by a stranger, his testimony as to the fact and its results is admissible to the jury though it may not be satisfactory proof of the non-existence of the person in question. Ibid, § 109.

We do not perceive the importance of establishing that Muller was a fictitious instead of a real person, since, if the former, the offense is complete when the instrument has the appearance of validity on its face. 3 Greenl Ev. §§ 103, 109; 1 Whart. Cr. Law, § 660; 2 Bishop Cr. Law, § 543. But we are reviewing the bills as we find them.

5th. This bill is to the charge of the judge and is that the court erred in not charging the jury, when requested by the defendant, that there was no resemblance or imitation of the handwriting of J. L. Muller proved by the prosecution, and without some proof of that fact there was no forgery.

The trial judge is expressly prohibited from giving the jury any opinion as to what facts have been proved or disproved, and he was but mindful of this prohibition in withholding such charge.

6th. Another objection to the charge is that the court erred in failing to charge the jury that there must be some evidence which should show that the cheque purporting to have been signed by Muller had been so altered, made or forged by the defendant as to deceive by its resemblance, that there was no such evidence and therefore no forgery.

Again we observe the court could not say anything about the facts or the proof of them, but the legal principle asked to be charged is not correct. Where the forgery is of a fictitious name, there can be no similitude because there is no original, and therefore the rule of similitude cannot obtain where the forged instrument is of that kind. 2 Bish. Cr. Law, § 593.

7th. It is complained that the court erred in not charging the jury that the only evidence of forgery, if any, is the evidence of the experts, and by that evidence either the defendant forged the cheque or no one did, and should they find that the defendant did not forge it they must find a verdict for the defendant on both counts.

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The simple answer to this is, that to constitute the offense of uttering a forged instrument it is not necessary to prove that the defendant had forged it. 1 Whart. Cr. Law, § 712.

8th. This bill merely recites that the court denied the prisoner's motion for a new trial based on the usual allegation that the verdict was contrary to the law and the evidence.

It is beyond our province to say whether the evidence was sufficient to justify a conviction. The trial judge refused to disturb the verdict, and we find no errors of law in his rulings. The contention that the uttering of a forged instrument is no offense unless some fraud has been actually perpetrated by it, which in an earlier edition of Dr. Wharton's book was said to be the case of instruments, the forgery of which is only a forgery at common law, has been silenced by the withdrawal of that dictum in a later edition, where it is said that principle seems no longer to be the law, the intent to defraud being sufficient, and this intent may be inferentially proved. 1 Whart. Cr. Law, § 705, 8th ed.

Judgment affirmed.

No. 9690.

FUSZ & BACKNER vs. TRAGER & NOBLE.

A suit upon an account by a commercial firm of Missouri against a commercial firm of this State and the members thereof *in solido*, presents a single controversy, which is removable to the U. S. Courts by parties on either side; but all the parties on the same side must concur in the application, and one defendant cannot remove in opposition to the wish of his co-defendants. In this case one partner of defendant firm claimed, while the other opposed, the removal, and the application was properly denied.

In a second application the defendant Trager alleged that there was a separate controversy between himself on the one side and his co-defendant and plaintiffs on the other, and asked a removal on that ground. We find no such controversy presented on the record, and the judge did not err in refusing the removal.

A PPEAL from the Ninth District Court, Parish of Concordia.
Young, J.

Steele & Garrett and Elam & Luce for Plaintiffs and Appellees.

Dagg & Mason and Jas. G. Leach contra.

The opinion of the Court was delivered by

FENNER, J. The only question presented for our determination in this case is the correctness of certain orders of the judge refusing applications for removal to the United States Court.

Fusz & Backner vs. Trager & Noble.

The suit was brought by plaintiffs, a commercial firm of St. Louis, against the defendants, a commercial firm of this State, and was accompanied by an attachment of property.

There were two appearances in the name of the defendant firm, one by an attorney employed by Trager, the other by an attorney employed by Noble.

Trager's attorney filed an application in the name of the firm for a removal. Noble's attorney filed an opposition to the removal.

The judge refused the application. Thereupon, Trager filed a new application for removal in his own name, alleging that "there was a controversy between the plaintiffs and defendants, and also a separable controversy between your petitioner on one side and the defendant Noble and the plaintiffs on the other, all of which can be fully determined between said parties in this suit." This application was also refused.

The both applications were made under the second section of the Act of March 3, 1875.

That section contemplates two cases of removal, viz: one where there is a single controversy between citizens of different States; the other where there are separate controversies, one of which is between citizens of different States.

The first application was made under the first provision, and the construction of it is well settled that, to entitle to a removal, all the parties on one side or the other must join in the application. Removal Causes, 100 U. S. p. 457; Desty's Removal of Causes, p. 117, § 10 j.; Peeler's Law and Eq. in U. S. Courts, p. 164, note 310.

One defendant in a single common controversy cannot remove in opposition to the wishes of his co-defendants. Noble had equal rights and interests with Trager in the defense of the single controversy, and as he opposed the removal, the judge rightly refused the application.

The second application was based on the second clause and on the claim that there was a separate controversy between himself on the one side and his co-defendant Noble and plaintiffs on the other.

It is sufficient to say that we search the record in vain to find any such controversy. It is true that we find a petition in the record filed by Trager, in which he asserted individual ownership of certain of the property attached, but it raised no issue and prayed for no relief. And, moreover, at the time when it was filed, Trager had already asked and obtained, in the name of Trager & Noble, an order releasing the whole of the property attached on bond, and had actually released the attachment on a bond executed in the name of the firm

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and conditioned, according to law, to pay whatever judgment may be rendered against the firm.

It is clear the separate controversy alleged did not exist, and there was no error in the judge's refusal to grant the removal.

Judgment affirmed.

No. 9682.

P. W. HOLLIDAY ET AL. VS. ZULMA HOLLIDAY ET AL.

A partition by sale of promissory notes belonging to a succession under administration, will not be ordered in the absence of proof to show that such a mode of partition is the only convenient one under the circumstances, and when it appears that such a sale could injure some of the heirs who are minors.

The most convenient and the speediest mode of affecting a partition among the heirs of a succession under administration, of past due promissory notes, is to require the succession representative to enforce the collection of the same, and to divide the proceeds among the heirs according to their respective shares.

A PPEAL from the Twenty-third District Court, Parish of Iberville.
Talbot, J.

David N. Barrow for Plaintiffs and Appellants.

A. Talbot, *contra*.

The opinion of the Court was delivered by

POCHÉ, J. This is an action for partition among the heirs of a succession, the principal assets of which consist of cash and of six promissory notes, all past due but one, and all in the hands of the testamentary executor.

Plaintiffs suggest a partition by sale of the notes; one of the defendants wants the partition in kind, the other defendants, among whom are minors, make default, save one of the tutors who desire a partition according to strict law.

P. W. Holliday, one of the plaintiffs, is the debtor for the largest amount, and his two notes are past due.

The judgment ordered the partition in kind, with the collation of P. W. Holliday's indebtedness *pro tanto*.

Plaintiffs have appealed, and their contention is that promissory notes, being indivisible without the consent of the debtors, they are not susceptible of a partition in kind, and that owing to the inequalities of the shares, a partition could not be conveniently made in that mode. But the record contains no evidence on the subject, and we find no steps taken for the appointment of experts to examine into and report on the alleged inconvenience of a partition in kind.

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On the other hand, the only defendant who advocates that mode of partition alleges the willingness of certain of the heirs, who are also debtors, to accept certain specified notes in full satisfaction of their respective balances, but she has failed to introduce any evidence on that subject, or in the case at all. It therefore appears that the record is exceedingly unsatisfactory and that neither of the litigants has made reasonable efforts to enlighten the court on the true issues of the cause.

But taking a common sense and a practical view of the question, we are not disposed to coincide with the views of either of the contesting parties or of the district judge.

Conceding that the fundamental rule, which must control the discussion, is that no one is compelled to hold property in common with another, we are inclined to the opinion that the speediest as well as the safest and most equitable way of dividing past due promissory notes among the heirs of a succession which is under administration in the hands of an executor, is by converting them into money by collection. We had no suggestion from any of the parties that the collection of those notes, four of which are secured by mortgage, would be met by any serious opposition or entail very heavy expense, hence a collection is certainly the speediest plan.

Even if it should appear that some of the notes are bad or not easily collected, we fail to see how they could be improved, either by a sale or by a partition in kind.

Every consideration suggested to our minds leads to the conclusion that the condition of the succession, and above all, the interest of the minors, could be best improved or promoted by a settlement in due course of administration than by either of the modes suggested by the contesting parties now before the court.

It is very plain to our minds that the only party to be benefited by a sale of these notes would be the largest debtor, who is one of the heirs, P. W. Holliday, one of whose notes is not secured by mortgage and would doubtless be sold at a sacrifice, to his great advantage, and to the detriment of his co-heirs, principally the minors.

It is the duty of the courts in dealing with questions of partition to prevent just such a contingency.

The course which we have concluded to adopt is in keeping with the views taken of a similar condition of things by our immediate predecessors in the case of *Rochereau vs. Maignan*, 32 Ann. 47.

In that case the Court refused to countenance a partition by sale of a judgment belonging to a succession, on account of the inevitable

losses to result therefrom to some of the heirs, and of the unequal advantage to be derived therefrom by the party who was provoking that kind of partition, although the judgment was then on appeal, and a collection of the same would necessarily be delayed. The Court then held that equity dictated and our laws sanctioned such a course, in order to equally protect the interests of all parties concerned.

As the only unmatured note owned by the succession in this case will be due and exigible but a short time after this judgment becomes final, the inconvenience of delay will herein be avoided, and the rights of all the heirs in the premises will soon be legally and fairly adjusted in due course of administration.

It is therefore ordered that the judgment appealed from be annulled, avoided and reversed, and that plaintiffs' demand be rejected at their costs in the lower court, as in case of non-suit, and at the costs of appellees on appeal.

DISSENTING OPINION.

FENNER, J. The only authority cited in support of the opinion herein is *Rochereau vs. Maignan*, 32 Ann. 47, which held that where several heirs of a succession under administration were owners in indivision of a judgment, partition by sale of the judgment will not be ordered on the application of one co-owner, when opposed by the others, when no effort has been made to execute the judgment, and when the sale would enure to the benefit of one and to the detriment of the other co-owners.

I consider the authority entirely inapplicable to the instant case, where the estate held in indivision is composed of several mortgage notes not reduced to judgment, and of cash, and where the pleadings present no opposition to a partition, but merely a contest as to whether it should be made in kind or by sale.

I think the decree abrades the absolute right of co-owners to terminate indivision, expressly guaranteed by Art. 1289 of the Civil Code, and disposes of the case upon an issue not raised by the pleadings.

We should content ourselves with determining the only issue presented in the pleadings of the parties and passed on in the court below, viz: whether the partition should be made in kind or by sale.

For these reasons I dissent.

State ex rel. Davidson vs. Judge.

No. 9629.

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THE STATE EX REL. A. M. DAVIDSON VS. THE JUDGE OF THE TENTH JUDICIAL DISTRICT ET ALS.

In applications for the writ of prohibition against inferior courts, we must necessarily act on the state of facts existing at the time of the application. If the particular grievance complained of no longer exists, there is no longer any need of the relief sought.

An application for a prohibition to an inferior judge, based on an alleged usurpation of jurisdiction, in that the suit or a former or similar suit had been transferred from the same judge to the United States Court and was still pending there, must be denied if it appear that the transferred suit has been dismissed from the United States Court prior to the application for the prohibition.

APPLICATION for Prohibition.

Egan, Pierson & Egan and J. D. Roach for the Relator:

The removal under the Acts of Congress of a suit *via ordinaria*, by the non-resident defendant into the United States Circuit Court for final determination, divests the State Court of all jurisdiction over the cause of action embraced in such suit. The State Court is thereafter without jurisdiction, under Act, 3d March, 1875, of Congress to proceed any further in the suit, and is hence without jurisdiction after such removal of the ordinary action to grant a decree for a writ of seizure and sale on the same cause of action between the parties, while the ordinary action is pending in the United States Circuit Court into which it had been removed. *Steamship Co. vs. Lugwell*, 106 U. S. 122; *Kern vs. Hindekoper*, 103 U. S. 491; *St. Paul and Chicago R. R. Co. vs. McLean*, 108 U. S. 216; *Davis vs. South Carolina*, 107 U. S. 597; *Railroad Co. vs. Mississippi*, 102 U. S. 135; 19 Wall. 222; 16 Pet. 97; 15 How. 198 and 22 Wall. 250.

The writ of prohibition is the proper remedy to relieve the defendant against the improper proceedings under the writ of seizure and sale after such removal. *Clark, Assignee vs. Rozenda*, 5 Rob. 29; 32 Ann. 534; 34 Ann. 877, 761.

L. B. Watkins for the Respondent:

1. The writ of prohibition issues to courts of inferior or judges who exceed their jurisdiction, only when it is manifestly injurious to rights of relator. C. P. 845, 846, 834.
2. When the allegations of plaintiff's petition and answer of respondents disclose a *prima facie* case of jurisdiction, this Court will not perpetuate the writ. 20 Ann. 239, 252, 311; High, p. 566. sec. 780.
3. Antecedent to the adoption of the Constitution of 1879, the writ of prohibition would not go in unappealable cases. 4 R. 48; 12 Ann. 513; 11 Ann. 187; 2 Ann. 236; 11 Ann. 696; 8 Ann. 92; 2 La. 86; 19 La. 183; 21 Ann. 123, *State ex rel. D'Meza vs. Judge*, 29 Ann. 360; *State ex rel. Cummings vs. Judge*; High. p. 572, No. 788; 10 R. 169; 2 La. 236.
4. Article 90 of the Constitution gives this Court "control and general supervision over all inferior Courts," whereby the power of this court, in the issuance and maintenance of the writ of prohibition, is not restricted to cases coming within the appellate jurisdiction.

But to authorize the maintenance of the writ of prohibition there, must "be a plain usurpation of authority, or an arbitrary exercise of power, on the part of such tribunal, and the injury must be actual, or immediately impending." 33 Ann. 925; 32 Ann. 1186.

5. It is not in all cases in which a court may have no jurisdiction that a prohibition can issue. It is not a writ of right. 19 La. 167, 174; 27 Ann. 336; 29 Ann. 360; 32 Ann. 1188.

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It is an extraordinary one which can only issue when the court having no jurisdiction clearly usurps jurisdiction. C. P. 846; 4 Ann. 11; 16 Ann. 186; 32 Ann. 549, 1182; 14 Ann. 7, 504; 2 Ann. 236; 27 Ann. 158; 20 Ann. 240.

It then issues only after a fruitless attempt in the lower court for relief. 10 R. 169; 10 Ann. 552; 29 Ann. 806; and then only in the sound discretion of the court having appellate or supervisory jurisdiction. 19 La. 174; 4 R. 48; 11 Ann. 196; 12 Ann. 513; 14 Ann. 504; 20 Ann. 240; 27 Ann. 158; High, p. 558, sec. 773.

6. Article 90 of the Constitution has received an interpretation in the following cases: 32 Ann. 553; 32 Ann. 549; 36 Ann. 711, 578.

The use of their supervisory power will be regulated by the discretion of the court, and will be most carefully administered, and only exercised in cases when there has been a flagrant usurpation of authority, or when serious injury may accrue to parties to whom no other remedies are apparent, or when the intermediate courts are powerless to give relief.

7. Relator's theory is that the judge *a quo* usurped jurisdiction the United States Circuit Court had acquired by virtue of the transfer under Act of Congress of March 3, 1875. Of the judgments of that court, this tribunal has no appellate jurisdiction.

Those courts are not powerless to give relator relief, because—according to his theory—both respondents and himself are subject to that jurisdiction.

Relator could have certainly filed an exception of *lis pendens* in that court. If necessary that court could have issued to the interfering State court a writ of *certiorari*, and had the executory proceedings brought up for inspection and comparison.

But relator's object is delay. He has no defense. The exception of *lis pendens* is an exception, and must be pleaded before default. Hen. Dig. p. 1168, No. 1; 15 Ann. 79.

8. When two suits are pending between the same parties, for the same cause of action, before different courts of concurrent jurisdiction, the declinatory exception of *lis pendens* will lie. C. P. 335, 94.

In such case the judgment first rendered is valid, and proceedings in the other cause will be stayed. 37 Ann. 409; C. P. 94.

The opinion of the Court was delivered by

MANNING, J. The relator seeks to obtain a prohibition against the judge of the district court for Red River parish, proceeding further in a suit pending before him, wherein John Chaffe & Sons are plaintiffs and the relator is the defendant, and the Chaffes are made co-respondents.

They had sued Davidson in the district court for Red River on November 21, 1885, upon a lost promissory note for \$4000, and several years' accumulated interest, and had attached his plantation and its rents and revenues, Davidson being a non-resident. Service of process was made on a curator *ad hoc*, and judgment by default was entered on December 2, following. The plaintiffs were about to confirm the default on the fifth, or to call the cause for trial when counsel appeared for Davidson, and moved to set the default aside and also moved a continuance, and without demanding or waiting for the action of the court on either motion prayed a transfer of the cause to the United States Court for Western Louisiana, and having filed a bond the order of transfer was made and no further proceedings were had.

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Davidson made no haste to obtain a transcript of the record but Chaffe & Sons did, and they filed it in the United States Court at Shreveport, and immediately filed their motion to dismiss their suit and paid all the costs.

It seems that the note meanwhile has been found for on December 9. Chaffe & Sons obtained from Judge Hall an order of seizure and sale of the plantation to pay this note and interest, and the sheriff advertised the sale shortly thereafter. Up to this time the United States Judge had not entered the formal judgment of dismissal in his court. This was not done until January 16, 1886.

Four days afterwards the relator applied to this Court for the writ of prohibition and it was issued provisionally with an order to shew cause, etc.

The respondent judge answers that when the petition for an order of seizure and sale, with accompanying documents was presented to him on December 9, there were also exhibited a certified transcript of the case filed in the United States Court with the motion of the plaintiffs to dismiss the same as of non-suit, and receipts for the payment of all costs in both courts, and although the judgment of dismissal had not then been rendered, he considered the plaintiffs had a right to the order for which they were then applying and he granted the executory process.

The relator bases his right to the writ on the assumption that the suit of the Chaffes against him is still pending in the United States Court. The writ is issued when inferior courts are usurping or exceeding their jurisdiction, Code Prac. Arts. 845-6, and it is because of this alleged usurpation by the State court of a jurisdiction then vested in the United States Court that the relator claims our interposition to check it. But the fact is that the United States Court had already divested itself of jurisdiction by dismissing the case when the relator applied for the writ. There was, therefore, then no conflict of jurisdiction nor usurpation of jurisdiction, nor any question of jurisdiction of any kind. Admitting all that the relator claims for the effect of a transfer in completely depriving the State court of jurisdiction and transferring it to the United States Court whenever the pre-requisites for removal have been complied with, the patent and salient fact confronts him and us that when he complained of the State court's usurpation of jurisdiction, the United States Court had ceased to have or claim it, but on the contrary had formally dismissed the case from its docket.

Necessarily we must act on the condition or state of facts existing when he seeks relief. However much he may ignore the dismissal of

Succession of Powell.

the suit by the United States Court on January 16, we must take cognizance of it; and when, on the 20th, he applies for a writ to which he would not be entitled unless the suit were still pending in the United States Court, we must recognize that it is no longer pending, since the certified copy of the judgment of dismissal by the United States Court is laid before us.

Possibly the relator did not know that a judgment of dismissal had been formally entered, but his argument is that the jurisdiction of the State judge must be determined by the state of facts existing on December 9, when he granted the order of seizure and sale, and since at that time the jurisdiction of the State court of the ordinary suit had been divested by the removal, and no order of dismissal had been made by the United States Court, the State court was incompetent to make any order or take any proceeding touching the subject-matter of the suit.

The answer of the respondents to that is that the judge neither then nor since has made any order in or assumed jurisdiction in any manner of the transferred suit, and that his grant of the order of seizure and sale was in a totally different proceeding and in an independent suit.

We are not required just now to say anything respecting these pretensions. The validity or rightfulness of the order of seizure and sale is not now before us. Whether the judge could legally grant it at that time is a matter we are not now concerned with. The particular matter in hand now is to ascertain and determine whether the relator had just and legal right to a writ prohibiting the inferior judge from proceeding in a certain cause on January 20, 1886, because a suit the same or similar to the one he had acted or was acting in had been transferred to the United States Court and was then pending therein, and we find that no suit was then pending there touching the subject-matter of the one he was acting in, and consequently there was then no usurpation of jurisdiction, and therefore

The writ is denied.

No. 9649.

SUCCESSION OF E. S. POWELL.—W. H. AND S. B. VAN BIBBER VS. H. S. BOSLEY, ADMINISTRATOR.

After a succession has been fully administered, all its debts paid, and nothing remains in the administration except the property, the purposes of the administration are fully accomplished, and the heirs, all and singly, have an absolute right to require it to be terminated and to be put into possession of the estate.

Succession of Powell.

The wishes of some of the co-heirs for a continuance of the administration cannot control or destroy the legal right of the others to terminate it to enter into possession of their own.

A PPEAL from the Tenth District Court, Parish of Red River.
Hall, J.

Egan & Pierson for Plaintiffs and Appellees:

1. The debts of the succession being all paid and the *residuum* ascertained, the heir may appear and demand the succession from the administrator. C. P. 1000.
 2. This demand of the heir shall be pronounced upon in a summary manner by the judge. C. P. 1002.
 3. The cases which are to be decided in a summary manner shall not be set down on the docket of the suit, but are decided on a day fixed for the purpose and in a speedy manner. C. P. 756.
 4. If the judge finds from the testimony that the petitioners are entitled to the succession, he shall put them in possession of it and shall direct an account within a reasonable time, to be fixed by him. C. P. 1003.
 5. Heirs of age can own property and enjoy their inheritance in common with their minor co-heirs. It is only when they are unwilling any longer, thus, to own property and enjoy the same that they must sue for and obtain a petition either in kind or by sale. Succession of Baumgarden, 36 Ann. 50.
 6. After the heirs of age are recognized, there being no further necessity for administration, and the law having accepted the succession under benefit of inventory for the minor, the succession will have been wound up and the executor under the obligation of rendering an account to the heir of age and to the tutor of the minor. *Ibid*.
 7. In point of fact, the function of the executor ceased when the debts were paid and the special legacies discharged. Succession of Geddes, 36 Ann. 965.
- The legal function of the executor having terminated, and all the purposes of his appointment having been accomplished, nothing more was left for them to do but to surrender the property to the joint owners, leaving them to make all necessary settlements among themselves. *Ibid*.

L. B. Watkins for Defendants and Appellants:

1. Plaintiffs rule defendant administrator to show cause why the heirs should not be put in possession of the property of the estate, and his administration be terminated.
- Defendant for answer denies that one of the beneficiary heirs of age, and representing one fourth interest in the successions, has ever claimed possession; and alleges that she now demands a continuance of the administration until a final partition can be effected, in pursuance of plaintiff's partition suit on file.
- He further assigns that he, as tutor for the minor heirs of Mary B. Powell, his deceased wife, and who are *ex necessaria legis* beneficiary heirs of W. A. and E. S. Powell, deceased, objects to holding the property in common with the plaintiffs, and demands that the partition be made before the succession is terminated.
- He further assigns in answer that W. P. Scarborough has transferred his eighth interest to Payne, Kennedy & Co., and that neither the transferees or Mrs. Reid, an heir to another eighth interest, have ever demanded possession.
- Finally, that two heirs, representing two-eighths interest in a succession, cannot terminate a succession and compel the heirs to the remaining three-fourths thereof to accept of and hold the property in common.
- In such a case a partition is necessary and must be first made.

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2. From a judgment terminating the succession and sending the heirs into possession, the defendant administrator procured an order of suspensive appeal, and therein he was joined by the heirs opposing, who adopted the administrator's answer as their own, and likewise appealed suspensively.

They had this right. C. P. 580, 565, 571; 4 La 567, Hook vs. Richardson.

The cases cited by and relied upon by plaintiffs' counsel were not in point. 32 Ann. 889; 33 Ann. 1321. *Per contra*. 34 Ann. 24; 23 Ann. 369.

3. Whether the defendant administrator has or not an appealable interest, the tutor for the minors and beneficiary heirs and the major beneficiary heirs may appeal. C. P. 671, 1000, 1002, 1003; R. C. C. 1192.

The heirs are not harmonious; they are divided in opinions as to their interest.

4. The plaintiffs abandoned the judgment in their behalf, by afterwards contesting the defendant's bond as administrator and testing the solvency of his securities. That can only be done inside of the succession. R. S. 3688; 28 Ann. 801; R. C. C. 3043.

5. When some of the heirs are majors, accepting unconditionally, and some are minors, necessarily beneficiary, and when there are no debts, these heirs cannot, by agreement, enter into possession and terminate the existence of an estate, when one of the majors demands an administration. 30 Ann. 388, Blake vs. Kearney; R. C. C. 1047, 1048, 1049; 36 Ann. 414, Picon vs. Duason; 2 R. 24, Self vs. Morris.

6. Minors are beneficiary heirs, though they be at the same time representative heirs. In the instant case, the mother of the minors died before she went into possession of her inheritance, though she died subsequently to her ancestors, W. A. and E. S. Powell.

The mother, as an heir of W. A. and E. S. Powell, at her death, transmitted her interest in their successions to her own heirs, with the right and faculty of accepting or renouncing said successions, although she had not herself accepted same. R. C. C. 944, 894; 23 Ann. 291; R. C. C. 1030.

The opinion of the Court was delivered by

FENNER, J. The succession of E. S. Powell was opened in 1871, when H. S. Bosley was duly appointed and qualified as administrator thereof, since which time he has had charge of the succession. All of the debts have been paid long since, and there remains now in his hands the free and unencumbered property of the succession, consisting of real estate and cash on hand.

There are five major and two minor heirs, the latter inheriting by representation of their deceased mother, who was the wife of the administrator, and being under the tutorship of the administrator himself. Such being the situation of affairs, two of the major heirs, desiring to put an end to the administration and to enter into possession of their share of the property, have proceeded summarily against the administrator by rule to show cause why he should not be discharged from the administration and why the heirs should not be put in possession.

The administrator opposed this demand and is joined in this opposition by himself as tutor of the minor heirs and also by one of the major heirs, who object to holding or taking possession of the property in common with the plaintiffs. The remaining heirs have not appeared.

Succession of Pqwell.

The contention is that part of the heirs cannot require the administration to be terminated and the estate to be turned over to the heirs in opposition to the wish of their co-heirs representing the largest interest therein. If the administration could be divided and continued as to the interest of the consenting heirs, while terminated as to the interest of plaintiffs, effect might be given to the wish of the former.

But the administration is indivisible, and must be continued or terminated as to all; and the question is whether the wishes of the majority can control and destroy the legal rights of the minority.

We consider it perfectly clear that when the succession is wound up and all the debts paid, and only its property remains in the hands of the administrator, the purposes of the legal agency confided to him are accomplished, and it is the absolute right of each and every heir to terminate it and to claim possession of his share of the succession, and he cannot be controlled in the exercise of this right by the adverse wishes of his co-heirs. Otherwise the administration might be prolonged and the heir desirous of entering into possession of his own property might be kept out indefinitely. This can work no legal injury to the other heirs; for if they desire to continue the agency of the administrator in the management of their own interests, they may do so extra-judicially, and they surely cannot force the continuance of the agency upon their unconsenting co-heir; and if they are unwilling to remain in co-ownership with the latter, the law touching partitions affords them a perfect remedy. We have considered these questions in two recent cases, and we think the principles there laid down sustain the foregoing position. Succession of Baumgarden, 36 Ann. 47; Succession of Geddes, 36 Ann. 964.

The cases cited from 30 Ann. 388, and 4th Robinson, 414, recognizing the right of beneficiary heirs to require an administration before a putting in possession, have no application, because here that right has been enjoyed, an administration has been had and it is completed.

We find nothing in any of the various judicial proceedings referred to by the administrator to estop the plaintiffs in rule from exercising the right to terminate this administration and be put in possession of their property, and see no reason to disturb the judgment appealed from.

Judgment affirmed.

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No. 9541.

LEON HOLZAB VS. NEW ORLEANS & CARROLLTON RAILROAD COMPANY ET AL.

The joinder of an action against one defendant for damages for breach of contract with an action against another defendant for damages resulting from a tort, is not good ground of exception where the defendants have been allowed to sever in their defence and separate trials have been had even if it be objectionable where there has been no severance. It is not mis-joinder for a plaintiff husband to sue in his own name for money expended for his wife's illness caused by an injury to her, and for damages for her sufferings caused by that injury, since these damages fall into the community of which he is the head and master.

The doctrine that a passenger in a public conveyance is in some way identified with the owner or driver of it so that he cannot recover of the owner of another public conveyance for injuries caused by a collision of the two, when he has exercised no control over the conduct of the driver of the vehicle in which he is riding, is unjust, illogical and indefensible.

The correct rule is that where one is riding in a public conveyance and has exercised and can exercise no control over the driver of it, and a collision occurs between it and another public conveyance, caused by the joint negligence of the drivers or managers of the two vehicles, the passenger is not identified with the driver of the vehicle in which he is riding and is not prevented from recovering of the owner of the other vehicle damages for injuries sustained by the collision.

Contributory negligence will not avail as a defence when the act charged to be such negligence was the result of tremor and excitement produced by the defendant's misconduct. Damages cannot be increased in favor of the appellee if he fails to answer the appeal and pray therein for such increase. A request for increase in the brief will not suffice.

The rule is inexorable that when the judgment has given the appellee interest to which he is not entitled and the judgment is amended by disallowing it in favor of the appellant, the costs of appeal must be borne by the appellee.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Henry P. Dart for Plaintiff and Appellee:

I.

When a passenger in a street car is injured by a collision between that car and a steam railway train, she has an action against both to recover the damages.

In such case, she must prove her own care and non-contribution to the accident, and the negligence of either or both defendants; the contributory negligence of her train, will not affect her however. 71 N. Y. 288; 19 Id. 351; 36 N. J. 225; 2 Mete. (Ky.) 119; 9 Bush. 728; Shearn and Rdf. Neg. 48; Whart. Neg. § 395; Thom. Carriers, 281. Also, 105 Ill. 364; S. C. 44 Am. Reps 791; 46 Mich. 596; S. C. 41 Am. Rep. 178; 36 Ohio St. 66; S. C. 38 Am. Rep. 558; 20 Rep. 598, and *Thompkins vs. Clay*, St. R. R., 4 Pacific Reporter, 1166, (Sup. Ct. Cal., 1884); 24 American Law Register, 707, (Nov. 1895).

II.

Where an injury is caused primarily by defendant's violation of a city ordinance, the question of negligence is involved in the greater issue of violation of law and an absolute responsibility for the injury is thereby created, if there be the least negligence on defendant's part. *Hays vs. Michigan, C. R. R.*, 111 U. S., 228; *McCloughry vs. Finney*,

38	185
47	1396
38	185
48	450
38	185
104	498
38	185
110	725
110	823
38	185
112	417
38	185
116	498

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37 Ann. 31; where a train has been stopping on the street notice must be given the passers by before moving the train. 51 N. Y. 544; 50 Mo. 467; 23 N. W. Rep. 67; 63 N. Y. 530; Whart. Neg. § 393 and 805.

Bayne & Denègre and *Farrar & Simonds* for Defendants and Appellants:

The exception of misjoinder should have been maintained. The action against the Carrollton Railroad Company was *ex contractu*, and against the defendant *ex delicto*. Chitty on Pleading, Vol. 1, p. 97; C. P. 29, 30, 31, 149 and 152; 14 Ann. Rep. 181; 17 La. Rep. 419; 9 Martin Rep. 394; 15 Ann. Rep. 310, 502; 24 Ann. Rep. 613.

The judgment is in favor of Leon Holzab personally, and his claim is exclusively for expenses alleged to have been paid by him, and the evidence shows that these do not exceed twenty seven dollars. In his petition he separates his action, and the evidence offered does not sustain the judgment. 33 Ann. Rep. 153; 32 Ann. Rep. 615; 30 Ann. Rep. 15, 31 Ann. Rep. 492; the Reporter, Vols. 19 and 80.

The legislature of the State and the City Council had granted to the railroad company the right to use the street (for moving freight and passengers), for a consideration, and in the interest of the public, and the cars were rightfully on the street detained for a few moments, by a train taking freight near the railroad depot. Under such facts no civil liability accrued to plaintiff. Act of 1870; Ordinance No. 8127; 34 Ann. 974; 10 Cushing, 385; 35 Ann. Rep. 744; 14 Gray, 249; 40 Maryland, 312; 11 Rhode Island, 456; 84 N. Y. 588. 45 Mich. 74; 129 Mass. 310.

The allegations of plaintiff and evidence offered show that the Carrollton railroad was guilty of gross and reckless negligence, and damage if any occurred from that negligence of the carrier, with whom plaintiff was identified, and her own negligence in standing up in the car and jumping out, contributed to the damage if any was sustained, and cannot recover. Thorogood vs. Bryan, 8 Comm. Bench (Court of Common Pleas, 115); Child vs. Hearn, La. Rep. 176; Armstrong vs. Lancashire R. R. Co. 10 Ex. 47; 97 Pa. St. 91; 9 Ohio, 484; 15 Ark. 118; 34 Ann. Rep. 162 to 180.

When the plaintiff's suit was instituted, he alleged an expected loss of a child which never occurred, and there were no actual damages except for about twenty-seven dollars. 11 Ann. Rep. 292; 13 Ann. Rep. 447; 29 Ann. Rep. 792; 33 Ann. Rep. 644; Milwaukee R. R. Co. vs. Arms, 91 U. S. 489.

The judgment gives interest upon damages and should be reversed. 1 Ann. Rep. 382; 3 Ann. 702; 18 Ann. 28.

The opinion of the Court was delivered by

MANNING, J. The action is for the recovery of five thousand dollars as damages for injuries to the plaintiff's wife caused by a collision of railroad trains, and was instituted against the New Orleans and Carrollton Company alone, but by a supplemental petition the Illinois Central Railroad was made a co-defendant. Mrs. Holzab was a passenger upon the Carrollton road, one of the numerous tramways of this city, and the collision occurred at the intersection of Baronne and St. Joseph streets, in the middle of which latter street the Illinois Central runs its steam trains.

A train of freight cars of the Illinois Central was standing on the St. Joseph street track divided into two parts, the gap between them.

being at the intersection of Baronne of sufficient width to permit the passage of the horse-car of the Carrollton road. The driver of the horse-car, in which Mrs. Holzab was seated, entered the gap and while going through, the freight train was backed and collided with the horse-car. The plaintiff's wife was thrown to the floor and was bruised. She was pregnant. The shock caused an illness that does not seem to have been severe or dangerous, but she was in bed several weeks and confined to her bed-room longer, undergoing medical treatment with considerable suffering and some expense. Abortion did not ensue but her nervous system was deranged temporarily by the shock and her health suffered in consequence.

The two railroads severed in their defence and a trial was had first with the Carrollton Company which resulted in a judgment for the company. The trial now under review is that had with the Illinois Central in which the judge below awarded the plaintiff three hundred dollars as damages. The defendant appeals and, although the plaintiff says in his brief, he has prayed an increase of the judgment there is no answer to the appeal or prayer in any other form for increase of the damages.

An exception was filed of misjoinder in this, that the Illinois Central road was sued for damages for a tort in the same action wherein the Carrollton road was sued for damages resulting from a breach of its contract of safe-carriage, and also a further misjoinder in the character of the action, the plaintiff having sued in his own name for money expended by reason of his wife's illness and as her agent for damages for her sufferings.

In Arrowsmith's case, 17 La. 419, one defendant was sued on a contract and the other on a tort, and they were allowed to sever in their defence as was done in this case. The court cited *Sere vs. Armitage*, 9 Mart. 394, where it was held that if there be several defendants in an action of trespass and they plead separately, they may have the cause tried separately, but if they go to trial jointly and suffer a verdict to be given against them, they cannot afterwards object to it as error, and then observed there was a much greater connection between trespassers who are sued for the same trespass than that between two defendants, one of whom is sued on a contract and the other for a tort, and the action was maintained.

That does not decide the point now made, but it is apparent the court did not consider the joinder of the action on a contract with one for a tort objectionable, and where severance in defence has been

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allowed and there have been separate trials, we do not think the joinder can be complained of even if it could have been without such severance.

On the other branch of the exception, the defendant has no concern with the distribution of the damages between the husband and the wife as the payment of the judgment will discharge the company's liability to both. But besides, the action for the personal wrong to the wife is properly brought in the name of the husband since the damages recovered will fall into the community of which he is the head and master. *Cooper vs. Cappel*, 29 Ann. 213.

The ordinances of this city impose the duty upon the defendant railroad to station a watchman with a red lantern or signal flag at the intersection of streets upon which cars run at least two minutes before the approach of the trains, and also to ring a bell at intervals while the trains are passing within the limits of the city. They further require that this railway shall use a smokeless dummy on St. Joseph street, and that it must be kept always in front of the train while in motion, and all railroad companies are prohibited from permitting their engines or trains to remain standing upon any street or crossing within the city so as to obstruct crossing in any manner whatsoever, except in so far as may be done by trains in motion.

There was a conspicuous violation of all these ordinances by the defendant. The train was backed by a reverse engine instead of being propelled by a dummy in front, and two freight trains were standing on the street. No bell was rung, and no flagman was stationed at the intersection of the streets. A horse car had passed through the gap two minutes before, so that the train must have started to back within two minutes of the collision. Negligence is thus fastened upon the defendant. Its defence is that if any damage was suffered by the plaintiff's wife, it resulted from the gross carelessness and contributory negligence of the Carrollton road, in whose car she was riding, and that she is identified with the negligent driver or owner of that car and cannot recover.

More elaborately stated, the doctrine is that a party who is a passenger in a public conveyance is in some way identified with those who own or have charge of it and that he can recover of the owner of another public conveyance that has collided with it and injured him only when they who own or have charge of the conveyance in which he is riding can recover, the principle being that their contributory negligence is imputable to him so as to preclude his recovery for any injury when they cannot recover in consequence of this negligence.

The doctrine was first asserted in *Thoroughgood vs. Bryan*, 8 C. B. 115, decided by the English court of Common Pleas, and while generally followed in that country since, its correctness has been questioned there by high authority. In this country it has been followed by some courts and rejected by others. It is so unjust to attribute to a passenger the negligence of the agents of the company in whose carriage he is riding, so untrue in point of fact that any identity exists between them, and so true that it can only be held to exist by a sort of legal fiction, that it is not surprising there has been a judicial revolt against the doctrine. The only way in which the identification of the passenger with the driver or train conductor can result is by holding the latter to be the servant of the former, but that cannot be, because the passenger has no control over the conductor, and the right to control the conduct of the servant is the foundation of the doctrine that the master is affected by such conduct and is responsible for it. We should reject the doctrine as illogical and unjust, even in the face of authority as high as the English courts, but the question is set at rest for us by a decision just rendered by the United States Supreme Court and published in the February No. 1886, of *The Reporter*.

The case is *Little vs. Hackett*. The plaintiff hired a public hackney-coach for a drive to a park, and the vehicle was crossing the railroad track *en route* to the park when it was struck by the engine of a passing train and the plaintiff was injured. The hackney-coach belonged to a livery stable keeper, and was hired at a stand for such coaches near an hotel and was driven by a person in the employ of the liveryman. The evidence shewed that the accident was the result of the concurring negligence of the managers of the train and of the driver of the carriage—of the managers in not giving the usual signals of the approach of the train by ringing a bell and blowing a whistle, and in not having a flagman on duty—of the driver in turning the horses upon the track without proper precautions to ascertain whether the train was coming. The defence was contributory negligence of the driver in driving upon the track under those circumstances, and that his negligence was imputable to the plaintiff under the doctrine of identification as already set out.

The court reviewed all the decisions on that question, beginning with *Thoroughgood vs. Bryan*, the ruling in which the court said was indefensible, and after marshalling the American cases that followed that decision and those that rejected it, summed up by ruling that one who hires a public hack and directs the driver to convey him to a par-

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ticular place but exercises no other control over his conduct, is not responsible for his negligence and is not prevented from recovering from a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of the managers of the train and of the driver of the hack.

The case at bar is stronger for the plaintiff than that just narrated. In that case the plaintiff had given directions to the hack driver where to go, and the route to that destination led across the railroad track near the station. There might have been a pretext or a reason for holding that the plaintiff was identified with the driver in consequence of the driver being for the time under his control and compelled to drive whither he should order, and because he actually did order the driver to convey him to a place, to reach which the carriage must cross the railroad track.

In the case at bar the plaintiff's wife was a passenger in a horse-car that ran over a certain track as fixed and immovable as that of a steam train, and she had and could not have had any control over the driver as to her route, nor indeed in any other particular. If the principle of non-identification be correctly applied in *Little vs. Hackett*, and we have not a doubt that it was correctly applied, *a fortiori* must it control the liability of the defendant in this case. There is no obstacle on that ground to the plaintiff's recovery.

The defendant pleads also personal contributory negligence of Mrs. Holzab, in this, that she rose from her seat when she saw that the collision was imminent, and was in consequence thrown with violence on the floor of the car, whereas if she had remained seated, she would not have been thrown down and would have escaped injury.

The alarm of the woman was caused by the defendant's own act in backing its train in a manner violative of the city ordinances. Her natural and irresistible impulse was to rise from her seat and get out of the car, as she saw the steam train coming down upon it. Her tremor was caused by the defendant's own negligence, and the rule is recognized as established that contributory negligence will not avail as a defence when it was the result of excitement and tremor produced by the defendant's misconduct. *Lehman vs. Railroad Co.*, 37 Ann. 705.

There is really no excuse for the defendant's flagrant contempt of the city ordinances and its disregard of the conditions imposed upon it when the permission was given to use one of the streets of the city for a track. Its own convenience and economy were the moving causes for obtaining such permission, and a due regard for its own obligations

and for the sanctity and safety of human life should induce a more careful observance of the precautions imposed upon it. We are inclined to increase the damages somewhat, but there is no answer to the appeal, and without a prayer for such increase elsewhere than in the brief we cannot do so.

The judgment allows interest upon the damages from judicial demand, and must therefore be amended in favor of the appellant. Interest can run only from the date of the judgment. The plaintiff's counsel earnestly pleads for a relaxation of the rule that mulcts his client in the costs of the appeal, because, he says, the insertion of the interest allowance in the judgment was not his work nor the judge's, but must have been done by the clerk, and that he would have entered a remittitur of the interest had he discovered the mistake. The rule is unbending and we cannot deviate from it.

It is therefore ordered and decreed that the judgment of the lower court is amended by allowing interest from the date of the judgment, and as thus amended it is affirmed, the plaintiff paying the costs of this appeal.

ON APPLICATION TO AMEND THE OPINION.

POCHÉ, J. Appellee's counsel call our attention to our refusal to increase the allowance of damages, on the ground, as stated in the opinion, that he had failed to make a timely motion to that end.

Justice to him requires from us the statement that such a motion had been filed in time, and equal justice to ourselves calls for the statement that the motion had not been attached to the transcript, or in any manner placed under our eyes or under our control, but that through inadvertence it had been kept in the clerk's office, where on inspection it was found by counsel after the announcement of our conclusions in the case.

Hence, counsel is and has been all through this appeal right on the record, and therefore the references to his failure to file a timely motion for an amendment of the judgment appealed from must be stricken out of the opinion, and are to be considered as unwritten.

Counsel of both parties now jointly inform the court that they have amicably arranged the question of the quantum of damages, hence our decree will remain undisturbed.

It is therefore ordered that the two references in the opinion to the failure of appellee to pray for an amendment of the judgment of the lower court be stricken out of the opinion, and that as thus amended said opinion and the decree predicated thereon remain in full force.

Opinion amended.

Lallande vs. Crandell.

No. 9681.

JOHN B. LALLANDE VS. A. W. CRANDELL.

When the judge has granted an order authorizing the defendant to release writs of attachment and sequestration on bond, which order has not been executed, he may order the suspension of its execution until hearing of the parties, when he discovers reason to believe that it was improvidently granted.

Nothing in the law prevents a defendant from releasing the crop gathered and ungathered on a plantation by giving a bond for one-half more than its value, without being under the necessity of bonding the plantation which was also attached. The right of defendant in attachment to bond should be favored, as mitigating the harshness of the remedy and as restoring the property to commerce or to use.

A PPEAL from the Eighth District Court, Parish of Madison.
Delony, J.

Stone & Murphy and *W. S. Benedict* for Plaintiff and Appellee.

A. L. Slack for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Lallande, claiming to be a creditor of the defendant for about \$11,000, brought suit therefor, and took out simultaneously writs of sequestration and attachment.

Under the sequestration the sheriff seized certain corn, cotton-seed, baled cotton and seed-cotton gathered and ungathered, the whole appraised on the sheriff's return at \$2955.

Under the writ of attachment he seized the same property above mentioned, and also defendant's plantation, estimated by the sheriff in his return to be worth \$30,000, besides mules, horses, implements, wagons, etc., attached thereto, appraised at a considerable additional value.

Defendant, desiring to release the property sequestered, applied to and obtained from the clerk of the court, in the judge's absence, an order for its release upon executing two bonds, conditioned according to law, one, for the sequestration, in a sum equal to the appraised value of the property, and the other, for the attachment, in an amount, exceeding, by one-half, said value.

The defendant tendered to the sheriff two bonds executed in accordance with the order, but the sheriff, after some consultation with the clerk, refused to comply with the order on the ground that it was illegal, because directing the release of part, instead of the whole, of the property attached.

We have no occasion to consider further this order or the action of the sheriff in relation to it, because the defendant undoubtedly abandoned his rights under it by his subsequent action.

Lallande vs. Crandell.

Instead of standing upon this order, he made a new and independent application to the judge, without any reference to the former proceeding, and obtained from him an order identical in substance with the one which the clerk had granted.

This new order he then presented to the sheriff, who refused to execute it, until he had communicated with the judge. Counsel for plaintiff thereupon telegraphed to the judge informing him of the fact that the order for release of attachment embraced only a part of the property attached, and asking him to order the sheriff to suspend execution of the order until hearing could be had. On receipt of this the judge telegraphed the sheriff to hold the property until further orders.

Then followed a rule by plaintiff to show cause why the order of release should not be revoked and cancelled, and a counter-rule by defendant to show cause why they should not be executed.

These rules were tried together. The judge revoked the former order and rendered a new order permitting the defendant to release the property sequestered on a bond for its value and to release the attachment on a bond for one-half over and above the value of the whole property attached.

The bonding of the sequestration alone would be of no service to the defendant, since it would leave the property still in the grasp of the attachment, and in order to release the latter, he must give a bond for something like \$60,000. Although the whole debt claimed by plaintiff is only about \$11,000.

The judge bases his ruling upon the ground that under article 259, C. P., there can be no release on bond of part of the property attached, but that the whole must be released or none, and the bond must cover the value of the whole.

The point is a new one in our jurisprudence; for the case of Taylor vs. Penrose, 12 La. 137, on which the judge relies, is not in point. That was a case of sequestration of slaves which had been conditionally sold to several defendants jointly, who had not complied with the conditions, and in which the plaintiff sued for the recovery of the slaves themselves.

One of the defendants alone applied to bond a part of the slaves of his own selection, while the plaintiff offered to bond the whole of them.

The court refused the defendant's and granted the plaintiff's application. On appeal this court affirmed the judgment saying: "the court did not err in refusing to permit the defendant to bond a part only of the slaves; otherwise he might have selected the most effect-

Lallande vs. Crandell.

ive, and left the young and old a burden and expense upon the plaintiff. Moreover, the other defendants, in such case, might have claimed the same right and have split up the contract and increased litigation, by compelling the plaintiff to bring as many suits as there were bonds."

These reasons have no application to the instant case, which is by attachment, which is brought on a moneyed demand, in which the right to the possession or ownership of the property seized is not in question, and in which there is but a single defendant.

The writ of attachment is a conservatory process, the only object of which is to secure the payment of the judgment which the plaintiff may recover. The plaintiff has no right to bond in any case. That privilege is secured to the defendant alone, the object being to enable him to recover the possession of his property, in order that he may use it and save expense and risks of the sheriff's custody; provided he secure the rights of the plaintiff by substituting a proper bond in place of the property released. It is a right which should be highly favored because it mitigates the harshness of the proceeding under which a man's property is wrested from his possession in advance of judgment and while the plaintiff's right is still undetermined, and also because it restores the property to commerce or to use.

We can see no reason why the defendant should not be permitted to release any part of the property attached when he gives a sufficient bond exceeding, by one-half, its value. Such a bond is a sufficient substitute for the property released, while, for any surplus of the judgment, the remaining property is retained in the sheriff's hands. The suggested difficulty of the defendant's substituting, for the property, a multitude of small bonds, is purely imaginary, because motiveless, and in view of the summary proceeding provided for the enforcement of such bonds, could serve no purpose except to mulct the defendant and his sureties in heavier costs.

The hardship of a contrary ruling, especially in such a case as this, is very evident, where, in order to recover control of his crop and to liquidate the claims upon it, the defendant is not only required to furnish two bonds, one for its value and the other for one-half above its value, but in addition to give an enormous bond for the value of a plantation and its appurtenances which he is willing to leave subject to the attachment.

We will not say that there might not be cases in which such a right might be properly denied or restricted, as where the part sought to be released is so essentially connected with the rest that its severance

Cooley vs. Cooley.

would greatly impair the value of the residue. But this is not such a case.

We therefore think the judge erred in requiring for the release of the property specified in the application, a bond greater than one-half above its value, and shall amend his judgment accordingly.

As to other points: We think the judge had an unquestionable right to suspend the execution of his order, when satisfied that it had been improvidently issued and on receiving information of facts of which he was ignorant when it was granted.

So also, we consider him fully justified in permitting the sheriff to amend his return as to the value of the property seized under the circumstances of this case and in finally fixing the amount of the bonds according to the true value. When the first estimate was made, a large quantity of the cotton was unginned or ungathered and the estimate of quantity was necessarily guess-work; but, before the trial of these rules, it had been nearly all gathered and ginned and turned out much more than had been estimated. Of course, in finally fixing the amount of the bond, he rightly did so at the true and ascertained value of the property to be released.

The motion to dismiss the appeal on the ground that such a judgment is not appealable, is untenable under the very authority relied on in this case by plaintiff, viz: *Taylor vs. Penrose*, 12 La. 137.

That point was not considered in *State ex rel. Gerson vs. Judge*, 37 Ann., for reasons therein stated.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be amended by fixing the amount of the bond required of defendant to release the property specified in defendant's application from the attachment at a sum exceeding its value as fixed in the judgment by one-half; and that as thus amended, it be now affirmed, plaintiff and appellee to pay costs of this appeal.

No. 9642.

ADATHEA COOLEY VS. BEN. C. COOLEY, HER HUSBAND.

A wife cannot be a witness in her suit against her husband for dissolution of the community, separation of property, and the recovery of her moneyed claim against him. The prohibition is not personal to the husband, and cannot be waived by him. It is founded upon public policy and considerations of social order and is peremptory.

The right of a creditor of the husband to appeal from the judgment obtained by the wife against the husband is included in the express grant of the right of appeal to third persons who allege they have been aggrieved by the judgment.

38	185
52	964

Cooley vs. Cooley.

When the creditor alleges in his petition of appeal that the execution of the judgment has or would deprive him of all means of satisfying his debt, he has specified the manner in and the means by which he will be irretrievably aggrieved, and has shown sufficient reason for an appeal to be granted him.

A PPEAL from the Fifteenth District Court, Parish of Pointe Coupée. Yoist, J.

A. Voorhies and James Vignes, Jr., for P. G. Gibert, Appellant.

Sample & Bounnehaut for Appellee.

The opinion of the Court was delivered by

MANNING, J. This is an appeal by petition of a creditor of the defendant husband from a judgment in favour of the plaintiff, his wife, for separation of property and for a moneyed demand.

Mrs. Cooley alleges her marriage in 1867 and her ownership of lands in Texas and of certain machinery, as set forth in the account thereto annexed—that her husband used the sums of money detailed in the account in his business and has never returned any part thereof—that his affairs are damaged, etc., and prays that the community be dissolved, the property be separated, and that she recover the amount of the account and her mortgage be recognized.

The account annexed is as follows:

ADATHEA COOLEY,

In account with B. C. COOLEY, her husband.

Proceeds of tract of land, September 18, 1879.....	\$ 700
Cash for rent of above land, 1869.....	250
Cash for rent of above land, 1870.....	250
Cash for rent of above land, 1871.....	250
Cash for rent of above land, 1872.....	200
Cash for rent of above land, 1873.....	200
Cash for rent of above land, 1874.....	250
One lot leather, 1869.....	280
Cash from estate J. Marshall, 1868.....	300
Cash proceeds cotton from same estate, 1868.....	350
One lot machinery, 1870.....	450

\$3,480

The answer is a general denial.

The sole testimony is as follows:

Mrs. Cooley, sworn, says: "Account marked A handed, submitted to witness, is said to be correct. Mr. B. C. Cooley has never paid back any part of that money to me. I believe that my husband, B. C. Cooley, is insolvent."

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R. Semple and A. Conrad swear to the defendant's insolvency.

A deed of land in Texas, dated September 15, 1879, from B. C. Cooley and his wife to one Robertson for \$700, was offered and received in evidence.

There was judgment for the amount of the account and otherwise as prayed, on September 18, 1885; and on October 6, Cooley conveyed all his property to his wife in satisfaction thereof.

In December following, P. G. Gibert, alleging that he is a creditor of the husband and that the judgment and *dation en paiement* deprived him of all means of realizing his claims, petitioned for and obtained an appeal therefrom.

Mrs. Cooley answers the appeal and alleges that Gibert, not being a party to the suit below, has no right to appeal on his *ex parte* affidavit that he is a creditor of the husband—that the appellant does not allege any fraud and has no right to obtain a reversal of the judgment—that he does not allege any ground for appeal except that he is deprived of all means of realizing his debt, which is not sufficient of itself, and that the objection to the wife's testimony is personal to the husband and no other person can avail himself of it.

The appellant urges that the testimony upon which the judgment was rendered is both illegal and insufficient. His objections are well founded.

It is illegal because the wife cannot be a witness for or against her husband except where they are joined as plaintiffs or defendants and have a separate interest. This is a suit by the wife against the husband, and falls squarely within the prohibition. The objection to her testimony is not personal to the husband, the prohibition being founded upon public policy and considerations of social order. *Tulley vs. Alexander*, 11 Ann. 628.

The testimony is insufficient even if it were legal. The detailed statement of a price received for land and of its rents in the form of an account, and the oath of the wife that "the account is said to be correct," is no proof at all. The deed is from husband and wife, and for aught that appears thereon the land may have been the property of the husband. It is in the common law form and does not even recite that the land is the property of the wife, although that would not be proof of her ownership if it did so recite. Her renunciation appended to the deed may well have been a renunciation of her dower in the land.

The right of third persons, who allege they have been aggrieved by a judgment, to appeal therefrom is expressly given by Art. 571 Code Prac., and they may avail themselves of everything in the record that

McCaffrey vs. Benson.

affects their rights. *Griffing vs. Bowman*, 3 Rob. 113. The allegation of the appellant that the judgment and the attempted satisfaction thereof wholly deprives him of all means to realize his debt is but an amplification of the averment that he has been aggrieved by the judgment and a specification of the manner in and the means by which he is aggrieved.

Against such an attack the judgment cannot stand.

It is therefore ordered and decreed that the judgment of the lower court is avoided and reversed, and that the appellant recover of the plaintiff and defendant the costs of this appeal.

No. 9545.

MRS. C. McCAFFREY VS. J. H. BENSON.

Persons legally married are, until a dissolution of marriage, incapable of contracting another.

Hence a marriage attempted by the wife of a previous marriage, before its dissolution by law or by the legal presumption of the death of her husband, is not valid. In a suit intended to enforce legal effects of such a marriage against the pretended second husband the latter as defendant can plead the nullity of the marriage by way of exception and without resorting to a direct action. No legal effects can result from such a union.

The term of absence without news of either of the spouses, which gives a sufficient cause to the other to contract another marriage, is ten years.

An absence of four years, unaccompanied by any circumstances tending to justify the belief that the absent husband is dead, is not sufficient to create the legal presumption of the validity of a second marriage contracted by the wife.

The burden of proof in such a case is on the wife who seeks to enforce the legality of her second marriage, to show that the absent husband was dead at the time that she attempted to contract another marriage.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. B. Lancaster and *J. O. Nixon, Jr.* for Plaintiff and Appellee.

L. F. Bouchereau and *J. Duvigneaud* for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff sues for a judgment of separation from bed and board against the defendant on the grounds of cruel treatment and of outrageous excesses.

Defendant first pleaded the general denial, and subsequently urged by way of a peremptory action that there was no legal marriage between him and plaintiff, for the reason that when he agreed to marry her, she was, by previous legal marriage, the wife of another man then living, and from whom she had never been legally separated. Hence

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he prayed for a judgment recognizing the nullity of his marriage with plaintiff. He prosecutes this appeal from a judgment which overruled his exception and granted to plaintiff all the relief which she prayed for.

The undisputed facts of the record are as follows:

Plaintiff was legally married to one Christopher Anthony in April, 1848, and lived with him until 1851, when she voluntarily separated from him on the ground of general ill-treatment. Anthony remained in New Orleans until 1856, when he disappeared.

In 1859, plaintiff, believing that he was dead, contracted a marriage, valid in form, with the defendant, Benson. In 1861, Anthony reappeared, and was seen by several persons, some of whom testify that he was then a resident of the parish of Plaquemines, in this State.

The reappearance of Anthony brought trouble to the Benson household. Friends of the couple expressed the opinion that their union was illegal and was simply concubinage, and advised them to take steps to regulate their conjugal affairs. As rumors had reached plaintiff's family, asserting the death of Anthony since his reappearance, the parties adopted the plan of presenting themselves to a priest for a second nuptial benediction; that ceremony took place in 1865, but was not preceded by a license, and the fact was not registered on the archives of the church or of any other institution. This is the marriage which plaintiff declares upon in her action for separation.

The parties continued to live together as man and wife during the time which intervened between the reappearance of Anthony, in 1861, and the marriage of 1865. From this state of facts plaintiff draws two legal propositions:

1st. That the burden of proof is on the defendant to show that Anthony was yet alive in 1865.

2d. That the legal presumption is that Anthony was dead in 1865.

I.

Under a proper construction of the law, it appears to us that plaintiff is in error in her first proposition.

We find no textual provision in our code, or in fact in the entire system of our laws, which justifies the presumption of death of any person after an absence of four years, or of less than five years.

In treating of the effects of absence respecting marriages our code, article 80, provides: "Ten years of absence without any news of the absentee, is a sufficient cause for the husband or wife of such absentee to contract another marriage, after having been authorized to do so by

McCaffrey vs. Benson.

the judge, on due proof that such absentee, without any news, had continued the time required as aforesaid."

From that text we are authorized to conclude, that in a question involving the validity of a marriage of either the husband or the wife of an absentee, an absence of four years is of itself insufficient to create the legal presumption of the death of the absentee, or to create a presumption in favor of the *prima facie* validity of a marriage contracted by the husband or the wife of such absentee.

That presumption could flow only from proof of an absence of ten years, or from circumstantial evidence of the death of the absentee, and from a compliance with the positive provisions of the code.

Our conclusion is clear that under the issue raised by defendant's exception, the burden of proof is on plaintiff to establish the legality and validity of her marriage with him.

II.

These considerations easily foreshadow our opinion on her second proposition.

Her counsel contend that the rules of law as contained in our code, on the subject of presumption of death from prolonged absence, are not inflexible, and that courts are authorized to consider any other circumstances which may lead to the same conclusion.

They rely very strenuously on the *dicta* of this Court in the cases of *Boyd vs. New England Life Insurance Company*, 34 Ann. 848, and of *Jamison vs. Smith*, 35 Ann. 609. Two very important principles, embodying very wise rules of construction, are reaffirmed in these two opinions, and they have been our mainstay and particular guide in our analysis of the questions involved in the case in hand.

In both cases we reiterated after our predecessors the following language: "It is essentially within the province of the judge to draw the line of distinction, by the exercise of a sound discretion, founded on the facts of each particular case."

And in addition to this, we said in *Boyd's* case: "But death like all other facts, may be established by circumstantial evidence, when, from the nature of the case, direct evidence is not accessible."

"Absence, without being heard of, though not of sufficient duration to create a legal presumption of death, may yet be one of other and supporting circumstances, which, taken together, would satisfy the mind and conscience of the judge or jury that the party was dead." * *

"This disappearance under circumstances of shipwreck, or earthquake, or battle, or explosion, or like perils, might well produce such conviction."

Reasoning within the scope of these rules, we found legal presumption of the death of Boyd, in the circumstances which showed that he was last seen on a vessel at sea, in rough weather, while he was very sea-sick, by his room mate who, in the night saw him leave the room to go out on the guards of the vessel, whence he never returned, and after which he never was seen, although diligent search and inquiry was made for him on the vessel after she had reached shore; and that he was not seen leaving the vessel with all the other passengers, although a close lookout was kept for him.

In Smith's case we found that he had joined one of the armies in the late war between the States, and had gone on the battlefield—whence he never returned; that he had never returned to this city where he had left his mother and all his relatives and where he owned valuable property and other rights, from all of which we felt justified, many years after his disappearance, to conclude that he was dead.

From the record in this case we find that Anthony was an insignificant, obscure man, with few acquaintances, or friends and no relatives in this city, where he lived for five years after the voluntary separation between him and his wife, for whom he had no fondness, or had formed no attachment; that he was homeless and childless after the year 1853; that he had disappeared from this city and from his usual haunts from 1856 to 1861; that he then reappeared and had been seen by his brother-in-law, who had given him some little money. It is not even pretended that he took any part in the disastrous war which was then raging, but it appears on the contrary that he was leading the unexposed life of a plantation laborer in an adjoining parish, where it is said that he had died. But the record fails to show the slightest effort on the part of his wife, her brother, relatives and friends to test the rumor by inquiries, which would have been very easily made, and which were of such vital importance to her in her project of receiving a second nuptial benediction joining her fate to that of another man. No pretence has ever been made that he had ever left the State, hence we cannot declare that he was even an absentee within the legal sense of the term, and much less can we conclude that his absence from this city from 1861 to 1865, justifies the presumption of his death, more than did his previous and longer absence, from 1856 to 1861.

We note the argument of plaintiff's counsel touching the disastrous results of a judicial declaration of the nullity of her marriage with the defendant on the ground of her pre-existing and undissolved marriage with another man not proven to have been dead when she sought to contract a second marriage.

State vs. Boasso.

We have also considered their construction that such a conclusion would be tantamount to a conviction of bigamy.

Under the issue as we understand it from the pleadings, we are not concerned with that question, and we have to deal merely with the alleged nullity of the pretended marriage with the defendant.

We find in our code, article 93, the following provision, clearly prohibitory in its character :

"Persons legally married are, until a dissolution of marriage, incapable of contracting another, under the penalties established by the laws of this State." One of those penalties is the absolute nullity of the marriage between persons, when one or both are not able to contract, and this nullity we must apply in all cases which fall within the scope of the prohibition.

This nullity is invoked by the defendant in a manner and under a mode which are sanctioned by jurisprudence. 15 Ann. 342, Succession of J. M. Minvielle; 15 Ann. 519, Summerlin vs. Livingston.

From our investigation of the facts we find that, both in 1859 and 1865, plaintiff was not able to contract a legal marriage with the defendant, on the ground of her pre-existing and undissolved marriage with Christopher Anthony, whose death cannot be presumed to have occurred at any time previous to the year 1865.

We conclude from the record that the intention of the parties to this suit in going through the ceremony of a nuptial benediction in 1865 was to legalize or attempt to ratify the marriage of 1859, which had been literally destroyed by the reappearance of Anthony in 1861. But the law does not recognize or even sanction the ratification of an absolutely null contract. Therefore no legal matrimonial effects could or did result from the marriage of 1865, which is the very contract declared upon by plaintiff.

These considerations lead us to a conclusion entirely different from the views taken of the case by our learned brother of the district bench, hence we must hold that his judgment is erroneous.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered that defendant's exception be maintained, and that plaintiff's action be dismissed at her costs in both courts.

No. 9593.

THE STATE OF LOUISIANA VS. T. J. BOASSO.

The judges of the "City Courts" of New Orleans, under the Constitution of 1879, replace the justices of the peace under the former system, and inherit the power to solemnize marriages from them. They are expressly required to make an "act" of every marriage they celebrate and the common and usual name of such "act" is a marriage-certificate. When a criminal statute makes an "intent to defraud" an ingredient of a crime, it does not mean only an intent to deprive one of personal property. Defraud has a broader meaning in such case and means to prejudice the rights of another in any way.

38 208
45 650

38 202
50 542

38 202
117 740

38 202
1120 140

38 202
1124 206

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When a judge has already charged the jury on a given matter and the prisoner among his requests of charges made thereafter, includes the matter already charged, the judge may well refuse to repeat it.

When a trial judge has already charged the jury that the State must affirmatively prove that the offence had been committed within the jurisdiction of the court, and a request is made afterwards for that matter to be charged, a misunderstanding of the purport of the request provoking the observation that there was no doubt of the court's jurisdiction is not serious matter of complaint. The essential thing is that the jury have been charged on that point correctly.

There can be forgery of a certificate of marriage where no marriage was ever celebrated just as there can be forgery of a promissory note where there was no indebtedness of the maker whose name is forged. As there can be a pretended marriage so there can be forgery of a certificate of marriage that never took place..

While judges are prohibited from commenting on the facts to the jury in a criminal trial, they are required to give to the appellate court their reasons for refusing instructions that are prayed.

It is not essential that the forged instrument be one that, if genuine, an action might be brought on it. If it could be used as proof in a suit either against him, whose name is forged, or in a suit against any other, whether to sustain a claim made or in defence of one, it is susceptible of forgery.

The constitutional right of being heard by counsel, cannot be construed into meaning that a prisoner's counsel must be permitted to re-argue *ad infinitum* all that had already been argued and to repeat all that had already been said. There must be some restraint of the volubility of counsel since there must be a limit to the duration of a criminal trial.

Our statutes dispense with the need of setting out any copy or *fac simile* of the forged instrument in the indictment, and it may be described by its usual and common name. It is not necessary to set out anything more than is necessary to accurately and adequately express the offence. It is neither necessary nor proper to set forth matters of evidence in the indictment, nor to set forth the kind of suit or matter of contestation in which the forged instrument is receivable in evidence.

The publisher or alterer of a forged instrument need not have been the forger of it. The two acts are distinct and constitute two different and well-defined crimes.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, and Lionel Adams, District Attorney, for the State, Appellee:

1. In any indictment for forging or uttering any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same shall be usually known. R. S. Sec 1049.

The marriage certificate or act is required by the Civil Code. Art. 105.

Justices of the peace are authorized to celebrate marriages within their respective parishes. C. C. Art. 103.

The judges of the city courts replace the justices of the peace within the city of New Orleans, and are judicial officers exercising the powers of justices of the peace under another name. Const. Arts. 258, 261, 266, 135; 33 Ann. 148; 34 Ann. 99; see also 32 Ann. 1234.

Judges of the city courts have also the power to grant marriage licenses. Acts of 1882, p. 40. The want of a marriage license and its publication previous to the ceremony does not affect the validity of the marriage. 26 Ann. 94. Nor is a marriage null because the laws relating to forms and ceremonies have not been observed. These laws are but directory. 20 Ann. 97; 3 La. 33; 6 La. 470; 2 Ann. 944; 7 Ann. 253; 15 Ann. 253.

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Defects as to legal formalities, *e. g.* seals or stamps, or due attestations, do not preclude a prosecution for forgery. It is only when the law, to which an instrument is subject, makes it absolutely and everywhere imperative without certain formalities, that to falsely make it without such formalities is not forgery. It is under this rule that the forgery of a will without the necessary witnesses is declared not to be indictable. 1 Whart. Cr. Law, 8th ed. § 697.

2. It is not requisite to charge in the indictment anything more than is necessary to accurately and adequately express the offence. Whart. Cr. Pl. and Pr. § 158.

It is in general sufficient to follow the words of the statute. Whar. Cr. Pl. and Pr. § 290; 8 Blackf. 212; 2 Iowa 162; 13 Miss. 13; 12 Miss. 268; 5 Blackf. 548; 3 Strobb. R. 269; 6 Miss. 147; 2 Ala. 26; 1 Not & McC. 91; 3 Penn. 142; 3 McCord, 442; 16 Mason, 448; 20 Pick, 356; 3 Gratt. 590; 6 Gratt. 664; 3 Blackf. 307; 1 Bailey, 144; 13 Ann. 243; 9 Ann. 210.

Matters of evidence need not be set forth in the pleadings. 14 Ann. 46.

When the crime is charged with certainty and precision, with a complete description of such facts as constitute it, in the language of the statute, and the accused on hearing the indictment read would clearly understand the charge, he is called on to answer, and the court could feel no doubt as to the judgment to be pronounced on conviction the indictment is good. 9 Ann. 106; Ib. 210; Whart. Cr. Pl. and Pr. § 166; 1 Starkie's C. P. 73.

3. The judge of the Second City Court has the power to solemnize marriages and to make those acts of the celebration of the marriage which are commonly known as "marriage certificates." Const. Arts. 258, 261, 266, 135; 33 Ann. 148; 34 Ann. 99; C. C. Arts. 103, 105.

4. (a) To "defraud" in trials for forgery is construed to mean to prejudice the rights of another. 1 C. C. 200; 1 Whart. Cr. Law, 8th ed. § 583. The term "to defraud" cannot be limited to mean "to deprive a person of his personal property."

(b) The jurisdiction of the trial court over the offense can only be questioned by plea to the jurisdiction or in arrest of judgment.

(c) There could be a forged "marriage certificate," although marriage actually took place. 1 Whar. Cr. Law, 8th ed. §§ 660, 690, 693.

(d) It is error to state the successive gradations of statutory offenses disjunctively; and to state them conjunctively, when they are not repugnant, is allowable. Whar. Cr. Pl. and Pr. §§ 162, 251.

(e) The forged paper need not be such as, if genuine, could be sued on. It need only be such as would expose a particular person to legal process. Apparent legal efficiency is sufficient. Whar. Cr. Law, § 680. The test is whether the instrument could be used as proof in a suit with another. Ib. §§ 691, 692.

5. The testimony is not in the record nor is it brought up by the bill; therefore, even if the appellate court had the power to review the evidence it would lack the information required for a reasonable exercise of such revisory power.

The questions of law have already been cited and discussed.

The prisoner suffered no actual injury because of the refusal of the district judge to hear argument upon the points of law presented by defendant's motion for a new trial. If these questions, as presented by the pleadings, are sound, and the action of the court below was prejudicial to the accused, they warrant the reversal of the judgment by the appellate court; otherwise, neither the revisory tribunal nor the trial judge can be justified in disturbing the verdict.

The remedial interposition of courts in granting new trials is wholly for the benefit of parties, and not to compel the good conduct of judges. 3 Gra. & Wat. N. T. 717; 35 Ann. 974; 6 Ann. 658; 2 Caines' 85; 3 Gilm. 202; 2 Tenn. R. 5; 9 Cowan, 680; 1 Scam. 18; 1 Gilm. 475; 2 Ib. 185; 11 Conn. 342; Greenl. R. 442; 4 Day, 42; 10 Geo. 429; 1 Brev. 109; 7 Wend. 79; 1 Neo. & Man. 598; 4 B. Monroe, 386; 24 Vt. 252.

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6. Even where the forgery is only a forgery at common law, in order that the uttering of the forged instrument should be an offense it is not requisite that any fraud should be actually perpetrated by it. An intent to defraud will be sufficient, and that intent is to be inferentially proved. 1 Whart. Cr. Law, 8th ed. § 705.

It is scarcely necessary to say that to constitute the offence of uttering, it is in no case requisite to show that the defendant had been implicated in the forgery. R. S. Sec. 833; 1 Whart. Cr. Law, 8th ed. § 712.

Marks & Bruenn and A. A. Ker & J. Duwigneaud for Defendant and Appellant:

1. Where an indictment seeks to charge a crime not provided for specifically by statute, a trial and conviction resulting therefrom is a nullity.
2. Where it is shown that no forgery or altering of any document recognized in law, and by or through which the crime of forgery can be committed, and there having been no forgery, the crime of altering and publishing cannot exist independent thereof.
3. The constitutional right to be heard in person or by counsel can never be denied by any court.
4. The publishing must be of a forged, false, altered or counterfeit record, with intent to injure or defraud some person or body politic or corporate. Revised Statutes, sec. 833.
5. Where it is charged in an information that a certain instrument, created by special statute with specific and distinctive features, has been altered and falsely published as true, it must be shown, in order to maintain the charge, that the identical instrument thus created has been altered and published. It does not maintain the charge to prove that another instrument has been altered and falsely published, no matter how close its resemblance to the instrument created by the statute and described in the information. *State vs. Anderson*, 30 Ann. 557.
6. The criminal statutes of this State make it a crime to falsely publish as true an altered record, but there is no such crime known to the law of Louisiana as altering and publishing as true an altered, false and counterfeit instrument. 30 Ann. 557.

The opinion of the Court was delivered by

MANNING, J. The indictment contained two counts, first forging a certificate of marriage, and second for publishing as true such forged certificate, and there was a conviction of both. The State entered a *nol. pros.* of the first and the prisoner was sentenced upon the second to imprisonment at hard labour for fourteen years.

There was a motion to quash on the ground that the pretended marriage certificate cannot in law be the subject of forgery, because it is invalid on its face and void of legal effects, the invalidity and want of legality being that the City Courts of New Orleans are without authority to issue marriage certificates or to solemnize marriages.

The certificate alleged to have been published as true purported to have been issued by William Voorhies, judge of the Second City Court of New Orleans, and certified the marriage of T. J. Boasso with Mary Catherine Kuhn on the 23d day June, 1885.

Justices of the peace were authorized to celebrate marriages, Rev. Civ. Code, art 103, and any one who celebrates a marriage must make

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"an act" thereof, *Ibid*, art. 105. The judges of the "City Courts" of New Orleans replace, under the Constitution of 1879, the justices of the peace. Const., arts. 135, 266; *State ex rel. Howard v. Walsh*, 32 Ann. 1234. And the legislature has expressly granted them the right to issue licenses to celebrate marriages. Acts 1882, p. 40. The judge of the Second City Court of New Orleans has therefore the right to solemnize marriages and is required to make a certificate thereof, that being the name of the kind of "act" he then confects, and hence the motion to quash was properly denied.

The court was requested to make the following charges to the jury, which were refused:

1. That the offence must have been committed with intent to defraud, and to defraud means to deprive a person of his personal property.

The judge had already in his charge explained to the jury at great length that an intent to defraud was one of the essential elements of forgery, and he cannot be required to repeat what he has already said with lengthy explanations. He instructed the jury that "defraud" meant something more than the definition of personal property, and he is correct. Wharton says it means to prejudice the rights of another, *Cv. Law* § 683. The statute punishes where the intent is to injure or defraud, *Rev. Stats. sec. 833*, and the indictment contains the charge of intent to injure and defraud.

2. That the law requires that the offence shall have been committed within the jurisdiction of the court, and if it be not so shewn the accused should be discharged.

The judge seems to have misapprehended the purport of this request as his answer was that the question of jurisdiction was not before the court, and there was no doubt of its jurisdiction, but he had already charged the jury that the State must shew affirmatively beyond a reasonable doubt that the offence charged had been committed in the parish of Orleans, that is, within the jurisdiction of the court, and the jury when they found the verdict of guilty as charged, necessarily passed upon the proof of that fact and found that it had been proved.

3. That there could be no forgery of a marriage certificate where no marriage ever existed.

To which the judge replies that the evidence on the trial established the possibility of such a contingency. It must be noted that this remark on the evidence was not made in the presence of the jury, but is the reason given by the judge in the bill of exceptions. While

judges are prohibited in criminal trials from commenting to the jury on the evidence, they are required to give to the appellate tribunal their reasons for refusing instructions that are prayed.

But the instructions prayed are not good law. As well might it be said there could be no forgery of a promissory note where no indebtedness of the maker existed. A certificate of a marriage that had not taken place, might be made for a variety of purposes, e. g., to affect the descent of property, to deceive individuals and families, etc., and when the forgery had for its intent to injure and defraud and the intent has been accomplished and borne its fruits (of which the jury are the triers) the offence is complete.

4. That the alleged forged instrument must be one which, if genuine, a suit could be brought upon it, for if it cannot be sued on it cannot be forged.

It is not essential that the forged instrument be one that, if genuine, an action might be brought on it. If it could be used as proof in a suit, either against him whose name is forged or in a suit against any other, whether to sustain a claim made or in defence of one, it is susceptible of forgery. 1 Wharton Cr. Law, §§ 691-2.

5. That there are two counts joined by a copulative instead of a disjunctive conjunction and they therefore form but one offence and the jury must disregard the charge of publishing as a second count.

The two counts are not joined in any way in the indictment. They are separate, distinct, and each complete in itself.

Besides these five bills there was a motion for a new trial, a motion in arrest of judgment and an assignment of errors.

The first is the usual motion formally made as a precursor to an appeal, but the counsel for the prisoner insisted on arguing it, which the court refused, saying he desired no argument thereon and overruled it. To this refusal a bill was taken.

The counsel arraign this refusal as a denial of the prisoner's constitutional right to be heard. The prisoner had been heard throughout as the numerous bills and motions attest, and if any error of law had been committed by the judge, the proper methods had been taken to bring such error before the appellate tribunal. An argument on the motion for a new trial on the ground that the verdict is contrary to the law and the evidence, could be only a reproduction of the arguments in the several stages of the trial, and surely the constitutional right of being heard cannot reasonably be construed as meaning that a prisoner's counsel must be permitted to re-argue *ad infinitum* all that had been

already argued, and to repeat all that has been already said. There must be some restraint of the volubility of counsel, since there must be a limit to the duration of a criminal trial. If a judge has a doubt of the correctness of his rulings or of the jury's verdict, he ought to and will grant a new trial, but when he has neither one nor the other, it is no denial of a constitutional right to refuse to hear argument on the formal motion for a new trial, based alone on the ground that the verdict is contrary to the law and the evidence.

The motion in arrest is on the ground that the verdict is an absolute nullity, for the reason that the indictment failed to specify the matter in which the certificate or attestation was or might have been receivable as legal proof.

The indictment is based on sec. 833, Rev. Stats., which punishes on conviction, whoever shall forge or counterfeit * * any certificate or attestation of any public officer in any matter wherein his certificate or attestation is receivable and may be taken as legal proof; or shall alter or publish as true any such false, altered, forged or counterfeited certificate or attestation with intent to injure or defraud any person.

As the judge of the Second City Court had authority to celebrate marriages and to make certificate of such celebration, his certificate is receivable in proof thereof. Our statutes dispense with setting out any copy or fac simile of the forged or published paper, and do not require that it shall be described by any technical name, but it may be designated by the name which it is usually known. Rev. Stats., sec. 1049. "Marriage certificate" is the name by which "acts of marriage" are usually known.

The indictment follows the words of the statute and it is not needful to charge anything more than is necessary to accurately and adequately express the offence. Wharton Cr. Pl. and Pr., § 158. It is sufficient to state all the circumstances comprised in the definition of the offence as given in the statute, so as to bring the defendant clearly within its provisions. State v. M'Clanahan, 9 Ann. 210. It is neither necessary nor proper to set forth matters of evidence in the pleadings, nor to set forth the kind of suit or matter of contestation in which the forged instrument is receivable in evidence.

The assignment of errors is: first, that the "indictment is defective, in that it seeks to charge the commission of a crime unknown to and not contained in the criminal statutes of this State. Second, that the record shews there was no forging or altering of any document recognized in law by or through which the crime of forgery can be committed. There being no forgery committed, the crime of publishing and

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uttering cannot exist independent of forgery. Third, that the record shews that the defendant was deprived of the right of being heard through counsel and by argument, contrary to his vested constitutional right."

This last alleged error has been already disposed of. The second is made on the supposition that the publisher of a forged paper must himself have been the forger, whereas the two acts are altogether distinct and constitute two different and well-defined crimes. One man may have forged a paper and another have published it. The defendant may have been innocent of forgery and guilty of publishing the forged instrument. The crime charged is denounced by the criminal statute already cited, and in its identical words.

We find no error in the rulings of the lower court.

Judgment affirmed.

No. 9502.

ROBERT R. BARROW ET AL. VS. MRS. MARGARET WILSON ET AL.

In a petitory action met by the defense of the prescription of ten years, the main legal discussion involves the question of the alleged just title, the good faith and the length of time of the defendant's possession of the property in controversy. The legality or validity of plaintiff's title is a question of secondary consideration, which comes up in case only that defendant's plea of prescription should not be found good.

A just title is one which in form and intent is translatif of property, which the purchaser acquires from one whom he believes in good faith to be the true owner.

If the possession begins in good faith, the right of pleading the prescription of ten years is not affected or impaired by the fact that the possession may subsequently have been in bad faith.

Irregularities and defects in a tax deed, which is *prima facie* valid, and which are not apparent or stamped on the face of the deed, are cured by the prescription of ten years.

Prescription is suspended by the minority of the parties against whom it is pleaded. Hence, if it appears from the record that the party to be affected by the plea of prescription was a minor a short time before the time at which it must have begun to run, and if the record does not show the precise time at which he obtained his majority, the cause will be remanded for trial of that issue.

A PPEAL from the Twenty-fourth District Court, Parish of Plaquemines. *Livaudais, J.*

E. Howard McCaleb for Plaintiffs and Appellants:

I.

1. Just title, good faith and actual possession are all essential to support the prescription of ten years. R. C. C. 3478, 3479, 3480, 3481, 3482, 3483, 3484.
2. The Act of Congress of March 2, 1849, donating swamp lands to Louisiana, did not convey title "to lands claimed or held by individuals." Sec. 2, Acts Cong., 1849.
3. A United States patent is the superior and conclusive evidence of legal title; and where plaintiffs in a petitory action claim under a patent from the United States issued in 1839,

38	209
48	346
48	589
49	582
88	209
111	765
38	209
113	52
38	209
120	550

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and defendants claim under a State patent leased in 1869, for the same land and ten years prescription, plaintiffs should recover the land. Defendants' title not being valid, cannot be the basis of the ten years prescription. "A State has no power to declare any title valid against a title held under a patent granted by the United States. A claim based on a patent obtained from the State must yield to a patent from the Government of the United States." 5 A. 75; 15 How. 433; 13 Pet. 436; 13 Pet. 498. "Valid" means good in law. Bouvier's Law Dic., verbo *Valid*.

4. The registers of the United States land offices cannot attest or certify the contents of documents in their possession. 3 R. 15. Such certificates are no evidence at all. 6 A. 683; 13 A. 357.
5. Defendant who, when sued for the price of land by his vendor, alleged that the latter was without title, that he feared eviction and claimed to withhold the price on that account, cannot in a subsequent suit brought by the true owner to recover the property claim to be a possessor in good faith and thus contradict his judicial admission to the contrary made nine years before, at a time not suspicious. Rev. C. C. 2291.
6. In a conflict of titles, the eldest must prevail. *Qui prior est tempore, potior est jure*.
7. When defendant's title is not traced to a sovereign grant possession in good faith, under successive purchases from private vendors for more than ten years, will not constitute a title by prescription against one who claims under a patent from the United States. 12 A. 151. The burden of proof rests with the party pleading prescription to show affirmatively a state of facts which will sustain the plea. *Idem*.
8. Where plaintiffs have shown that the property was vacant, no one living upon it, and it was occupied only as a pasture for cattle seven years prior to the institution of the suit, the plea of prescription of ten years will not be sustained.

II.

- a. Where the pleadings and evidence show that the parties trace their titles to the same source, neither can attack the title of their common author. 2 L. 213; 8 L. 239; 1 R. 369; 5 A. 677; 10 A. 327.
- b. Where defendant relies on a tax sale as his title, plaintiff has the right to show its illegality. 33 A. 438; 34 A. 1973.
- c. Where the land stood recorded in the name of H. L. Hunley, who died (and whose succession was opened) in 1863, leaving his sister, Volumnia W. Barrow, his universal legatee, and she died in 1868, bequeathing her estate to plaintiffs, then minors, and while her succession was being administered upon, an assessment, advertisements and tax deed made in 1871, in the name of "Est of H. L. Handley," will not convey a just title to the property. The misnomer is fatal. 10 A. 771; 12 A. 748; 14 A. 209; 15 A. 15; 33 A. 520, 912; 34 A. 107, 407; 35 A. 952; 36 A. 985.
- d. Where the property was sold for a parish tax exceeding the limit fixed by law (Sec. 7, Act 42 of 1871), the sale is illegal. 34 A. 123; Blackwell, 160; Cooley on Taxation, 295; Burroughs on Taxation, 301. The police jury were without power to assess or tax collector to collect taxes in excess of the limitation fixed by law. 29 A. 1; 28 A. 536; 30 A. 1085; 32 A. 401.
- e. Where no curator *ad hoc* was appointed to represent a non-resident in tax proceedings under Act 42 of 1871 (sec. 60), and the land was not divided or sold in tracts of from ten to fifty acres (Sec. 62, Act 42 of 1871; Art. 139, Constitution of 1868), the sale is an absolute nullity. 24 A. 454. 23 A. 231; 23 A. 354; 33 A. 873.
- f. A description of land on the assessment roll, in the tax collector's advertisement of sale and in the tax deed, as "160 acres, bounded above by L. Edgcomb and below by A. Cox," does not sufficiently identify and will not convey title to land known, designated and described in acts of sale registered in conveyance office as "Lot or section No. 5, in township 18 of range 16, E, containing 159 acres." The description is void for uncer-

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tainty, and cannot be the basis for any judgment. Manning, Unr. Cas. p. 56; 1 R. 20 10 A. 327, 672; 30 A. 295.

- g. The Auditor's deed is necessary to complete a tax sale under Sec. 62 of Act 42 of 1871.
- h. Where a tax deed carries its death wounds on its face (1) not designating or describing the property; or (2) giving the name of the true owner; or (3) stating the taxes for which the land was sold, whether State or parish, and how much; or (4) the years for which they were due and unpaid—the prescription of ten years will not cure such radical defects, and the decision in Giddens vs. Mobley (37 A. 417) does not apply.
- i. An unrecorded sale cannot support prescription. 11 L. 346; 11 R. 56; 2 A. 787, 868.
- j. Defendants in bad faith and without title cannot recover for improvements, and are responsible for revenues. R. C. C. 3451, 3452, 3453, 3454; 1 Woods, 57; 35 A. 977. The fruits to be restored by the possessor *mala fides* are what the premises are reasonably worth, with interest to the time of trial. 15 Wal. 624; 33 A. 1178.

F. O. Zacharie for Defendants and Appellees:

The prescription of ten years possession under a just title is pleadable, and must be sustained against a United States patent issued prior thereto. 12 A. 151. The United States laws and courts do not disregard but sustain the statutes of limitations of the States. 2 Bk. 599; 5 Pet. 402; 5 Peters, 457; 3 Pet. 270; 13 Pet. 45; 7 How. 779, 780, 783; 17 Wall. 600; 2 Bank Rep. 318; 12 Bank Rep. 426, 540; Hemp. 325; Abb. Adm. 430; 2 Wood and M. 470; 2 Wood and M. 402; 9 Blatcliff, 127; 1 Bias, 186; 1 Story, 102.

"It is sufficient if the possession has commenced in good faith; and if the possession should afterwards be held in bad faith, that shall not prevent the prescription." C. C. Art. 3481; 3 A. 8; 12 A. 942.

Bad faith is not presumed. C. C. 3481; 12 A. 242; 14 A. 362, 363.

An immaterial mistake in the spelling of the name of the owner of land sold for taxes will not vitiate the sale, if the land be definitely described. Desty, p. 963; 3 A. 8; Bouvier's Dict. verb; 2 Idem. Sonans; Burroughs, 203; 37 N. H. 307; 14 A. 99, 580; Cooley on Taxation, 285; Desty, p. 555; 101 Ill. 645; 47 Cal. 501.

A slight variance in the quantity of the land sold from the true quantity owned by the delinquent will not vitiate the sale. Cooley on Taxation, p. 282; 9 Penn. St. 38.

A title not registered may be the basis of prescription. 11 A. 100; 8 A. 5; 4 R. 170; 6 A. 164; 11 A. 57; Guzman vs. Berryman, N. R. Op., Book No. 50.

"Every proprietor who, for a long time and without any just reason neglects his right, should be presumed to have entirely renounced and abandoned it." Vattel's Law of Nations, B. 2, ch. 11.

Defendants have possessed in good faith for more than ten years, under transalative titles.

The plea of ten years prescription should be sustained. R. C. C. Arts. 3479, 3451, 3452; 27 A. 598, Hall and Turner vs. Mooring; 4 R. 205, McCloskey vs. Webb; 14 A. 596, Roberts vs. Brown; 18 Howard, 52, 59, Wright vs. Mattison; Blackwell on Tax Titles, p. 671; 13 How. 472, Pillow vs. Roberts; 21 How. 340, Thomas vs. Lawson; 5 A. 380, Eldridge vs. Thibbets; 34 A. 705, Wederstrandt vs. Freyhen; 35 A. 893, Ludeling vs. McGuire; 35 A. 1086, Hickman vs. Dawson.

Just title. R. C. C. 3479, 3483, 3489, 3486, 3481, 3485, 496; Blackwell on Tax Titles, 649, 662, 666; Wood on Limitation of Actions, 528; 35 A. 492, Davidson vs. Houston; 15 La. 566, Divole vs. Choppin.

Of title valid in point of form. 7 O. S. 406, Carroll vs. Cabaret; 4 N. S. 224, Frique vs. Hopkins; 11 O. S. 715, Dufour vs. Camfranc.

Tax sales and judicial sales are assimilated. 33 A. 491, Shannon vs. Lane; 36 A. 392, Aymer vs. Bourgeois; C. P. 695; 3 A. 8, Leduf vs. Bailey.

Of the elements of judicial titles. 2 Rob. 468, Waldon vs. Caulfield; 8 A. 138, Dade vs. Bouguville; 9 A. 522, Mithoff vs. Dewees; 13 A. 450, Hynson vs. Bailey; 6 N. S. 458, Thomp-

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- son vs. Chanveau; 5 A. 854, Davis vs. Wilcozen; 8 La. 321, Poultney vs. Cevill; 34 A. 205, Roberts vs. Zanaler.
- An apparently valid assessment, an element of judicial title, sufficient for prescription. 8 La. 241, Bedford vs. Urquhart; 4 A. 69, New Orleans vs. Gottschalk; 10 La. 283, Reeves vs. Towles; 14 A. 598, Roberts vs. Brown; 6 N. S. 349, Nancarrow vs. Weathersby; 7 La. 50, Smith vs. Corcoran. Antecedent to 1868.
- Tax titles are *prima facie* valid. Art. 118, Const. 1868; 30 A. 1235, Jurey & Gillis vs. Hugh Allison & Co; 25 A. 236, Coco vs. Thienman; 29 A. 115, Lannes vs. Workingman's Bank; 30 A. 860, O'Hearn vs. Hibernia Ins. Co; 31 A. 661, Renshaw, Cammack & Co. vs. Imboden; 1b. 840, N. O. Ass'n vs. Labranche; 35 A. 893, Ludeling vs. McGuire; Sec. 65, Art. 114, 1869; 35 A. 1086, Aickman vs. Dawson.
- The want of recital in deed that a curator *ad hoc* was appointed, does not affect the plea of prescription. Sec. 66, Act 114 of 1869; 35 A. 894, Ludeling vs. McGuire; 13 How. 472, Pillow vs. Roberts; 8 How. 56, Wright vs. Madison; 21 How. 340, Thomas vs. Lawson; 21 A. 661, Renshaw vs. Imboden; 33 A. 1043, Mulholland vs. Scott; 32 A. 912, Lague vs. Boogni; 21 A. 506, Woods vs. Lee; 14 A. 792, Louallien vs. Castille.
- Of the possession necessary to plead prescription. R. C. C. 2479, 3487; Secs. 4 and 8, Act 39 of 1871, 22 A. 470, Ellison Iler; 4 A. 60, Hayden vs. Nutt. Plaintiff's petition alleges possession of defendants. R. C. C. 3487, 3434; 11 La. 433, Baker vs. Towles.
- Validity of tax title. Sec. 2, of Act 101 of 1873, declares that judicial possession under tax title duly recorded, for two years, is an acquiescence in same and a waiver of all informalities in assessment and sale, and operates an estoppel against the former owner and authorizes sale by purchaser to any third person.
- Of rents and revenues, and improvements and taxes. R. C. C. 503, 3543; Henn. Dig. p. 1195; 14 A. 605, Roberts vs. Brown; 10 R. 178, Lazur vs. Generes; 34 A. 1163, Kibbee vs. Campbell; 34 A. 1086, Hickman vs. Dawson; 13 A. 494, Stanbrough vs. Wilson; 2 R. 137, Baldwin vs. Union Ins. Co; 2 A. 347, Beard vs. Morancy; 26 A. 588, Wilson vs. Benjamin; 18 A. 407, Howard vs. Zeigler; 27 A. 398, Dulfilho vs. Mayer; 34 A. 705, Wederstrandt vs. Freyhen; R. C. C. 503, 3453.

The opinion of the Court was delivered by

POCHÉ, J. This is a petitory action involving the title to two separate tracts of land.

Plaintiffs claim the property under the rights of their deceased mother, who was the only heir at law of her predeceased brother, H. L. Hundley, the alleged former owner.

Defendants claim one of the tracts under a patent issued by the State of Louisiana in January, 1869; and the other tract under a tax sale made to their author in September, 1871.

Asserting both conveyances to have created a just title, and alleging possession in good faith for upwards of ten years, they pleaded that prescription. That defense prevailed in the district court, and plaintiffs have appealed.

After a prolonged and a thorough examination of the record, and a mature consideration of the innumerable authorities relied upon by the respective counsel, discussed by them at great length in able and ex-

haustive briefs, we have reached the conclusion that there is no error in the judgment appealed from.

But in view of a very important question which has been discussed on appeal only, and on which the record does not contain sufficient or decisive evidence, we are unable to make a final disposition of the cause in our present decree, and we shall remand the case for trial on that question.

Under the pleadings as affected by the plea of prescription of ten years, the main legal discussion hinges upon the question of the alleged just title set up by the defendants as a basis of their plea.

I.

The first tract of land is shown to have been acquired by the defendants' author in 1869, under a patent issued by the State of Louisiana. Upon its face that muniment of title is transferable of the ownership of the property which it purports to convey, and the record contains no evidence to show that the purchaser had any reason to fear or suspect that the State of Louisiana was not the true owner of the land which he proposed to purchase and for which he gave valuable consideration.

These are the elements which our Code contemplates as the essential conditions of the good faith which forms the basis of a just title. C. C. 3478, 3484.

We note in this connection the line of argument followed by plaintiffs' counsel throughout the whole case, and in which he strenuously, and we will add, successfully contends that in 1869 the legal title to this land was in plaintiffs' author.

It would be difficult to establish a more complete chain of title than the one which he has interwoven in defendants' path. But under the issue which we are trying, we are not concerned with the legality of plaintiffs' title. The issue is restricted and the discussion must be confined to the questions of the just title set up by the defendants and of their possession of the lands in controversy as the foundation of their plea of prescription.

Counsel's argument, although it is predicated on indisputable evidence, is answered by the textual provisions of our Code on this subject. Article 3484 reads: "By the term just title, in cases of prescription, we do not understand that which the possessor may have derived from the true owner, for then no true prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the ownership of the property."

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On the question of good faith, plaintiffs submit the point that one of defendants' authors, Burton, who had purchased from Cox, resisted the payment of his notes representing part of the purchase price, on the ground, judicially alleged, that Cox's title was defective. From the record it appears that this contention arose in 1875, four years after his purchase from Cox, and two years after the latter's purchase from the State.

That argument is likewise answered by the text of the Code.

Article 3482 reads: "It is sufficient if the possession has commenced in good faith; and if the possession should have afterwards been held in bad faith, that shall not prevent the prescription."

Article 3481 reads: "Good faith is always presumed in matters of prescription, and he who alleges bad faith in the possessor must prove it."

These provisions of our law have been frequently expounded by this Court, and application has been frequently made of them in conformity with our present conclusions. *Leduf vs. Bailey*, 3 Ann. 8; *McGovern vs. Laughlan*, 12 Ann. 242.

It is therefore safe to conclude that the doubt of the validity of the title of Cox which Burton once entertained, and which was evidently removed, as it appears that he subsequently paid the very purchase notes in question, cannot affect the good faith of Cox at the time of his purchase, or the resulting good faith in the present possessors, both in their purchase and in their possession.

But on the question of possession, plaintiffs' counsel argues in this Court, that the defendants have not shown possession of the property for ten years, prior to the 16th of October, 1884, the date of the institution of this suit. One of the witnesses, who rented the property in 1878, says that at that time it was vacant, occupied for cattle only. But this does not exclude the possession which the law contemplates as resulting from an authentic sale of immovable property. C. C. 2479.

The lands in question are shown to have been low marshy lands, and to have been sold by the State as "swamp lands subject to tidal overflow." Doubtless the grazing of his cattle thereon, was all the possession which the then owner needed of the lands, and such possession, accompanied by the regular payment of taxes, as shown herein, is sufficient in law to supply a proper foundation for prescription. *Giddens vs. Mobley*, 37 Ann. 417.

At all events plaintiffs are estopped from urging want of possession in 1878, either in these defendants or their predecessors, by reason of

their judicial admission to the contrary. Their petition in this case, filed October 16, 1884, contains the following allegation :

"That about nine years ago the aforesaid defendants, well knowing that they had no title to the aforesaid lands, or that their pretended title was in all respects vicious and defective, wrongfully and in bad faith *entered upon and took possession of the above described lands, and have ever since illegally gathered for their own benefit, received, enjoyed and disposed of the fruits and revenues of said lands* belonging to your petitioners, and worth the sum of four hundred dollars per annum, making three thousand six hundred dollars for the rents, revenues, use and occupation of said lands during the past nine years, justly due and owing unto petitioners by defendants." (Italics are ours).

The allegation has reference to both the tracts of land now in suit, and it is palpably inconsistent with the contention that the tract of land now under discussion was not in the possession, illegal or otherwise, of the defendants prior to the year 1878.

II.

In support of their tax title to the second tract of land in controversy, defendants rely upon a tax collector's deed, dated December 16, 1871, which recites in substance that the property had been assessed in the name of H. L. Handley, that it had been seized for taxes, of which notice had been given, that the seizure had been duly advertised, that the sale took place conformably to the advertisement, on the 30th of September, 1871, and that the property was then and there adjudicated to Leonard Edgecomb for the sum of \$121.90, which was duly paid.

The authority of the tax collector was not disputed, but numerous irregularities in the assessment of the property, and in the manner of effecting the sale, are set up by plaintiffs as elements of nullity of the tax sale, evidenced by the deed which we have just described.

In this connection we must repeat that we are not trying the legality or binding validity of this sale, but our investigation must be restricted to the question of the good faith of the purchaser at the sale, and of the belief which he had that he was acquiring a just title.

The deed speaks for itself, and amply justifies the legal conclusion that it operated a transferable title of ownership in the purchaser, and hence that it was a just title.

That feature of the case is so absolutely identical with the questions involved in the case of *Giddens vs. Mobley* recently decided by this Court, and reported in 37 Ann., p. 417, that we feel justified in adopt-

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ing the reasoning of that case, as our reasons for the disposition of that part of the present case.

We shall therefore content ourselves to refer to our discussion of that case and to the authorities which we quote therein, as amply sufficient to fairly and justly dispose of the points discussed by counsel on this branch of the case in hand.

Great stress is laid by plaintiffs on alleged illegalities and irregularities which characterized the assessment, the seizure and the sale of these lands at the tax sale relied on by the defendants. Among others they contend that the assessment was in the name of *H. L. Handley*, and not in the name of *H. L. Hundley*, who was the true owner; that the parish tax claimed of him was in excess of the limit imposed by law to the taxing power of the parish, and that the lands were not subdivided in lots for the purpose of sale as was required by the Constitution and the laws then in force.

The legal answer to these objections is that none of those defects or illegalities were stamped on the face of the tax collector's deed, which is valid in form and contains a detailed recital of a compliance with all the forms and other requirements of the laws then governing such sales.

As we said in the case of *Giddens vs. Mobley*, we can but repeat here: "A possessor cannot be deprived of the right of pleading prescription, because he might by inquiry and careful examination discover that his vendor had no title," or that the tax sale under which he claims as a basis of prescription was defective on account of some latent illegality or irregularity.

We now reach the question which was discussed on appeal only and on which the record is not satisfactory.

It involves the proposition that plaintiffs, who were minors when they acquired the rights of their mother, had not been of age ten years previous to the institution of this suit, and that as prescription does not run against minors, it had been suspended a sufficient time to defeat the plea as a means of defense.

That the minority of plaintiffs suspended prescription as long as it lasted, is a proposition which cannot be controverted. C. C. arts. 3522, 3544. The record shows that they were both minors in the year 1869; and their counsel contends that one of them reached the age of majority in 1875, and the other in 1879, only.

But on this point the record is absolutely silent. Hence we have no means of legally ascertaining the precise time at which they both reached their respective majority. It stands to reason that the point

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is of vital importance to the final and just determination of the controversy, which hinges on the question of prescription.

On the face of the record, and under the law, as we have shown, the case is with the defendants on their plea of prescription, but the ends of justice compel us to remand the case in order to solve the question of the alleged suspension of prescription through and by means of the alleged minority of plaintiffs during a portion of the ten years necessary to sustain the plea; and for that reason only we must reopen the case and reverse the judgment appealed from.

It is therefore ordered that the judgment of the district court herein be reversed; and that the case be remanded to the lower court for trial exclusively on the question of the alleged prescription of ten years by reason of the minority of plaintiffs extending to a time less than ten years before the 16th of October, 1884; the true intent of the trial thus ordered being to legally ascertain the precise time at which the two plaintiffs herein reached their respective age of majority, either by the lapse of time or by legal emancipation. Costs in both courts to abide the final determination of the cause.

ON APPLICATION FOR REHEARING.

MANNING, J. Among the reasons urged by the defendants' counsel why a rehearing should be granted, is that the opinion does not pass upon his plea of prescription of two, three and five years, and if the plea of ten years' prescription should not be borne out by the evidence we have ordered to be taken, that he desires to avail himself of these shorter terms. Those pleas were not passed on because the case was rested on the ten years' plea, but the defendants are not and will not be precluded from urging those pleas, if the longer term shall be found not to be sustained.

Rehearing refused.

No. 9636.

SCANNELL & LAFAYE VS. R. BEAUVAIS.—JOHN HENNESSEY & BRO.

THIRD OPPONENTS.

If a vendor of parts and pieces of machinery of a sugar mill, which are detachable, permit them to be sold confusedly with the mass of machinery and the sugar house, without provoking a separate appraisement of them, he loses his privilege upon them.

A vendor of such pieces of machinery has no privilege upon the sugar-house and the acre of ground on which it stands and the other machinery in it, and if he ignores the privilege he has and sets up and attempts to enforce the privilege he has not, he will lose that which he has and will be remediless.

38	217
51	1743
38	217
106	87
107	713
38	217
110	239

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APPEAL from the Twenty-second District Court, Parish of St. James. *Duffel, J.*

Sims & Poché for Plaintiffs and Appellants.

A. J. Murphy for Third Opponents and Appellees.

The opinion of the Court was delivered by

MANNING, J. The plaintiffs provoked the sale of the defendant's sugar plantation by executory process and bought it. On the day of sale, John Hennessey & Bro. filed a third opposition, claiming \$2,694 61, of which \$2,400 was for machinery sold by them and alleged to be then in the sugar-house, and the residue was for repairs to machinery. They asserted a privilege superior in rank to the plaintiffs' mortgage upon the sugar-house and the acre of ground upon which it stands.

The machinery sold by the third opponents is described by them as "Two clarifiers and fittings; one copper evaporator and fittings; one skimming tank, in three compartments; two boilers; one steam and mud drum, with fittings; one No. 3 Knowles plunger pump and steam pipe for same." They prayed for and obtained an order for a separate appraisement of the sugar-house, acre of ground, and all the machinery therein contained, which was made, the separate appraisement amounting to two thousand five hundred dollars. The opponents did not pray for or obtain a separate appraisement of the machinery sold by them, and the same was sold by the sheriff with the plantation and all of its appurtenances, which were adjudicated to the purchasers, *in globo*.

The plaintiffs answered the opposition by denying the existence of the privilege as claimed, but the opponents had judgment according to their prayer and the plaintiffs appealed. They have sold the plantation to other parties, and these join in the appeal.

The sugar-house was built in 1870, and has been operated ever since. The machinery of the opponents was sold by them to the defendant in 1883. The testimony is that the several pieces detailed above were movable by their nature and could have been removed without injuring the house or other machinery therein.

The vendor of a movable has a privilege on it for the price :

"But if he allows the things to be sold confusedly with a mass of other things belonging to the purchaser, without making his claim, he shall lose the privilege, because it will not be possible in such a case to ascertain what price they brought." Rev. Civ. Code, Art. 3228.

The opponents allowed the parts or pieces of the machinery upon which they had a privilege to be sold confusedly with the other ma-

Succession of Moseman.

chinery and the sugar-house, and did not cause them to be appraised separately, nor did they claim or attempt to enforce a privilege upon them, but instead claimed the privilege upon the sugar-house and all the machinery and an acre of ground, and had these appraised separately.

Had they claimed the privilege they really had upon the machinery they had sold, and caused it to be appraised separately, they could have enforced their claim. *Caslin vs. Gordy*, 32 Ann. 1285; *McIlvaine vs. Legare*, 36 Ann. 359. But they had no privilege upon the sugar-house and the machinery in bulk and ground. They ignored and abandoned the privilege they had, and set up and attempted to enforce a privilege they had not, and the penalty they suffer is the loss of what they might have secured, for they are now remediless.

It is therefore ordered and decreed that the judgment of the lower court is avoided and reversed, and that the plaintiffs have and recover of John Hennessey & Bro., and of James M. Hennessey, liquidator of that firm, their costs on the third opposition in the lower court and the costs of appeal.

POCHÉ, J., takes no part herein.

No. 9676.

IN THE MATTER OF THE ESTATE OF JACOB E. MOSEMAN—ON OPPOSITION TO FINAL ACCOUNT OF ADMINISTRATOR.

A policy of insurance on the life of a man vests the rights to the policy and to the fund arising on the happening of the loss, at the date of the execution of the contract. This has been frequently held in cases where third persons are the beneficiaries, and the same rule must apply when the beneficiary is the insured himself or "his administrators, executors or assigns." Hence when such a policy is taken out by an unmarried man, the rights and interests thereunder belong to his separate estate, and do not fall into a community arising under a subsequent marriage. If in such case, premiums have been paid by the community, it is entitled to have such payments reimbursed to it as expenditures made by it for the benefit of the separate estate of the insured spouse.

A PPEAL from the Twenty-third District Court, Parish of Iberville.
Talbot, J.

Pugh and Folsé for Opponents and Appellants.

David N. Barrow, Contra.

Alex. Hebert for the Administrator, Appellee.

The opinion of the Court was delivered by

FENNER, J. Jacob E. Moseman died intestate, having been twice married, leaving six children, offspring of the first nuptials, and a widow and one child of the second.

38	219
44	921
38	219
108	408
38	219
109	365
38	219
111	308
38	219
120	607

Succession of Moseman.

The active mass of his succession is composed of two items, viz: First. The sum of \$3,012 91, amount collected on two insurance policies on the life of deceased. Second. The sum of \$396 45, an amount collected for salary due the deceased.

The passive mass (as slightly amended in the decree of the court) consisted of \$436 70, privileged debts, and \$103 28, ordinary claims, besides \$1,100 due to the children of the first marriage on account of paraphernal funds of their mother received and converted by deceased.

The administrator, in his account, assigned the entire active mass to the community, deducted the entire passive mass (including the \$1,100 due the above children) therefrom, gave one-half the residue to the wife, and divided the other half equally between all the children. To this account the widow filed an opposition denying the existence of the debt of \$1,100 allowed in favor of the children, and claiming that, if allowed, it should be paid as a debt of the separate estate of the husband out of his share of the community, and also claiming that she was entitled to the usufruct of the share of the community assigned to the children.

The children of the first marriage also opposed the account on the ground that the sums received from the insurance policies belonged exclusively to them, or, if not, to the separate estate of deceased and not to the community of the second marriage.

Thereupon the widow filed a supplemental opposition, claiming that, in case the pretensions of the children of the first marriage should be sustained, she and her minor child would be entitled to the homestead right of \$1,000 on the ground of their necessitous circumstances. There were other grounds in the widow's oppositions not necessary to mention.

The judge, in his final decree, amended and restated the account, as follows:

1st. He approved the administrator's assignment of the entire active mass to the community.

2d. He held the debt due the children of the first marriage to be a separate, and not a community, debt.

3d. After deducting the remaining passive mass from the entire active, he divided the residue between the widow and the husband's succession.

4th. From the latter's half, he paid the debt due the children of the first marriage, and divided the residue equally between all the children, but decreeing the widow entitled to the legal usufruct of said residue.

Succession of Moseman.

From this judgment, the children of the first marriage have alone appealed. The widow obtained an order of appeal but failed to perfect the same by giving bond. Neither she, nor any appellee has filed any answer in this court praying for any amendment of the judgment in their favor.

The only error in judgment appealed from urged in this court by the only appellants before us, is as to the disposition of the sums collected on the insurance policies.

The admitted facts are that, at the time when the policies were taken out, Moseman was a widower; that the policies were taken out for his own benefit and payable to "Jacob E. Moseman, his executors, administrators or assigns;" that he paid several premiums on them before his second marriage, and several after that event, the latter undoubtedly, out of community funds.

The legal question is whether, under such circumstances, the money collected on the policies after his death, belong to the community or to his separate estate.

Mr. Bliss, in his work on Life Insurance, after quoting several other definitions, says: "The best one is that given by Bunyon, who says: 'The contract of life insurance is that in which one party agrees to pay a given sum, upon the happening of a particular event, contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum, or certain equivalent periodical payments, by another.'" Bliss on L. I., §3.

Every man possesses an insurable interest in his own life, and he may insure it in his own favor, or in favor of any third person having the requisite interest therein.

The contract creates certain rights and obligations which spring into existence the moment it is formed. Thus, at the date of the policies, Moseman acquired for himself the right to receive, at his death, through his executors, administrators or assigns, the sums stipulated to be paid, subject to the condition of compliance with his own engagements to pay the premiums as they fell due.

This condition having been complied with, "has a retrospective effect to the day that the engagement was contracted." C. C. 2041. The character of the interest and of the ownership thereof takes its impress from the date of the contract.

This is the logical result and inevitable corollary of the principle settled in our jurisprudence that the title and interest of the beneficiary, when a third person, vest at the date of the contract, and are indefeasible thereafter without his consent. Succession of Kergler, 23

Succession of Moseman.

Ann. 455; Succession of Hearing, 26 Ann. 326; Succession of Clark, 27 Ann. 270; Succession of Bofenschen, 29 Ann. 714; Pilcher vs. N. Y. L. I. Co., 33 Ann. 324.

It is impossible to apply a different rule to the case where the beneficiary is the insured himself and his legal representatives after his death, and we are bound to hold that the interest of Moseman under these policies, having vested before his second marriage and at a time when he was a single man, belonged to his separate estate, and did not enter into the subsequent community.

We are of opinion, however, that the community is entitled to reimbursement of the amount of the several premiums which were paid, after the marriage, out of its funds.

We are aware that, in the case of insurance by the husband for the benefit of the wife, it has been held that the latter takes the fund without liability to reimburse the community the premiums paid by it. Succession of Bofenschen, 29 Ann. 714.

Without now affirming this decision on this point, it is sufficient to say that it rests on the principle that the wife receives directly from the insurance company and that the fund does not enter at all as an asset of the succession.

This principle can have no application here, because the insurance is for the benefit of the succession and necessarily forms a part of its assets to be distributed according to law. Hence the premiums paid by the community fall under the common rule entitling it to reimbursement out of the separate estate of all expenditures made by it for the separate benefit of the latter.

These views obviously require a restatement of the entire account; for while, in the condition in which this appeal is presented, we can make no amendment of the decree below except in favor of the appellants, and while the allowances made in favor of all the creditors must stand as to their amounts, yet as the provision made for their payment was so made upon the assumption that the whole estate was community, and as we now transfer the major part thereof to the separate estate of the husband, it is essential that the creditors should be referred for payment to the respective estates to which the law entitles them to look.

As these questions have not yet been passed on by the lower court, we deem it best to remand the case for restatement of the account according to instructions.

The same views apply to the claim of the widow and minor for the homestead allowance of \$1,000. We cannot pass upon it now. But,

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as it was only conditionally presented to the lower court to be considered only in case the insurance funds should be assigned to the separate estate, and as, that condition not happening, it was never considered at all, we do not think she was bound to appeal from a judgment with which she was satisfied, or that she should be debarred from urging her claim, when, by the effect of our decree, the condition upon which her claim may arise has, for the first time, happened.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from, in so far as it fixes the amounts due the several creditors, be affirmed, and that, in other respects, it be and is annulled, avoided and reversed; and it is now ordered, adjudged and decreed that the case be remanded to the lower court for a restatement of the account and for further proceedings according to law, with instructions to assign to the separate estate of the deceased the funds arising from the policies of insurance and to refund therefrom to the community the amount of premiums paid during the existence of the latter, and to distribute the separate and community estates according to law among the creditors heretofore recognized and the widow and heirs, without prejudice to the right of the widow and her minor child to assert her claim to the homestead allowance of \$1,000, and to have the same passed on by the court according to the law and the evidence. Costs of this appeal to be paid out of the succession.

No. 9497.

JOHN MCDUGALL VS. PASCAL MONLEZUN ET ALS.

88	223
110	903

The last article of the Code defining litigious rights to be those which cannot be exercised without undergoing a lawsuit, does not apply to those litigious rights from which one can be released by paying the real price of the transfer under Art 2652, because the next article particularly defines this latter right to be litigious whenever there exists a suit and contestation on it. These two articles regulate a particular kind of litigious right, and there must be an existing suit for the enforcement of it, or release cannot be had by paying the price of its transfer.

The fact that a suit may be necessary to enforce a claim does not make the claim a litigious right.

Where a peremptory exception, sustained below, has been reversed on appeal, and the record leaves in doubt whether a trial on the merits was had, the cause will be remanded for a trial thereof.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette.
De Baillon, J.

Breaux & RenouDET for Plaintiff and Appellant.

M. E. Girard, C. O. Mouton and C. D. Caffery for Defendants and Appellees.

The opinion of the Court was delivered by

MANNING, J. The plaintiff sues to recover a tract of land of seven hundred and twenty arpents, in Lafayette parish. He acquired title

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from Otto Meine, in April, 1883, and Meine acquired from T. O. Starke, and Starke bought at a sheriff's sale in 1866.

In 1873 and 1874 (Meine being then the owner) the land was forfeited for non-payment of taxes and was returned as forfeited to the Auditor's office, in December of 1874 and 1875, respectively. On the 6th of the following May (1876), the tax collector of Lafayette sold the land by public auction, and William Brandt bought it for \$65 64, and received from the collector a deed which contained the usual stipulation that the owner might redeem the property within six months. On the 31st of the same month, Meine redeemed the land and obtained from the Auditor his certificate of redemption, and this certificate was recorded in Lafayette the following month, June 15, 1876.

It must be noted that Brandt was then the recorder, and himself recorded this certificate of redemption.

Notwithstanding this certificate of redemption, obtained the same month that Brandt had bought at the tax sale, obtained too through the instrumentality of Brandt who was Meine's agent, and notwithstanding this certificate had been recorded by Brandt himself officially in the next month after his purchase, he sold the land to one Salles in the following January (1877), and this Salles was the deputy of the tax collector and had himself signed the certificate of redemption before its transmission to the Auditor, wherein he certified that Otto Meine had redeemed the land and paid the forfeiture.

Monzelun acquired from Salles four months after Salles took his deed from Brandt, viz: in May, 1877. These three are the defendants.

During the progress of the trial the defendants peremptorily excepted that the plaintiff had bought a litigious right, the reprobation of which by law prevented his recovery. The court did not act on the exception then and the parties proceeded, but the trial being concluded, judgment rested upon that exception alone. It was sustained, and the plaintiff had judgment for one hundred dollars, the price paid by him for the land, with interest from the date of his deed to the filing of the exception.

Litigious rights are defined in the last article of the Code to be those which cannot be exercised without undergoing a lawsuit. This article is exclusively occupied with definitions, and begins with the declaration that whenever the terms of law employed in the Code have not been particularly defined therein, they shall be understood as defined in that article.

A litigious right had been particularly defined in the body of the Code in these words: A right is said to be litigious whenever there

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exists a suit and contestation on the same. Art. 2653. We do not conceive that this anterior and particular definition overrides and supercedes that subsequently and generally given. On the contrary the two articles are not inconsistent, as was pointed out in *Peaision vs. Grice*, 6 Ann. 238, where the Court said: "It is only when forced to commence a lawsuit that it is ascertained that the claim cannot be exercised without undergoing a lawsuit, and it becomes a litigious right by the commencement and existence of the lawsuit."

The definition in Art. 2653 applies to that kind of litigious right which in the article next before is said one can be released from by paying the price at which it was bought. There are different kinds of litigious rights. Article 2652 permits him against whom a litigious right has been transferred to get released by paying the real price of the transfer, and the next article declares when a right is said to be litigious. The collocation of the two articles forces the conclusion that the kind of litigious right that one can be released from by paying the real price of it is that one, the enforcement of which is resisted by an existing suit. Else why the definition immediately following. These two articles are necessarily construed together. They form parts of the same subject-matter, and manifestly relate to and regulate the particular kind of litigious right that is there under consideration, enacting first how one may be released from the attempted enforcement of a litigious right, and then defining what is the litigious right from the enforcement of which this means of escape is provided.

The decisions of this Court have uniformly restricted the meaning of this kind of litigious right to the terms employed in Art. 2653. In *Denton vs. Willcox*, 2 Ann. 62, the Court dismissed the objection curtly, although from the note of the Reporter it appears to have been argued with citations of numerous authors. It was a purchase of a judgment which was final in that case. This was followed by *Marshall vs. McCrea*, 2 Ann. 79, where the demand was unquestionably litigious at the date of the transfer, as it was the subject of a suit then pending, but that litigation had ceased and the Court said the demand had lost its litigious character by a judgment which had finally determined the rights of the parties. See also *Consol. Assoc. vs. Comeau*, 3 Ann. 553. In *Pearson vs. Grice*, 6 Ann. *ut supra*, it was emphatically said this Court has uniformly refused to avoid the sale of a thing on the ground that it was a litigious right unless suit had been brought to enforce the right at the time of sale, and this was cited and applied in *Grayson vs. Sanford*, 12 Ann. 646. This was succeeded by *Billiot vs. Robinson*, 13

Ann. 529, where the Court went further than it had yet done and held, although there was not a formal *contestatio litis* at the time of sale, it appeared from the particular facts of that case that the right purchased was litigious. There was, however, no abridgment of the general rule established by the antecedent decisions, the Court resting its judgment on the special facts of that case.

There was no suit pending at the time of the purchase by the plaintiff of this land, and the fact that a suit might possibly be necessary to enforce his claim to it does not constitute it a litigious right, and therefore the exception of the defendants was improperly sustained.

The affairs of modern commerce would be seriously hampered by a narrower construction of our codal provisions touching litigious rights. No one could safely purchase a mortgage-note lest perchance the maker of it should resist its payment by flimsy pretexts of the invalidity of the mortgage, albeit his resistance might be merely for delay.

Recurrence to the French authorities in the explication of the provisions of our Code corresponding to those of the Napoleon Code are rendered unnecessary when a series of our own decisions have settled the meaning of our own text, but as the lower judge quoted Pothier to sustain his ruling, it is pertinent to remark the fact that his teaching on this subject did not prevail in redacting the Napoleon Code:

"Pothier enseignait que ces expressions comprenaient toutes les créances qui sont contestées ou peuvent l'être, en total ou en partie, par celui qu'on prétend débiteur, soit que le procès soit déjà commencé, soit qu'il ne le soit pas encore, mais qu'il y ait lieu de l'appréhender. Au contraire, le Président de Lamoignon n'admettait le retrait que lorsqu'il y aurait litige engagé, ce qui était également professé par Rousseaud de la Combe et par Mornac. Les rédacteurs du Code ont adopté cette dernière opinion et ils ont déclaré dans l'art. 1700, que la chose est censée litigieuse des qu'il y a procès et contestation sur le fond du droit." Répertoire Général, 5 *tome*, 910, secs. 70-2. See the full discussion of the French commentators in 13 Ann. 529-535.

From the statement of the chain of title hereinbefore given, it is manifest that the plaintiff is entitled to recover. He derives from Otto Meine, who had redeemed the land from the tax sale within the time permitted by the statute under which it was sold. The defendant, Monlezun, derives his title from that tax sale, the effects of which had been nullified by the redemption. His immediate vendor is the deputy of the tax collector who had himself signed the certificate of redemption, and his vendor in turn is the recorder who had recorded

McDougall vs. Monlezun et als.

that certificate. And all these acts had been done several months before either of these defendants began to create that simulacrum of title which they urge now to defeat the plaintiff's claim. Brandt and Salles were unquestionably in bad faith, and there is nothing in this record to shew that Monlezun was not in like condition.

It is therefore ordered and decreed that the judgment of the lower court is reversed, and it is further decreed that the plaintiff have and recover of the defendants the tract of land described in his petition, with costs of both courts.

DISSENTING OPINION.

BERMUDEZ, C. J. The right of the defendants to be relieved, depends upon whether or not the right acquired and sought to be enforced is a *litigious right*.

The proof in the record leaves no doubt that when McDougall purchased from Meine he was *fully aware* that the pretensions of the latter to the land in question could not be enforced before the sale, *without undergoing a lawsuit*.

He had been informed, in answer to overtures which he had caused to be made to defendants, that they would not yield, unless to the superior power of law. So that he was *aware*, not only that a suit was *possible*, but that it was *certain*.

It is worthy of note that the purchase price was \$100, for property actually worth several thousand dollars.

The Code contains in its body two articles on the subject of *litigious rights*, viz: Art. 2447, which forbids the purchase of *such* rights by certain officers of the law; and Art. 2652, which refers to all other persons whomsoever, against whom litigious rights may have been validly transferred.

The former does not *define* litigious rights. The latter declares a right to be litigious whenever there exists a suit and contestation on the same.

This declaration is undoubtedly correct, as far as it goes; but it is incomplete, for Art. 3556 (18) R. C. C., with which the Code closes, further defines litigious rights to be those which cannot be exercised *without undergoing a lawsuit*.

Pothier, who wrote before the Napoleon Code was framed, and from whose commentaries copious extracts were made and incorporated in that remarkable body of legislation, says:

"On appelle *Créances litigieuses* celles qui sont contestées, on peut l'être, en total, on en partie, par celui qu'on en prétend le débiteur,

McDougall vs. Monlezun et als.

soit que le procès soit déjà commencé, soit qu'il ne le soit pas; mais il faut qu'il y ait lieu de l'appréhender." Vente No. 584.

After giving this definition, which sets forth with precision and particularly what constitutes a litigious right, the author proceeds to illustrate.

His definition, though qualified by Merlin, is kindred to that which the latter himself gives while dealing with this subject. Vo. Droits litigieux No. 1.

Pothier's definition was not however embodied in the Napoleon Code, which simply relates to such rights when *actually in litigation*.

That definition was not adopted in the Code of 1808, which followed in the main the Napoleon Code; but the jurists who revised that body of laws thought differently from the "*Conseil d'Etat*." They amplified the existing legislation and perfected it by incorporating Pothier's definition substantially in the Code of 1825, which still rules under the name of the Revised Code of 1870.

Hence it is, that although Articles 2652, 2653 and 2447 of our Code substantially correspond with Articles 1699, 1700 and 1597 of the French Code, no vestige of Article 3556 (18) is to be found in it.

Article 1699, C. N., with which Article 2652 (2622) of the L. C. corresponds, derives from two Roman laws (*per diversas et ab Anastasio*), made in dislike of buyers of suits.

Pothier says that the legislation had for its purpose to put a stop to the cupidity of purchasers of litigious rights and to judicial controversies. Pothier Vte. 591, Maleville, Conseil d'Etat, Dec. 31, 1803.

In the case of Billiott vs. Robinson, 13 Ann. 535, in which the question of the construction of those various provisions of the Code of 1825 (retained in that of 1870, R. C. C.) was presented, the Court, while premitting any formal or decisive opinion, actually said:

"If a technical *contestatio litis* had not been formed, the parties have admitted in their solemn acts that a real one was before them."

In Spears vs. Jackson, 30 Ann. 525, the Court did not undertake to solve the question.

In Duson vs. Dupré, 33 Ann. 1132, the present Court announced, after quoting Pothier and comparing the various articles, that "a litigious right is that which cannot be realized *without* undergoing a lawsuit, or a right touching which there exists a suit or a contestation.

This conclusion is undoubtedly correct.

The language found in Article 2652, that "a right is said to be litigious whenever there exists a suit and contestation over the same, is not a definition.

It is an illustration of what may be a litigious right. It is nothing after all, but this: that whenever there exists a suit and contestation touching a right, that right is said to be litigious.

To define is to express with precision the constituent ingredients of the essence of that which is to be defined—incongruous, accidental and extraneous features being left out—in such manner that the definition will not apply to any other object than that defined.

The article does not assume to define with any particularity what a litigious right is in general. It merely declares that a disputed right in suit is a litigious right, and does not assume to propound that none but such litigated rights are litigious rights.

There exists a material and glaring dissimilitude between litigated and litigious rights.

The former are such as are actually contested in court; the latter such as may be disputed there, or are open to contestation.

So that the words "*litigious rights*" would rather apply, in their general sense, to rights not in actual suit.

Owing to the circumstances then, that the exact and full meaning of the terms *litigious rights* is not given in the article, it becomes necessary, in order to ascertain what are the true real characteristics which constitute essential ingredients or elements of a litigious right, to have recourse to Article 3556, which was framed for the special purpose of expounding the signification of law terms used in the Code, and not *therein particularly defined*.

Paragraph 18 of that article determines and announces broadly and emphatically that "*litigious rights are those which cannot be exercised without undergoing a lawsuit.*"

This definition is essential. It is exact, full, precise and ample. It embraces within its extensive compass all rights, as well such as are actually in litigation before the court, as such as may eventually be litigated and which cannot be exercised without a lawsuit.

From this view of the law, it is manifest that the right purchased by plaintiff and here sought to be exercised, was a litigious right to the knowledge of plaintiff and has not ceased to be such, and that under the special provisions of Article 2652, the defendants are entitled to get released by paying to the transferee the real price of the transfer.

I therefore dissent.

[Mr. Justice Poché concurs in this opinion.

Favrot vs. City of Baton Rouge.

ON APPLICATION FOR REHEARING.

MANNING, J. The defendants complain of our decree in every particular. We adhere to our opinion on the question of litigious rights, but the record leaves a doubt in our minds whether the trial on the merits was had in full. The transcript is a bungle and may well have misled us, and as the judgment of the lower court was on the exception alone, we shall remand the case for a trial on the merits. The rehearing is granted.

ON REHEARING.

MANNING, J. It is ordered and adjudged that our decree reversing the judgment below remain unaltered, and that the other branch thereof whereby final judgment was rendered in favor of the plaintiff is avoided and set aside, and the case is remanded to the lower court for further proceedings according to law, the defendants to pay the costs of appeal and those of the lower court to await the final decision of the cause.

Bermudez, C. J., absent.

Poché, J., concurs in the decree remanding the cause.

No. 9660.

C. D. FAVROT VS. CITY OF BATON ROUGE.

The Supreme Court has no jurisdiction over tax suits regardless of the amount involved, unless the legality or constitutionality of the tax be in contestation.

Hence in a suit which presents the question of the legality of a tax, and in which the tax is resisted on the further grounds of illegality of the assessment, and irregularities in the mode of levying and of collecting the tax, the court will entertain the appeal on one branch of the contestation, the illegality of the tax, and will ignore the appeal on the other branch of the case.

A tax of ten mills by the city of Baton Rouge is not illegal because it does not conform to the limit of municipal power of taxation as fixed by the charter of 1878. That feature of the charter must yield to, and be controlled by Article 209 of the Constitution. The decision in the case of Laycock vs. City of Baton Rouge affirmed.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

O. D. Favrot and Knox & Laycock, for Plaintiff and Appellant.

H. F. Brunot and Favrot & Lawson, for Defendant and Appellee.

MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. A statement of the pleadings is necessary to a proper understanding of the grounds of the motion to dismiss this appeal.

38 230
45 723
45 1365
38 230
47 1471
47 1473
38 230
52 833
38 230
107 573
38 230
108 688

Plaintiff enjoined the sale of his property for municipal taxes claimed thereon for the year 1882, and for several years previous thereto.

His grounds are in substance :

1. That the rate of taxation claimed of him is in excess of the restriction placed to the taxing power of the city of Baton Rouge by its charter, which is Act 44 of 1878.

2. That there was no legal assessment ; that tax rolls had not been exposed for correction according to law ; that the budget had not been published ten days prior to adoption, and defective descriptions of the property.

The main ground of the motion is that the aggregate amount of the taxes herein involved is not equal to the lower limit of our jurisdiction, and that we are without jurisdiction over the questions involved in the alleged illegality of the assessment and of the mode of collecting taxes.

The point is well taken. It is conceded that the total amount of the taxes is not equal to our jurisdiction, and it is clear that questions involving the legality of the assessment and the mode of levying and collecting a tax, do not affect the legality or constitutionality of the tax itself, over which question alone this court has jurisdiction irrespective of the amount involved. *Adler, Goldman & Co. vs. Board of Assessors*, 37 Ann. 507. *State ex rel. David vs. Judges Court of Appeals*, not yet reported. *Henry C. Minor vs. J. C. Budd, sheriff*, not yet reported.

It follows that we have no jurisdiction over that branch of the case. Hence we must decline to consider the questions involving the alleged illegality of the assessment of plaintiff's property and the numerous alleged irregularities in the manner of levying and of collecting the tax, and as to that branch of the case, the appeal is ignored.

On the merits, the only question involving the legality of the tax which is herein resisted is the ground that, as the charter of the city of Baton Rouge limits its power of municipal taxation to the rate of taxation by the State, the limit to municipal taxation as fixed by the Constitution of 1879, does not apply or have reference to that corporation, which remains restricted to the rate of six mills, as fixed by the Constitution for the State.

The identical question was presented to us, was fully discussed, maturely considered and finally disposed of in the case of *Laycock vs. City of Baton Rouge*, reported in 36 Annual, p. 328.

It is worthy of note that the attack on the taxing power of the corporation to the extent of ten mills was then led by the same counsel who represent appellant in the present case.

Farmer vs. Hafley.

They now urge that the case was not then fully presented to the court. This modesty is very commendable, but candor compels us to say their argument presents no essential point which is not met in the opinion, and that their position has not been fortified by the lapse of time.

We can add nothing to the reasons which support our decision in that case, and we must conclude, with the District Judge, that the point of resistance is without force, excepting for years previous to the year 1879.

His judgment dissolved the injunction for the taxes claimed for the years 1879, 1880, 1881 and 1882, and we find it correct. Judgment affirmed.

No. 9646.

A. A. FARMER VS. W. C. HAFLEY, Admr.

A peremptory exception, which goes to the very foundation of the suit, such as the alleged nullity of the citation, should be decided *in limine*, hence it is bad practice in a court to refer similar exceptions to the merits.

If there is no citation there can be no trial on the merits, hence the injustice of subjecting the parties to the trouble and expense of introducing evidence on the merits, when eventually the case may go off on the exception.

A judgment against an absent party on whom citation was served through his alleged attorney, in fact, but who is shown not to be such an agent, is practically against a party who is not legally before the court, and is therefore a nullity.

A PPEAL from the Tenth District Court, Parish of Red River.
Hall, J.

Kennard, Howe & Prentiss, for Plaintiff and Appellee:

The beneficiary heir, residing out of the State, becomes, when he accepts the administration of a succession in this State, subject to the provisions of the law now embodied in Section 14 of the Revised Statutes of 1870. Suc. of Penny, 10 Ann. 292.

Under the prayer for general relief the court will grant such further relief as the averments of the petition will justify.

Espinola vs. Blasco, 15 Ann. 426, 427, and cases cited, 14 Ann. 719.

Montfort S. Jones, on the same side.

L. B. Watkins, for Defendant and Appellant:

1.

In the choice of an administrator the preference shall be given to the beneficiary heir over every other person, if he be of age and present in the State. R. C. C. 1042.

The beneficiary heir is entitled to the administration of an estate, though he be *not* a resident of the State. 10 Ann. 290, Succession of Penny, R. C. C. 1045.

It suffices that the heir be *actually present* when the application for administration is made.

3 Ann. 262, Succession of Williamson 12 Ann. 610, Succession of Sloone.

38	232
46	600
38	232
123	818
123	824

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II.

If a beneficiary heir, who resides out of the State of Louisiana, may be appointed administrator of a succession that is opened in this State, his subsequent non-residence could not constitute a ground for his removal therefrom, under R. C. C. 1158.

III.

The failure of an administrator to file an account furnishes no ground for his dismissal from office. If he has been ordered by the court to file an account and fails or refuses so to do, he may be removed for disobeying the order. 28 Ann. 800, Succession of Head. 34 Ann. 533, Congregation vs. Faculty.

IV.

The sale by an heir to a stranger, of an unliquidated interest in a succession, does not constitute the vendee an heir. He certainly could not become such without he had subjected himself to all the charges for which the estate is responsible. R. C. C. 984, 871, 872, 873.

V.

In 1875, Mary Farmer, one of the collateral heirs of the deceased, the mother of A. A. Farmer, joined W. C. Hafley, her brother, and aided him in procuring the administration of the succession of deceased, and her son and transferee is bound by his mother's acts, and is estopped from disavowing or gainsaying them. T. pp. 8, 9.

In 1877, Mary Farmer was one of the plaintiffs who instituted the suit of Heirs of Stephen and Seth Bedford vs. Williams and Dickson, acting through the present plaintiff, A. A. Farmer, as her agent. T. p. 11.

On the 6th of December, 1880, this suit was compromised and the defendants' title recognized, and therein A. A. Farmer appeared as her agent again.

"One who buys the interest of an heir in a succession, the administration of which is closed, and the property of which is in the possession of the heirs, does not become liable for that heir's share of the debts of the succession." 30 Ann. 440, Sevier vs. Gordon.

Hence, he is without right, or responsibility, as an heir.

VI.

When an heir assumes the quality of heir in an unqualified manner, in some authentic or private instrument, or in some judicial proceeding, the acceptance of the succession is express. R. C. C. 988.

The effect of a simple acceptance of the succession, whether express or tacit, is such that when made by an heir of age, it binds him to the payment of all the debts of the succession, personally and out of his own property. R. C. C. 1013, 1423, 992.

The institution of a suit in the capacity of an heir of a decedent, or the sale by an heir of his interest, as heir in a succession, amounts to the acceptance of the succession, pure and simple." 2 N. S. 475; 8 N. S. 242, 2 La. 299; R. C. C. 947; 15 Ann. 170; 3 Ann. 502; 29 Ann. 349; 21 Ann. 278; 25 Ann. 56; 30 Ann. 93; 29 Ann. 837; 25 Ann. 220, 56; 33 Ann. 827.

VII.

The defendant administrator is entitled to appeal from a judgment of the court *a qua*—rendered *ex gracia*—destituting him from office as an unfaithful fiduciary, and, as he contends, without evidence; and at the demand of one *not an heir*. R. C. C. 1160.

The opinion of the Court was delivered by

POCHÉ, J. This is a suit for the removal of the defendant as administrator of the succession of Seth Bedford, opened in the year 1874.

The principal complaint against him is that he permanently resides out of the State of Louisiana, that he has been absent continuously

Farmer vs. Hafley.

for over one year without having provided for his place, as administrator, being filled by another, and without rendering any account of his administration.

Citation was prayed for and was served on I. F. Stephens, a resident of the parish, alleged to be the agent and attorney in fact of the absent and non-resident administrator. This action was met on the part of the defendant by peremptory exceptions, one of which was that I. F. Stephens was not then and had never been his agent as alleged.

He also pleaded the exception of no cause of action, and several other exceptions which it is useless to enumerate.

The exception of no cause of action was overruled, and by order of the court, all the other exceptions were referred to the merits.

At a subsequent term of the court a default was entered against the defendant, and later on, during the absence from sickness of his counsel, a trial took place and a judgment was rendered overruling all the exceptions, removing the defendant as administrator and ordering him to file an account of his administration within a specified time.

Defendant appeals from that judgment, and has embodied the substance of his exceptions in an assignment of errors, in which he also charges error in the order of the court referring his exception denying the agency of Stephens, to the merits. That ground is sustained alike by reason and by law, and it will decide the fate of the controversy in the present appeal. The habit of referring exceptions which go to the very foundation of the suit, to the merits, by which process parties are unjustly subjected to heavy costs, in procuring unnecessary evidence which burdens the record on appeal, is unfortunately growing to an alarming extent in the District Courts of the State.

While it must be deprecated generally, it must be specially censured when the exception which is referred to the merits, is one which involves the legality of the citation, without which there can be no suit and therefore no trial. That is the nature of the question presented by Defendant's exception to the capacity of Stephens as his alleged agent to stand in judgment for him.

If Stephen's was not the agent of Hafley, as alleged, the citation served on him was an absolute nullity, and the defendant was not before the court. If there was no party-defendant there were no merits to which the exceptions could be referred.

The injustice of such a ruling is as great to the plaintiff as it is to the exceptor; it almost amounts to a denial of justice.

The evidence which we find in the record shows conclusively that Stephens was not the agent or attorney in fact of the non-resident

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administrator, hence the lower court rendered a judgment against a defendant without citation, or answer.

The mere statement of the proposition carries with it the nullity of the judgment.

It may be true, as contended by appellant's counsel, that Hafley, the absent administrator, had no authorized agent to represent him in court in matters connected with the succession, and that by means of which omission, he has actively violated the law and unpardonably neglected his duty.

But it is yet more undeniable that no judgment can be rendered against him until he is properly and legally brought before the court.

As these considerations have successfully sapped the foundation of the whole proceeding, the superstructure must crumble to the dust, and nothing is left to do but to brush away the *debris*.

It is therefore ordered that the judgment appealed from be annulled, avoided and reversed, and that plaintiff's action be remanded to the lower court for further proceedings according to law, that he pay costs of appeal, and all costs from the service of citation, other costs to abide the final determination of the case.

No. 9677.

SUCCESSIONS OF ZENON AND ELISE LABAUVE.

An appeal does not lie from an order commanding an administrator to shew cause on a given day why he should not be ordered to furnish additional security for the faithful performance of his official duties. No irreparable injury can be wrought him by a mere order to shew cause. *Non constat* that on the trial of the rule it will be discharged and his bond will be found sufficient.

A PPEAL from the Twenty-third District Court, Parish of Iberville.
Talbot, J.

A. Talbot and Jonas & Nixon for the Administrator, Appellant.

A. Hebert and F. E. Grace, contra.

The opinion of the Court was delivered by

MANNING, J. One of the heirs of these two successions moved for a rule on D. J. Campbell, the administrator, to shew cause why he should not be ordered to furnish an additional bond, and the rule was ordered to issue. The administrator moved to rescind that order, which being refused he appeals.

Successions of Labauve.

ON MOTION TO DISMISS.

The grounds of the motion are:

1st. "That the motion to rescind is in the nature of an exception of no cause of action, and was tried on the face of the papers without evidence."

If the motion to rescind is in the nature of an exception of no cause of action, it was properly tried on the face of the papers without evidence. There is no other way to try that exception.

2d. That the order overruling the motion to rescind is interlocutory and works no irreparable injury, and that the rule has not been tried on its merits.

That ground is well taken.

The motion for the rule opens with irrelevant and unnecessary allegations, such as that the administrator had qualified under a bond never approved by the court, that the sureties are non-residents of the parish, that he has not administered the estate with care and prudence and has made payments or distributions in an arbitrary manner, and the like—all tending so to confuse the mover's pleading that until we read his concluding allegation and his prayer for relief it seems doubtful whether his motion has not for its object the removal or destitution of the administrator, which would ensure its dismissal under the rule recognized in *Succession of Sullivan*, 25 Ann. 474, and *Succession of Calhoun*, 28 Ann. 323.

The last and substantive allegation is that a plantation belonging to the successions has lately been sold and the proceeds thereof are in the hands of the sheriff, and that the mover believes and has reason to fear that these proceeds will be lost to the estates if they are suffered to go into the hands of the administrator under the existing condition of his bond. Then follows the prayer, and the nature of the proceeding is determined by the relief sought therein:

"Wherefore your appearer moves the court and prays for a rule to issue commanding said administrator, within a delay to be fixed by the court, to shew cause why he should not furnish an additional bond with good and solvent security conditioned according to law, before the amount now in the hands of the sheriff of this parish shall be paid to him; and your appearer prays that the sheriff be ordered to hold said sum during the pendency of this rule and until the further order of this court."

This shews that the relief sought is that sanctioned by Sec. 10 Rev. Stats., which authorizes any person interested to require an administrator to give new and additional security for the faithful performance

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of his duties as often as the court, on motion to that effect, may judge it to be necessary.

The rule was ordered to issue commanding the administrator to shew cause on the first day of the next term why he should not furnish additional security, and the sheriff was ordered to retain in his hands the proceeds of sale of the plantation, but should the administrator furnish additional security approved by the court pending the rule, then that the funds in the sheriff's hands be turned over to him.

The appeal is really from this order, although in form it is from an order refusing to rescind it.

The terms of the order shew that irreparable injury cannot be done by it. *Non constat* but the rule will be discharged on trial and his bond will be adjudged sufficient. The administrator has not been ordered to furnish the security or be dismissed. It has not been decided that he shall furnish additional security, nor that the mover has established the truth of his allegation of insecurity of the funds under the administrator's bond as it now stands. The order is merely that he shew cause why he should not be ordered to give additional security, and meanwhile that the sheriff keep the particular fund lately realized. But as if to deprive the administrator of any cause of complaint, and to exhibit unmistakably the lower judge's conception of the nature of the proceeding, he added to his order that the administrator should receive the fund before any trial of the merits of the rule if he should give security approved by the court.

When the trial of the rule has been had below, and the evidence has been submitted and there has been judgment, the party injured thereby may be entitled to an appeal, but just now it is premature.

The appeal is dismissed.

DISSENTING OPINION.

POCHÉ, J. I think that the motion to dismiss this appeal should have been denied.

Conceding that the motion to rescind the orders issued against the administrator should be treated in the light of an exception, I find that on the trial appellant had filed in evidence his letters of administration, and among the numerous allegations contained in the rule, and which are declared by the majority as irrelevant, I find none which points out any defect in the bond, occurring since the letters of administration had been issued. As those allegations make up the only grounds of the rule, and they are discarded as irrelevant, it appears that there are no allegations at all.

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Now, our jurisprudence has settled the rule that "letters of administration make full proof of the party's capacity until they be revoked. They must have their effect, and the regularity of the proceedings on which they issued cannot be examined collaterally." *Duson vs. Dupré*, 32 Ann. 898, and authorities therein cited.

It follows, therefore, that the allegations in the rule, which were a collateral attack on the validity of the letters of administration, were not sufficient to disclose a legal cause of action, even under Section 10, Rev. Stat., and that the administrator's exception should have been maintained, and hence that he has suffered irreparable injury from a judgment which thus allowed a collateral attack on his capacity.

Under the allegations that his bond was void *ab initio*, the order made against him to furnish a new bond implies the judicial assertion that his bond is defective and that his office should be vacated.

As a consequence of that order, the effect is to withhold from him the funds belonging to the successions which are under his administration, which is thus paralyzed. He is suspended from his functions *quoad* those funds, and it is easy to see that he may thus be irreparably injured.

If he cannot at this time appeal from a judgment which produces such effects, it is difficult to perceive at what time or at what stage of the proceedings the right to appeal will accrue so as to afford him effective protection.

I therefore dissent from the opinion and decree of the majority.

No. 9648.

J. M. WOODWARD, ADMR., W. T. WOODWARD, ADMR., SUBSTITUTED,
VS. J. T. S. THOMAS ET ALS.

The administrator of a succession which, though apparently solvent, owes debts and is unsettled, and which the heirs, though present, have never accepted, may bring a real action for the revendication of property claimed to belong to the succession and held by adverse title not derived from the decedent, in his own name and without joining the heirs

The law and jurisprudence on the subject fully reviewed.

A PPEAL from the Tenth District Court, Parish of Red River.
Hall, J.

L. B. Watkins, for Plaintiffs and Appellants :

I.

In case heirs neither accept nor reject a succession, it becomes the duty of the judge to appoint one as administrator. E. C. C. 1041.

38	238
46	633
38	238
47	1367
38	238
109	725
38	238
112	58
114	69
38	238
124	395
125	188
d125	541

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In such case the beneficiary heir is entitled to preference. R. C. C. 1043.

Administrators thus chosen have the same powers, and are subject to the same responsibilities as the curators of vacant estates. R. C. C. 1049.

Administrators thus appointed shall proceed to the sale of the property of the succession, and to the settlement of its affairs, and to the distribution of the *surplus, above debts, among the heirs*. R. C. C. 1038.

The powers and duties of administrators extend further, and are broader and more comprehensive than those of curators of vacant successions and absent heirs, and extend to all suits in which they are obliged to act. R. C. C. 1155.

II.

There is no analogy between the powers of an *administrator* and those of an *executor*. Those of the latter are alone derived from dispositions *mortis causa*. R. C. C. 1570, 1574, 1659. If the testator has not given his executor seizin of his property, the latter cannot acquire it. R. C. C. 1659.

III.

The cases chiefly relied upon by the judge *a quo* were those in which the powers of executors were defined. 6 La. 97; 34 Ann. 322; 37 Ann. 418; 9 Ann. 302; C. P. 123.

In such cases it was necessary that the heirs be made parties.

IV.

In another class of cases cited by him, the court held that an administrator cannot sue to annul simulated acts of the *intestate*, whose succession he represents. 21 Ann. 150; 18 Ann. 51; 6 Ann. 494; 14 Ann. 610; 12 Ann. 684, 759; 30 Ann. 530.

Otherwise if the rescission of such acts be necessary to pay debts of deceased.

V.

This suit was brought to annul a tax sale. It does not fall in either category mentioned. In such case an administrator has full authority. R. C. C. 1049, 1155; C. P. 111; 9 Ann. 589; R. C. C. 51, 1113; 26 Ann. 214; 14 Ann. 156; 33 Ann. 1225, 1037.

Egan & Pierson for Defendants and Appellees:

When the succession is so abundantly formed property in possession, and the widow and heirs are all of age and present in the State, (to whom alone the *residuum* belongs after paying debts) the administrator alone without being joined by the heirs and widow, (who alone are interested), cannot sue for or stand in judgment to annul an alleged tax sale under which defendant claims, and is in possession under a tax sale made of the property, as that of a third person prior to the death of the deceased, whose succession is being administered. 37 Ann. 417, 34 Ann. 322; 30 Ann. 576-80; 21 Ann. 150; 9 Ann. 213-302; 6 La. 97.

An amendment to pleadings is where a party to the suit offers to amend or alter his pleadings previously made in court. C. P. 419. But a petition by third persons asking to become parties to the suit, either by joining the plaintiff or defendant or by opposing one or both, is an intervention. C. P. 369.

An amendment or intervention comes too late after judgment sustaining the peremptory exception of want of proper parties and of no cause of action in the plaintiff's petition. 35 Ann. 281; 34 Ann. 323; 7 N. S. 645.

The opinion of the Court was delivered by

FENNER, J. This is an action of revendication of certain real estate, claimed as the property of the succession, but in the adverse possession of a third person under a title derived from a tax sale, which is alleged to be null and void.

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The action was brought in the name of the administrator alone and was met *in limine* by an exception that the plaintiff in his petition "has set forth no necessity or right to bring this suit without joining the heirs as co-plaintiffs with him or that it is necessary that he should recover the property in question in order to discharge the debts and charges of the succession," and that "the heirs should have been joined as parties to the suit."

This exception was overruled by the court and thereafter the defendants filed answer to the merits.

Subsequently the defendants filed the following peremptory exception: "That this is a real action, and all the heirs are present and represented in the State; said succession is solvent. Defendants except that, this being a real action, the right of property and the right to bring this suit rests alone in the heirs and not in the administrator."

Plaintiff opposed to this exception the ruling on the former exception as *res judicata*; but the court overruled this plea on the ground that the subject matter of the two exceptions was not the same. This was not error. The first exception went to the sufficiency of plaintiff's allegations on the face of the petition, and the ruling on it merely decided that it was not essential for an administrator, in bringing such an action, to allege the solvency of the estate or the absence of the heirs.

The second exception tendered an issue of fact and assumed the burden of proving the facts alleged as a basis for the legal right claimed. The issues were different and the judge rightly overruled the plea of *res judicata*.

On hearing, the proof showed that all the heirs were majors and present in the State. On the question of solvency, the evidence of a single witness was introduced showing, in substance, that the inventoried value of the succession property, consisting of lands, was about \$16,000; that the succession owed debts of about \$1,600 to persons outside of the family, besides a claim in favor of one of the heirs of \$4,000 or \$5,000, concluding with the statement: "The succession is solvent and is worth, at the inventoried value, some \$6,000 or \$8,000 over and above the amount of its indebtedness."

Upon this evidence, the judge maintained the exception and dismissed the suit, basing his ruling on the legal proposition that the administrator of a solvent succession, when the heirs are present or represented, cannot maintain a real action, in his own name, without joining the heirs as parties.

The question presented is, whether an administrator of a succession, which has never been accepted by the heirs, and which, though apparently solvent, owes large debts, can maintain a real action to recover property claimed to belong to the succession and held by adverse title, not derived from the decedent, and the attack on which involves no assault upon the latter's acts.

We have examined every case referred to by the judge *a quo* or by the defendant's counsel, or which we have been able to find in the books, without discovering one applying the necessity of making the heirs parties in *such* an action, to an administrator situated like the plaintiff herein.

We shall now review them in their chronological order :

Executors of Hart vs. Boni, 6 La. 97, was an action by *executors* with *seizin*, to annul a donation *intervivos* of decedent, and it was held that such executors could maintain the real action, but that, if the heirs were interested and were present or represented, they should be made parties.

Scott vs. Key, 9 Ann. 213, was a case where the defendant was administrator of one who had died in possession of slaves and movables which had been duly inventoried as part of his estate and were held by the administrator in his capacity as such. He had paid *all the debts* of the succession. An action was brought against him individually, for the property, as a trespasser; and the court held that he should have been sued as administrator and that the heirs should be joined with him.

Cronan vs. Executors, 9 Ann. 302, simply enforced the letter of Article 123, C. P., that "all real actions must be brought both against the executor and the heirs present or represented."

Succession of Weigle, 18 Ann. 49, involved the right of an administrator to attack authentic acts of his decedent on the ground of simulation, when not alleged to be in fraud of creditors, and the court, doubting whether judgment in the case would be binding on the forced heirs who could alone attack such acts, remanded the case to allow such heirs to become, or be made parties. To same effect, see 6 Ann. 494; 14 Ann. 610; 12 Ann. 684, 759.

The same case, 21 Ann. 150, simply held that, the heirs being necessary parties and having become parties, they should have been made parties to the appeal which, in failure thereof, was dismissed.

Ledoux vs. Burton, 30 Ann. 576, was an action by the administrator of a succession which had *no creditors* attacking the validity and reality

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of sales made by the decedent, and the Court held that the heirs present or represented were necessary parties to such an action.

Bird, ex'r, vs. Generes, ex'r, 30 Ann. 576, simply enforced the letter of C. P. 123.

Giddens vs. Mobley, 37 Ann. 417, was the case of an executor of a foreign decedent whose debts, legacies and charges had all been paid, who qualified in this State solely for the purpose of suing for land situated here; and we held that, under such circumstances, the "land had devolved to the heirs, who alone could sue for it."

It is obvious that none of the foregoing cases touch the question now before us. They all rest upon the peculiar powers of executors or upon the particular *status* of the administrators in the several cases, viz: when, in the absence of creditors, the administrator assumed to assail acts of the decedent which only forced heirs could be heard to attack.

On the other hand, in the case of Pauline vs. Hebert, 14 Ann. 156, which was a real action brought against the administrator alone, and where the latter's capacity to stand in judgment was raised, the Court said: "We see no objection to the form of the action. The heirs may not have accepted the succession, and as the administrator must represent the creditors also, we see no objection to his standing in judgment for the protection of the rights of all parties in the effects of the succession entrusted to his administration. The article (123) of the Code of Practice relative to testamentary executors is not applicable. The powers of the testamentary executor were very different from those of the administrator."

Turning now to the textual provisions of our Codes, we find that there are four classes of persons to whom are confided the administration of successions, viz: 1st. Executors, when there is a will; 2d. Curators of vacant estates, when the heirs are unknown or reject the succession; 3d. Curators of absent heirs, when the heirs are absent and not represented in the State; 4th. Administrators, when the heirs, though present or represented, do not accept or reject the succession, but avail themselves of the benefit of inventory.

With regard to executors, Art. 123 of the Code of Practice especially provides that real actions cannot be brought against them without making the heirs parties; from which it is inferred that a like rule applies to real actions brought by them, though this is not settled as to all cases. But if it had been intended that the same rule should apply to administrators, it is strange that it should not have been so expressly provided. On the contrary, Art. 122 provides that all kinds of actions may be brought against curators of vacant successions, and that judg-

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ments rendered against such curators shall be "as valid and efficacious as if they had been rendered against the heirs themselves."

We note the language employed in the first clause of the article, viz: "When all the heirs are absent and not represented in the State," but such language is surplusage as applied to curators of vacant estates, which are only *vacant* when the heirs are unknown or reject the succession. This and other clauses of the article apply to curators of absent heirs.

Besides, Art. 1113 of the Civil Code had already provided that all kinds of actions should be brought against the curators of vacant successions.

Now, when we read in Art. 1049 of the Civil Code that administrators "have the same powers and are subject to the same duties as the curators of vacant estates," we naturally assimilate their rights to sue and be sued to those possessed by such curators rather than to those of executors.

Besides, Art. 1058 of the Civil Code requires administrators to settle all the affairs of the succession and, after payment of the debts, to pay over the surplus to the heirs.

This implies the right and duty to recover the property, as much as to collect the debts, of the succession. Otherwise he cannot settle its affairs and ascertain the surplus. It is not for him, it is true, to assail the validity of acts done by the decedent, unless necessary for the protection of creditors; and if he have already settled all the debts and charges of the succession, it is improper for him to institute new actions, because the objects of his agency have been fulfilled and he should give way to the heirs who are the only persons interested and may assert their own rights.

But certainly, so long as the debts are unpaid and the affairs of the succession are unsettled, if he discover property belonging to the succession held by adverse title not derived from the act of decedent, it is his duty to reclaim it, and he has the right to sue for it without joining the heirs.

Such heirs are exercising their legal right of awaiting the settlement of the succession, in order to receive what may come to them without incurring liability for its debts; and for the preservation of this right it is essential they should do no act indicating an intention to accept or which they would have no right to do except in the quality of heirs. C. C. 988. They could not join in a suit for succession property except in the quality of heirs, though perhaps, under Art. 998 they might escape the effect of acceptance by proper "reservations and protesta-

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tions." But if they prefer to stand aside and let the administrator act in his own name, we see no reason why they should not be permitted to do so.

Under the circumstances of this case, we think the administrator had the right to stand in judgment and that defendants' exception should have been overruled.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed; that the exception of defendants be overruled at their costs; and that the case be now remanded, to be proceeded with according to law, defendants and appellees to pay costs of this appeal.

9647.

SUCCESSION OF SETH BEDFORD.—IN THE MATTER OF THE APPLICATION OF A. A. FARMER TO BE APPOINTED PROVISIONAL ADMINISTRATOR.

An administrator of a succession against whom a judgment has been rendered in order to remove him, has the right of appeal from said judgment, and having perfected such an appeal, he has a right of appeal from an order of the court appointing another person to succeed him in the administration of the succession: such an appeal may be treated as an auxiliary to the other.

The Supreme Court has jurisdiction over a contest involving the right of administration of a succession, if the assets of the latter exceed \$2,000. * *

A PPEAL from the Tenth District Court, Parish of Red River.
Hall, J.

J. D. Roach, Kennard, Howe & Prentiss, and M. S. Jones, for Applicant and Appellee.

L. B. Watkins, for Opponent and Appellant:

I.

Since the revision of the Civil Code and Statutes, in 1870, there has been no law in force, authorizing the appointment of a provisional administrator, with the exception of Act 87 of 1870, creating the office of public administrator, excepting the parish of Orleans, same was repealed by Act 74 of 1877. 30 Ann. 101, Succession of John Clark.

II.

Upon the applicant's own showing, he should have been required to give bond for \$25,000 R. C. C. 1127, 1048.

III.

An appeal lies from an order appointing, as well as from an order removing an administrator. R. C. C. 1120, 1160.

An appeal lies from a chamber's decree. Act 75 of 1804; 34 Ann. 599, 588; 37 Ann. 232, 261; 21 Ann. 733.

IV.

Had the appointee been qualified, an injunction would lie. 30 Ann. 507.

V.

The suspensive appeal of Hafley did not prevent Farmer from qualifying, if he had furnished proper bond. R. C. C. 1120, 1127, 1048.

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MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. This appeal is a sequel of the question just decided in the case of A. A. Farmer vs. W. C. Hafley, No. 9446, on the docket of this Court, and reference is made to that decision for a full statement of the facts which have a bearing on both cases.

After the finality of the judgment which purported to remove Hafley from the functions of administrator of the succession of Seth Bedford, Farmer asked and obtained an order appointing him provisional administrator of that succession on a bond of one hundred dollars.

This appeal is taken by Hafley from that decree, and the grounds of the motion to dismiss urged by Farmer will now be considered in the order in which they are presented by counsel:

1. That no appeal lies from the order appointing Farmer, and this court is without jurisdiction.

As the whole case has been submitted "on the face of the record and on the motion to dismiss," without oral argument or brief, by appellee's numerous counsel, we are left to surmise the precise meaning of this ground, as well as of the others, from the language used, and which is somewhat indefinite.

The right to appeal from such an order as is herein brought up is granted in terms by Article 1120 of the Civil Code. True, the law provides that the appointment is not retarded in its effect by the appeal, but in a motion to dismiss we are not concerned with the effect, but only with the right, of appeal. Succession of Clark, 30 Ann. 804.

In the absence of specifications we are left in the dark as to the ground of our want of jurisdiction, but if it be *ratione materiae*, we find a ready answer in an allegation in Farmer's petition for the removal of Hafley as administrator, which is part of this record. He sets forth that "there still remains in the succession assets, consisting of rights and credits, and causes of action, amounting in value to \$19,800." This strongly points to our jurisdiction over the contested appointment of an administrator for such a succession, and corroborates the jurisdictional allegations in the petition supported by affidavit of appellant's attorney.

2. That in any event no suspensive appeal could be taken therefrom.

The appeal was taken both in the suspensive and devolutive forms. If under the law it cannot suspend the execution of the judgment, it is certainly good as a devolutive appeal. Under a motion to dismiss an appeal it is not necessary to decide the specific character of the appeal.

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3. That even if an appeal lies, it has not been taken and perfected according to law.

Again we are left to surmise the precise meaning of general and loose allegations, which, in justice, should be overruled without giving any reasons.

But the record shows that the appeal was prayed for by petition, and granted by the clerk of the court, in the absence of the judge from the parish, and the law vests the clerk with full power in such cases. Act No. 75 of 1884.

The record further shows that citation of appeal was prayed for, and served on appellee, that a bond of appeal was furnished in accordance with the terms of the order of appeal, and that the transcript was filed here even before the date on which the appeal had been made returnable both according to law and according to the order. If anything else is required, counsel for appellee have omitted to inform us.

4. That said W. C. Hafley has shown no appealable interest herein.

As the administrator proposed to be ousted in the case of Farmer vs. Hafley, he had undoubtedly an appealable interest in that judgment. The record shows that he had taken and perfected a suspensive appeal therefrom, he therefore had the right to bring up the present appeal as an auxiliary to the other. C. C. 1160; Brown vs. Brown, 30 Ann. 504; Succession of Clark, 30 Ann. 804.

We are not concerned with the question involving the effect of his appeal on the appointment of appellee pending his appeal.

The motion to dismiss this appeal is therefore overruled.

On the merits, the judgment appealed from, which is merely a consequence of the judgment which purported to remove Hafley as administrator of the succession of Seth Bedford, must therefore share the same fate. Under the effect of our decree in that case, Hafley remains administrator of the succession, hence there is no room for a provisional administrator or any other kind of succession representative; therefore the appointment of Farmer falls as a natural sequence from the reversal of the judgment which purported to create a vacancy in the office of administrator of the succession.

We do not propose to discuss the legality of the appointment of a provisional administrator, or the alleged illegality of such an appointment, or the legal effect of any act which Farmer may have performed as *provisional* administrator, whether such an office is known to our

State ex rel. Trimble vs. Judge.

laws or not. Our conclusion is simply that there was no vacancy to fill, and that any and all appointments, whether legal *per se*, or not, of administrators to a succession already administered, are void.

It is therefore ordered that the judgment or decree appealed from be annulled and set aside, and that Farmer's application for appointment as provisional administrator of the succession of Seth Bedford be rejected, and that he be condemned to pay all costs in both courts.

No. 9633.

THE STATE EX REL. JAS. E. TRIMBLE VS. JUDGE OF THE THIRD
JUDICIAL DISTRICT.

Prohibition lies against a judge who takes jurisdiction to decide a plea of recusation against himself, on the ground that he had been employed as advocate in the cause.

A rule, taken in a cause in which final judgment has been rendered, calling defendant to show cause why a writ of *capias ad satisfaciendum* should not issue, and why he should not pay the judgment or be sent to prison, is a proceeding in the same cause, and the judge who has been employed as advocate, even before the judgment, is subject to recusation. Nor is the case affected by the fact that he had been the counsel of the party who claims his recusation.

APPPLICATION for Prohibition.

W. S. Benedict for the Relator.

The opinion of the Court was delivered by

FENNER, J. Relator applies for a writ of prohibition restraining the respondent judge from proceeding further in the trial of a certain issue arising in the case of School Board of Union Parish vs. J. E. Trimble.

The complaint is that the relator had filed a plea of recusation of the judge, under Art. 338 C. P. and Act 40 of 1880, on the grounds that he had been "employed as advocate in the cause;" that the judge refused to recuse himself, and refused to refer the plea to a judge *ad hoc* for trial, but himself tried and overruled the plea and maintained his right to try the cause.

Irrespective of the merits of the plea of recusation, it is clear relator is entitled to the relief sought, under our opinion as expressed in a very recent case, where we held, on both principle and precedent, that a judge is incompetent to determine a plea of his own recusation, but must refer it for trial to a judge *ad hoc* called for the purpose. State ex rel. Segura vs. Judge, 37 Ann. 253.

The only difference between that case and the instant one is, that in the former the ground of recusation was being personally interested in

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48	1143

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112	536

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122	239

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the cause, while here the ground is having been employed as an advocate. It is a distinction without a difference, so far as the principle involved is concerned.

The facts are, that the judge had been relator's own counsel in the case of School Board vs. J. E. Trimble, which was finally decided in this Court in 1881, and is reported in 33 Ann. 1073.

The proceeding now taken is a rule on defendant to show cause why a writ of *capias ad satisfaciendum* should not issue, and why he should not pay the judgment or go to prison.

This rule is undoubtedly a proceeding in the cause of School Board vs. Trimble, in which the judge had been employed as an advocate. The high character of respondent renders superfluous his assurance that he has no interest in the controversy. But that is not the question. The law has made interest one ground of recusal and employment as an advocate another. Each is independent and equally effectual.

Nor does it make any difference that the judge had been relator's own counsel. The law makes no such distinction and we cannot make it. Nor does the law make any distinction between proceedings in a cause after and before judgment, or between proceedings before or after cessation of employment as advocate and settlement of all claims thereunder.

The law is unambiguous and we must apply it as we find it. If the proceeding (not merely formal) is in a cause in which the judge has been employed as advocate, the condition of recusal prescribed by the law is fulfilled. See on the general subject: Bryan vs. Austin, 10 Ann. 612; Amacker vs. Varnado, 19 Ann. 381; State vs. Judge, 27 Ann. 225; Succession of Fuqua, 27 Ann. 272; State vs. Judge, 33 Ann. 1293; Succession Pinaud, Mann, Un. C., 37; Nugent vs. Stark, 34 Ann. 628; Board vs. Perché, 36 Ann. 160; State ex rel. Segura vs. Judge, 37 Ann. 253.

It is, therefore, ordered and decreed that the writ of prohibition issue and be made perpetual.

9687.

JAMES C. JOHNSON VS. KINGSLAND AND FERGUSON MANUFACTURING COMPANY.

When a sale is a mere simulation it may be disregarded and be treated as a nullity by a creditor of the seller, but when the sale is real, however fraudulent, the creditor cannot seize the property in the possession of the buyer, but must resort to the revocatory action. And this rule is applicable to the sale of movables as well as immovables.

Johnson vs. Manufacturing Company.

A PPEAL from the Eleventh District Court, Parish of Natchitoches. *Pierson, J.*

W. G. McDonald, for Plaintiff and Appellant:

"A sale of partnership property by one of the commercial partners on the eve of insolvency is null and void, and will be set aside." 24 Ann. 247, 217; Ann. 75; 2 R. 38; 25 Ann. 169.

The recording in the mortgage office of an act of sale, containing a vendor's privilege on a sugar mill and machinery, "is sufficient to preserve the vendor's privilege against third persons. The subsequent incorporation of the machinery into the mill converts it into an immovable by destination, but the conversion does not prejudice the privilege and the same may be signed and sold separately, as they may be detached and removed without injury to the soil or structure."

Joseph O. Cailin vs. M. T. Gordy, sheriff, et al., 32 Ann. 1287; 28 Ann. 749; 34 Ann. 925.

Jack & Dismukes, for Defendant and Appellee:

"Even when it is shown that the expressed consideration of a transfer does not exist, the contract cannot, on that account, be invalidated if the transferee proves that there was another legal and sufficient consideration." 30 Ann. 966; 32 Ann. 94.

"When immovable property has been sold by authentic act, valid on its face and accompanied by actual delivery and continuous possession and control by the vendee as owner, the seizing creditor will not be allowed to allege and prove that the sale is a fraudulent simulation." 33 Ann. 1026.

"But we think the only issue which could have been passed upon in this case was that of simulation—the only issue which the creditor has a right to make when he commences with a seizure." 31 Ann. McAdams vs. Soria, p. 865.

A party who judicially demands to be paid the proceeds of a sale, admits thereby the legality of that sale, and is estopped from impeaching it. 29 Ann. 274; 31 Ann. 100; 23 Ann. 245; 22 Ann. 135; 31 Ann. 81.

The vendor's privilege on movables, can only be enforced while the goods are in possession of the vendor. 20 Ann. 545 and 557; C. C. 3227.

Actual malice need not be shown, to entitle a party to exemplary damages; if the act was wantonly or recklessly done, it is enough, or if in evident disregard of the rights of others. Bouvier Law D. p. 630; 26 Conn. 416; 42 Miss. 607.

The opinion of the Court was delivered by

MANNING, J. The plaintiff enjoins the sale of certain parts of the machinery in the Pelican Saw-mill which the defendant was provoking under a *fi. fa.*, issued upon a judgment it obtained against Hardee Brothers and Isaiah and William T. Hardee, the individual members of that firm. They were formerly owners of the mill. The property seized is alleged to be worth twelve hundred dollars.

In January, 1885, Johnson bought William Hardee's interest in the whole mill and machinery, and the timber, wagons, teams, etc., but the written deed was not executed until April 2, following. The consideration was expressed to be cash but in fact a part of the price was paid by the conveyance from Johnson to Hardee of a tract of land. He also bought Isaiah's half of the same property on April 2, and both

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these deeds were recorded on the 6th of that month, and Johnson, who had possessed one-half of the property since January, thereafter had possession of the whole.

The property seized is a wheel, carriage, ways, shingle machine, pulleys, several saws, and a long list of such like pieces of machinery. The whole machinery and the mill are alleged to be worth five thousand dollars. Over eighteen thousand dollars are claimed as damages.

The judgment of the defendant against Hardee Brothers was rendered April 11th, a few days after the recording of the sale of the mill by them to the plaintiff, and was obtained upon the notes of the firm representing the purchase price of these pieces of machinery. The judgment recognized the vendor's lien. Execution issued on May 12th against Hardee Brothers and the individuals William and Isaiah, and these pieces of machinery were seized and advertised to be sold in the following September, and at the same time William Hardee's land, that he had acquired from the plaintiff in payment of a part of the price of his half of the mill, was seized to satisfy the defendant's judgment.

After the general issue the defendant pleads that the plaintiff's purchases from the two Hardees were fraudulent simulations made and entered into by all three parties to defeat and defraud it, and it prays that these titles of Johnson to the property be declared fraudulent simulations.

The allegation of the plaintiff is that the sale was real and *bona fide*, that the titles were of record and he was in possession under them, and the seizure was illegal, tortious, and malicious, and he invokes the rule that when the sale is real the creditor cannot seize the property in the possession of the purchaser but must resort to the revocatory action.

The application of this rule to the sale of movables was examined with great care in *McAdam vs. Soria*, 31 Ann. 862, and all the antecedent decisions were reviewed by the court in the opinion read in that case, where it was said, "the settled jurisprudence is that where the sale is a mere simulation, it may be disregarded and treated as a nullity by the creditor of the seller. But where there is a real sale, however fraudulent, the creditor cannot seize the property in the possession of the purchaser but must resort to the revocatory action." And that opinion goes on to say the rule was applied to movables in a series of decisions beginning with *Peet vs. Morgan*, 6 Mart. N. S. 139, down to *Bass vs. Messick*, 30 Ann. 373, and citing them. It is too well established to be controverted now. Indeed, this main ground of the injunction is not discussed or alluded to in the defendant's brief but is passed *sub silentio*.

The proof shows incontestably that the sale was real whatever may have been the motive of the parties. Johnson testifying says the mill cost him altogether nearly nine thousand dollars. He assumed a large number of the obligations of Hardee Brothers as part of the price and paid Isaiah one thousand dollars and William three hundred cash. Isaiah Hardee says Johnson bought his brother's half interest in the property in January, 1885, and was his partner from that time, and that he sold to Johnson because he had not money to run the mill and Johnson had not furnished the money he had promised. He estimates the mill as worth twelve thousand dollars at the time of sale and says Johnson assumed the payment of all the debts of which there were a large number. But the Hardees made a list of their debts at the time of the sale for Johnson's information which he was to assume and did assume, and this debt to the defendant was not on it. Johnson gave his notes to the several creditors whose claims he had assumed to pay and he gave none to the defendant. The Hardees had given the defendant a mortgage upon some property in Texas to secure its claim and seem to have considered that that property was sufficient to pay it. Johnson knew of the defendant's claim afterwards certainly for he knew of the suit against Hardee Brothers and advised them to confess judgment and they did it. But there was no assumption of this claim by him, nor is there any allegation by the defendant that he had assumed it. The issue raised by the pleadings is simulation *vel non*, and the proof establishes that the sale was not simulated, and the injunction was therefore rightly issued and must be sustained.

The plaintiff is entitled to damages but the record does not enable us to estimate them satisfactorily. His own testimony is not sufficiently specific. For instance he says: "I cannot say exactly what amount I have been damaged by this seizure on account of loss of credit, but estimate it at \$12,000 or \$14,000." There must be an exhibit more in detail of the damages suffered before we can reasonably be expected to assess them, and we shall therefore give both parties an opportunity to address themselves with more particularity to the question of the amount of damages that should be awarded. Therefore

It is ordered and decreed that the verdict of the jury is set aside and the judgment thereon is avoided and reversed, and that the injunction of the plaintiff is perpetuated, reserving to the plaintiff the right to institute a suit for the damages sustained and reserving to the defendant the right to institute a revocatory action to annul the sale. It is further decreed that the plaintiff recover of the defendant his costs in both courts.

 Levy vs. Lane et al.

No. 9671.

L. L. LEVY (J. T. ROSSEL, SUBROGEE) vs. MRS. M. M. ADA LANE ET AL.

Article 3304 C. C., making valid a mortgage granted on the property of another when the mortgagor subsequently acquires the ownership, requires three elements to give it application, viz:

1. "A person contracting an obligation towards another," i. e., becoming his *debtor*;
2. That such *debtor* should have granted a mortgage on property of which he was not the owner;
3. That such *debtor* should "subsequently acquire the ownership of the property."

It has no application when the person who subsequently acquired the property had granted a mortgage as agent, and in the name of the then owner, without any personal guarantee, and with full exhibition of his powers embodied in authentic act of procurator referred to in the act of mortgage.

Although it was judicially determined that the procurator did not authorize the mortgage and that, therefore, it was not binding on the principal, yet, under the express terms of the Code the mandatary, having exhibited the power of attorney under which he acted, incurred no responsibility. C. C. arts. 3012 and 3013.

Hence, not having contracted a debt by virtue of the act, his subsequent acquisition of the property did not validate the mortgage.

The rights of the commissioners herein being based exclusively on the bank's claim of mortgage, and that thus falling to the ground, they have no rights or interest to set up the alleged nullities of the judicial sale attacked.

A PPEAL from the Twelfth District Court, Parish of Grant.
Overton, J.

Jas. G. White, Jos. P. Hornor and F. W. Baker, for the Appellant.

J. C. Wickliffe and C. A. Wickliffe for the Appellees.

The opinion of the Court was delivered by

FENNER, J. This controversy involves the validity of the same judicial sale which was before us in the case of Lane and Husband vs. Cameron & McNeely, 36 Ann. 773.

The nullity was there asserted by Mrs. Lane, who was defendant in the hypothecary action under the judgment in which the sale was made. The principal grounds were these, viz:

1st. That it was a sale of a litigious right to one who was an officer of the court, and null under Art. 2447 C. C.

2d. That the adjudication was null because the bid did not exceed the amount of a certain prior special mortgage alleged to exist on the property in favor of the Mechanics and Traders' Bank.

By reference to the opinion, it will be seen that we rejected Mrs. Lane's demand on grounds which did not conclude the bank, which was not a party to that suit.

The same nullities are now urged by Lacombe and others, commissioners of the bank, which has been placed in judicial liquidation.

Levy vs. Lane et al.

A multitude of questions are discussed with great learning and ability by counsel on either side, of which we find it necessary to consider only one.

The foundation of all the bank's rights in the premises, is the claim that the bank is a mortgage creditor of W. S. Calhoun by special mortgage prior in rank to that of the seizing creditor.

No mortgage consented by W. S. Calhoun in his own right in favor of the bank is extant. No mortgage in favor of the bank against him appears recorded in his name.

The certificate of mortgages furnished by the recorder and read at the sale contained no mention of any mortgage in favor of the bank.

While such omission cannot prejudice the rights of a duly registered mortgage-creditor, and while the duty of the sheriff in making the sale to require a bid exceeding the amount of duly recorded prior special mortgages is not, perhaps, affected by defenses which may exist against them, yet when the question is whether any such special mortgage existed or was recorded, and whether its omission from the certificate was proper and legal, we are bound to determine such questions before deciding that the adjudication was unlawful in disregarding such alleged mortgages.

The bank's judicial allegations are, substantially: that in 1870, W. S. Calhoun, acting as agent of his mother by virtue of an authentic procuration, executed a special mortgage in her name upon the property now in controversy then belonging to her, which was duly recorded and has been reinscribed, to secure certain notes made by Mary S. Calhoun through her said agent, which are now held by the bank; that subsequently it was judicially determined that the said notes and mortgages were null and void so far as Mary S. Calhoun was concerned, because in executing them her said agent acted in bad faith and exceeded his authority under the procuration; that, by reason thereof, said W. S. Calhoun became personally liable for said notes; that, since that time, he became the owner of the property mortgaged, and that, under Art. 3304 of the Civil Code, the mortgage thereby became valid and attached to the property.

If the Article 3304 does not apply to such a case as that here presented, obviously the mortgage, which was confessedly null and inoperative against the property originally, never became valid or attached thereto, did not exist, was properly omitted from the certificate, and had no title to be considered in the adjudication.

The article is in the following words: "*If a person contracting an obligation towards another grants a mortgage on property of which he is*

Levy vs. Lane et al.

not then the owner, this mortgage shall be valid if the *debtor* should ever after acquire the ownership of the property by whatever right."

An analysis of the article shows conclusively that three elements are essential to give rise to its application in any case, viz:

1st. "A person contracting an obligation towards another," *i. e.*, becoming the latter's *debtor*;

2d. That such *debtor* should have granted a mortgage on property of which he was not then the owner;

3d. That such *debtor* should subsequently "acquire the ownership of the property."

Now, did W. S. Calhoun, in executing the notes and mortgage in the name and as agent of his mother, contract any obligation towards, or become the debtor of, Nevins, the original mortgagee and author of the bank? If not, clearly his subsequent acquisition of the property did not give validity to the mortgage.

The question is conclusively solved by the following articles of the Code:

"Art. 3010. The attorney cannot go beyond the limits of his procuration. Whatever he does exceeding his power is null and void with regard to the principal, unless ratified by the latter, and the attorney is alone bound by it in his individual capacity.

"Art. 3012. The mandatary, who has communicated his authority to a person with whom he contracts in that capacity, is not censurable to the latter for anything done beyond it, unless he has entered into a personal guarantee.

"Art. 3013. The mandatary is responsible to those with whom he contracts, only when he has bound himself personally, or when he has exceeded his authority without having exhibited his powers."

Applying these principles to the facts of the instant case, we find that W. S. Calhoun acted exclusively as mandatary of his mother; that he entered into no personal guarantee or obligation; and that he exhibited his powers, which were embodied in an authentic act of procuration expressly referred to in the act of mortgage itself.

Hence, it is plain that, however he may have exceeded his authority, and however ineffective may have been the obligations created by him against his principal, W. S. Calhoun did not, by virtue of the act of mortgage, "contract any obligation towards" Nevins or become the latter's "debtor," and, therefore, was not within the operation of Art. 3304.

If, by reason of misappropriation of funds loaned to his own use, he incurred any equitable obligation of reimbursement, such obligation

would arise, not from the contract, but from subsequent acts, and would have no relation to the mortgage.

Although this solution seems sufficiently clear on the face of the Code, yet, considering the importance of the question, we have extended our investigations in every direction where we could look for additional light.

At the date of the preparation of the Code of 1825, its compilers had the advantage of the experience of France for twenty years under the Code Napoleon, during which many controversies had arisen as to its meaning and construction in the courts and amongst commentators.

The Article 3304 was not contained in the Code Napoleon, and, in its absence, there had been much difference of opinion as to whether the principle therein stated, which was derived from the Roman law and also existed in the ancient French law, was still applicable under the new system.

To avoid such controversy, the compilers of our Code inserted Art. 3304.

We have studied the commentaries of Merlin, Troplong, Duranton, Pont, and Aubry & Rau, on Art. 2129 of the French Code, under which the question arises, and have followed their references to the Roman and ancient French law, and we can find no authority or reason for extending the principle to such a case as this.

For the most elaborate discussion of the question, see, on one side, Troplong Pr. and Hy. vol. 1, p. 326, *et seq.*; on the other, Pont, vol. 2, p. 625, *et seq.*

The obvious application of Art. 3304 is to cases where a person has executed a mortgage for his own debt on property which he fraudulently or erroneously pretends to own. It might possibly be extended to the case of a mandatary who, without exhibiting his powers, has fraudulently assumed to have and to exercise authority which his principal has never delegated to him, and where his personal liability would thus directly result from the contract; but we can find no authority in the letter or spirit of the article itself, or elsewhere, justifying its extension to a mandatary, acting exclusively as such, under written procuration exhibited to the other contracting party, and who, therefore, incurred no personal obligation flowing from the contract.

This, we consider, disposes of the case in all its aspects, and dispenses us from the necessity of considering the other questions.

The bank, basing its rights entirely upon its alleged mortgage, and being found to have no mortgage, is without right or interest to invoke the cause of nullity alleged.

Judgment affirmed.

Manning, J., is recused, having at one time been of counsel for the bank in reference to this mortgage.

Tessier vs. Bourgeois.

38 256
46 98

No. 9637.

JEAN TESSIER VS. PAMELA BOURGEOIS — ON RULE AGAINST
PURCHASER.

The purchaser of immovable property of an insolvent succession sold under executory process cannot retain the balance of the purchase price after satisfying the claim of the seizing and ranking mortgage creditor, unless there are special mortgages of inferior rank existing against the property, or unless he is threatened with eviction by the holders of general mortgages affecting the property. The right to retain said balance cannot be exercised even if there are special mortgages when it appears that the holders of the same have asked to be paid out of the proceeds of the sale, and when similar proceedings have been resorted to by all the mortgage creditors, who have thus all transferred their rights from the thing to the proceeds.

In such a condition of things the funds must be turned over to the administrator of the succession.

A PPEAL from the Twenty-second District Court, Parish of St. James. *Duffel, J.*

James Legendre and St. M. Bérault, for Plaintiff and Appellee.

Sims & Poché, for Defendant and Appellant:

- 1st. A purchaser of succession property, sold under executory process, has the right to retain in his hands the surplus of the price of adjudication, after paying the amount of the seizing creditor's writ, to be applied *directly by him* to the payment of anterior, concurrent or subsequent mortgage and privilege creditors. Code of Practice, Art. 707; *Morris vs. Cain's Executors*, 34 Ann. 657; 2 R. 214; 5 Ann. 313; 27 Ann. 60; 31 Ann. 86; 18 Ann. 65.
- 2d. In such a case the administrator of the succession is without right to demand from the purchaser the payment of the surplus in order to distribute same in course of administration. 30 Ann. 323; 34 Ann. 657; C. P. 707; 16 La. 170; 5 Ann. 306; 24 Ann. 381; 32 Ann. 325.
- 3d. Payment to the sheriff or the administrator would not protect the purchaser, or abridge or affect the right of mortgage or privilege creditors to enforce their hypothecary rights against the property purchased by him. 34 Ann. 663; 2 R. 214; 31 Ann. 86; 16 La. 170; 5 Ann. 313; 18 Ann. 641-65.
- 4th. The mortgages recorded against the property adjudicated to the purchaser can be erased only with the consent of the mortgagees, or by a final judgment rendered *contradictorily* with all parties in interest. 8 R. 97, 130; 8 Ann. 58; 21 Ann. 401; 2 Ann. 606; 29 Ann. 848; 34 Ann. 665; 2 La. 489; 11 R. 171; 6 R. 299.

The opinion of the Court was delivered by

POCHÉ, J. This rule is taken by R. Beltran, administrator of the succession of J. Aristide Bourgeois, to compel the purchaser of the immovable property of the succession, at a sale made under executory process at the instance of plaintiff, Jean Tessier, to turn over to the administrator the balance of the purchase price after satisfying in full the seizing creditor's mortgage in principal, interests and costs.

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The mortgage thus foreclosed had been granted by J. A. Bourgeois three years before his death, which occurred in November, 1884, and executory process was issued in December, 1884, against the defendant, Pamela Bourgeois, individually and as tutrix of her minor children, issue of her marriage with the deceased J. A. Bourgeois.

The amount of the purchase price was \$5,700, and the cash balance remaining in the hands of the purchaser is \$2,869.05, which he claims the right of holding in order to apply the same to the payment of mortgages existing on the property subsequent to that of the suing creditor, in accordance with the provisions of Article 707 of the Code of Practice.

Before the rule was taken, three of the creditors of the succession had filed third oppositions on their respective claims urging a right of preference on said proceeds; one, the defendant herein, setting forth a legal mortgage for the restitution of her paraphernal funds, and the others claiming privileges as unpaid artisans and laborers.

Resisting the rule, the purchaser filed several exceptions which were overruled, and in his answer he took the position that he could not legally be compelled to part with the proceeds of the sale remaining in his hands until the adverse claims of the third opponents, mortgage and privilege creditors on the property which he had purchased and which was the only immovable property of the succession, had been judicially determined, and his property thus unburdened. He has taken this appeal from a judgment making the rule absolute.

We understand that the exceptions urged by the defendant in rule was abandoned on appeal excepting the objection that third opponents should have been made parties to the rule.

As the administrator of the succession is the special representative of all its creditors, it follows that the judgment rendered in the rule will be *res adjudicata* as to all of them. As the only object to be subserved by making these third opponents parties to the rule, is thus accomplished, the objection loses all force, and the exception is thus disposed of.

On the merits, the pivotal question hinges upon the nature of the mortgages which the purchaser sets up as the encumbrances of which he desires to relieve his property with the balance of his purchase price so as to be quieted in his title.

As shown by the third oppositions on file and not yet decided, these mortgages are general and not special mortgages, in the enforcement of which the creditors holding the same could not have proceeded by

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executory process. But the mortgages which are contemplated by the Article 707 of the Code, the fundamental authority invoked by the purchaser, are "special mortgages existing on the property."

And in order to leave no doubt as to the legislative intent on the subject, the compilers of the Code have framed Article 710, which reads as follows :

"If there exist a general mortgage on the property resulting either from a legal or judicial mortgage, the purchaser cannot avail himself of this mortgage, although it be duly recorded, to retain part of the price for the purpose of paying it, or to refuse paying the price, if that has not been already done, unless there has been a suit commenced against him, in virtue of the general mortgage, to make him quit the property, or unless he has just reason to fear that such a step will be taken, in which case he may retain the price, unless the suing creditor shall relieve him from this disturbance, or give him proper security against it."

The two articles being construed together, lead to the conclusion that the purchaser's fears in the present case are ill-founded. We find nothing in the record to justify the slightest fear on the part of this purchaser of any hostile action by the holders of the general mortgages and privileges recorded against the property, calculated to disquiet him in his unencumbered title. On the contrary, the record discloses that those creditors are claiming payment by preference out of the very proceeds of his purchase, and that they are therefore thus judicially estopped from any future attempt to enforce their mortgage claims against the property.

The same estoppel would apply to the holder of the only special mortgage heretofore existing on the property, inferior in rank to that of the seizing creditor. That mortgage is held by the administrator who specially sets it up in his rule, and claims payment thereof out of the proceeds of the sale, as the next mortgage in rank after that of the seizing creditor, and hence he would likewise be forever estopped from claiming any mortgage rights against the property.

The record thus shows a *concursus* among all the creditors who could possibly urge any mortgage claim against the property purchased by the defendant in rule, who have all transferred their respective and adverse rights from the thing to the proceeds of the sale.

What harm can therefore befall this purchaser by paying over the price of his purchase ? Under the state of the pleadings he can easily obtain an order directing that all pre-existing mortgages affecting the

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immovable which he has bought be cancelled and erased. What can he ask beyond that protection?

These are the very rights which the law intends to secure him, by allowing him to retain the balance in his hands after paying the seizing creditor. The reason of the law having ceased, its application can no longer be invoked.

We have carefully examined and given due consideration to the numerous authorities, all decisions of the court, which the purchaser's counsel quote in support of his claim.

They each and all refer to cases in which the purchaser had to meet and deal with *special* mortgages, either anterior, concurrent or subsequent, and in which his title could have been jeopardized by those encumbrances in case he had unguardedly paid the whole of his purchase price either to the sheriff or to the succession representative. Hence these authorities fail to bear him out in his contention. *Pepper vs. Dunlap*, 16 La. 170; *Bank vs. Peters*, 2 Rob. 214; *Scott vs. Featherston*, 5 Ann. 313; *Quertier vs. Hill*, 18 Ann. 65; *Johnson vs. Duncan*, 24 Ann. 381; *Bank vs. Smith et al.*, 27 Ann. 60; *Gally vs. Dowling*, 30 Ann. 323; *Bucos vs. Hernandez*, 31 Ann. 86.

We note the great and very confident reliance which his counsel place in the case of *Morris vs. Cain's Executors*, 34 Ann. 657, which they hold up as absolutely sustaining their position in this case.

But it appears from that decision that the mortgages which the purchaser had to provide for were special mortgages, created by the same act whence the mortgage of the seizing creditor had emanated although of inferior rank.

It was in view of that condition of things, and with reference to the *special* mortgages then under discussion, that we used the following language, which is quoted by appellant as decisive of the issue which now concerns us: "The case would be different if, after the payment of the seizing creditor and retaining an amount sufficient to pay anterior, concurrent and subsequent mortgage and privilege creditors, there remained a balance of the price of adjudication; but it would be only to such balance that the executors could raise their claim."

The balance now in the hands of the purchaser in this case is precisely in the condition of the balance as described in that quotation.

It is now before the Court for distribution as *in concurso*; the proper place for its distribution is in the administration of the succession to which the fund belongs of right, and the administrator is the proper custodian thereof, for payment in due course of administration. Such were the conclusions of the district judge; they are supported by good law, and they have our sanction.

Judgment affirmed.

38	260
117	372
117	375

No. 9670.

SUCCESSION OF W. H. TREADWELL.

The rule has long been settled that all parties to the record who are interested in maintaining the judgment must be made parties to the appeal from it.

Where the tableau of distribution and final account of an administratrix have been homologated and the funds have been distributed in accordance therewith, and a creditor of the deceased, who was not a party to the mortuary proceedings, appeals from the judgment of homologation, he must make the creditors who have been paid parties to his appeal.

When the petition of appeal contains no prayer for citation and none is issued, the fault is the appellant's and dismissal is the penalty of his neglect. The Act of 1839, now Sec. 36 Rev. Stats., does not cure this defect.

A PPEAL from the Tenth District Court, Parish of Red River.
Hall, J.

Pierson & Hull for the Appellant.

Egan & Pierson, contra.

The opinion of the Court was delivered by

MANNING, J. This appeal is taken by petition of a creditor of the succession from the judgment homologating the distribution of its assets, the creditor not having been a party to the proceedings in the lower court.

Treadwell died in March, 1885, and his widow qualified as administratrix on the 15th of the next month. A statement or tableau of debts was made and filed the following day along with a petition for the sale of the property, it appearing that the debts exceeded the appraised value of the property. The sale was made. The plantation, which was appraised at \$10,000, brought \$12,000. The rest of the property, appraised at a fraction under two thousand dollars, brought the full appraisal. A tableau of distribution was filed, advertised and homologated, no opposition having been made thereto, and the funds were distributed.

In December following, S. W. Rawlins, alleging that he is a creditor of the deceased, petitioned for a devolutive appeal, which was granted. The administratrix has alone been cited, and she moves to dismiss on the ground that the creditors who have been paid have not been made parties to the appeal.

The motion must prevail.

The rule is and has long been settled, that all parties to the record who are interested in maintaining the judgment must be made parties to the appeal from it, and this rule has been often applied to appeals such as this, it having been uniformly held that in an appeal from a

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judgment homologating an administrator's final account the creditors who have been paid are necessary parties. *Suc. Duco, Manning's Unrep. Cas. 229; Condon vs. Samory, 12 Ann. 801.* and authorities there cited; *Broussard vs. Robin, 13 Ann. 560; Cummings vs. Erwin, 14 Ann. 315.*

The appellant cannot invoke the rule that when the fault is not his he cannot suffer for another's neglect or omission, for here the fault is his. He did not ask that citation should issue. His petition for appeal concludes with this prayer: "Wherefore, premises considered, petitioner prays for an order of devolutive appeal, returnable to the Supreme Court on the second Monday of February, 1886, according to law. He prays for all orders necessary and general relief."

There is no prayer for citation of anyone, nor was any ordered, the judge having simply granted the appeal and prescribed the amount of the bond. The prayer for all necessary orders does not include it.

This omission is not cured by the Act of 1839, now Sec. 36 Rev. Stats., a series of decisions having settled that this statute is not applicable to so vital a prayer as that for citation when the appeal is by petition, and that when that prayer is not made the lack of it is attributable to the appellant. *Fagan vs. Moriarty, Manning's Unrep. Cas. 439; Adams vs. Dermody, 21 Ann. 238; Guilbeau vs. Cormier, Idem, 629; Gerodias vs. Handy, 31 Ann. 334.*

The appellant complains that "a summary process of administration was adopted." Creditors of successions have rarely had occasion to complain of the speedy settlement of them. The evil lies in the opposite direction, but in this case the final account was filed May 29th. Only ten days advertisement of it was required, but it was not homologated until July 18th, nearly two months interval.

The appeal is dismissed.

 No. 9667.

**W. B. COOK, TAX COLLECTOR, AND POLICE JURY OF ST. TAMMANY
vs. THEODORE DENDINGER.**

Parishes are vested with the power to tax persons and property in incorporated towns, unless such power is withdrawn by legislative authority.

No legislative act has deprived the parish of St. Tammany of the power to levy such taxation in the town of Madisonville.

The Act 110 of 1880, conferring upon incorporated towns the power of amending their charters, only conferred on them the power to regulate their internal organization and the modes and agencies by which the powers and privileges conferred upon them by law

38	261
47	601
38	261
48	259

Tax Collector and Police Jury vs. Deydinger.

might be exercised. It did not authorize them, by such amendments, to extend their powers and privileges or to alter or destroy the existing authority of the State or parish over their inhabitants.

Hence, the provisions of the amended charter of Madisonville adopted under that act, prohibiting the imposition of a parish tax or license, is *ultra vires*, null and void.

A PPEAL from the Justice Court, First Ward, St. Tammany.
Duporte, J.

White & Saunders and John Wadsworth for Plaintiffs and Appellants.
Thos. C. W. Ellis for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. The sole question involved in this case is the legality of a license tax imposed by the police jury of the parish of St. Tammany upon the business defendant, who is an inhabitant of the town of Madisonville, conducting his said business within said limits.

It is not disputed that, under the general law of the State, the police juries of parishes are vested with power to tax property and persons within the limits of incorporated towns, unless such power be withheld or withdrawn by express legislative provision. *Benefield vs. Hines*, 13 Ann. 420; *Maurin vs. Smith*, 25 Ann. 445; *Iberia vs. Chiapella*, 30 Ann. 1143.

It is admitted that the legislative charter of the town of Madisonville (Acts of 1852, p. 226) conferred no exemption of its people or property from parochial taxation, and that no other legislative act embodying such exemption has ever been passed.

But in 1880, the Legislature passed Act No. 110 of that year, entitled "An Act prescribing the manner of altering, changing or amending the charters of cities and towns in the State of Louisiana (the city of New Orleans excepted)," which delegated to the people of such towns and cities the power of altering and amending their charters, by a vote thereon taken at special elections held in accordance with regulations prescribed in the act.

Availing themselves of the provisions of this act, the people of the town of Madisonville adopted, in 1883, an amended charter, the only feature whereof with which we are presently concerned is Section 8, declaring: "That the power of the police jury shall cease, so far as respects woods, roads and highways in said town of Madisonville, and the imposition of a parish tax or license is hereby especially prohibited."

This section furnishes the sole foundation for the defendant's contention that the parish license herein claimed is illegal.

Plaintiff opposes this contention on the double grounds:

1st. That Act 116 of 1880 is unconstitutional;

2d. That, even if constitutional, it does not confer upon towns the power of assuming new and additional privileges, or of taking away from parishes powers hitherto possessed by them, but only to regulate their methods of internal government and the modes in which the privilege conferred upon them shall be exercised.

The case is so clearly with the plaintiff on the second ground that we have no occasion to consider the first.

The towns of the State would, indeed, be "chartered libertines," if, by amending their own charters, they could confer upon themselves indefinite privileges and immunities, and repeal and annul the general laws of the State so far as applicable to them.

The proposition is equally inconsistent with any reasonable construction of the Act of 1880, and with the fundamental principles of the law of corporations.

The act evidently deals with towns as already constituted, with powers and privileges defined and fixed by law, and gives them the power, by appropriate amendments, to regulate their internal organization and the modes and agencies by which these powers may be exercised. It contains no reference whatever to the relations between their inhabitants and the State or parishes, and confers no power express or implied to alter or destroy these relations. The authority to abrogate an existing power of parochial taxation would be so extraordinary a function to confer upon a town that it could be deduced from nothing less than the most express and unambiguous provision of the law. Yet this is what the town of Madisonville claims to have done and to have had the right to do. The powers of municipal corporations can only be derived from direct legislative authority, and are closely limited to the express words of the grant and to necessary implications therefrom, and all reasonable doubts concerning the existence of power are to be resolved against it. Dillon Mun. Corp. § 55, *et passim*. These principles are of transcendent importance, and it is not to be supposed that the Legislature intended to abrogate them by a sweeping grant of authority to towns to assume whatever powers they please.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now ordered, adjudged and decreed that plaintiff have judgment against defendant, Dendinger, for the license taxes claimed, viz: the sum of twenty dollars, with interest according to law and costs in both courts.

State ex rel. Levet vs. Lapeyrollerie.

No. 9638.

38 264
45 53538 264
108 10838 264
114 36938 264
116 718

THE STATE EX REL. J. M. LEVET VS. ANTOINETTE AND CHARLES LAPEY-
ROLLERIE AND THE SHERIFF OF THE PARISH OF ST. JOHN THE
BAPTIST.

A writ of prohibition will not issue to arrest the execution of a judgment of one of the courts of appeals, on the complaint of the party cast, on the ground of want of jurisdiction, unless it appears from the record that the court was absolutely without jurisdiction in the premises.

In an action of boundary between the owners of two contiguous estates, the test of jurisdiction is not in the value of either or both of the adjacent estates, but in the value of the strip of land included between the two contested lines; and if it appears that the value of such strip of land is in the sum of three hundred dollars, the jurisdiction of the cause on appeal is in the court of appeals, and not in the Supreme Court. The case of Lombard vs. Belanger, 35 Ann. 311, affirmed.

A PPLICATION for Prohibition.

James Legendre for the Relator.

G. Leche, L. DePoorter and *James D. Augustin* for the Respondents:

1. In an action of boundary, the only matter in dispute is the value of the lands included between the two contested lines, and unless relator shows the value of such strip exceeds two thousand dollars, the Supreme Court is without jurisdiction. 35 Ann. 311.
2. In this case the action partakes of the nature of an action of boundary (only in this sense) that the reports of the parish surveyor chosen by both parties to draw the boundary line is sought simply to be approved and homologated—both by the allegations and prayer of respondent's petition.

And therefore the only matter in contest would be the surplus land beyond the titles of the parties apportioned according to law by their chosen surveyor in proportion to the respective titles of the parties

The affidavit of respondents that said disputed strip is worth three hundred dollars, taken in connection with the report and testimony of the surveyor, settled the question of jurisdiction. C. C. 832, 833, 851; R. S. 3740, 3743, 3745. See Exhibits A and B, annexed to the return of respondents.

3. A party cannot shift his position to a contradictory one, so as to defeat the action of the law. Louque's D., p. 225, § 61, and p. 226, § 84.
4. After the consent survey, the sole object of the action of respondents against relator was to prevent a disturbance to their possession of the strip of land allotted to them proportionately by the surveyor, and that possession is alleged to be worth three hundred dollars; therefore the appellate jurisdiction was legally exercised in the premises. Neither the title, ownership or possession of the properties owned by the litigants were in question, and the issue was simply which line should be decreed to be the true one and to whom the twenty-foot strip belonged to; therefore it is the ownership and possession of the latter which determined the appellate jurisdiction of the Circuit Court. Lombard vs. Belanger, 35 Ann. 311; see also Manning's Unreported Cases of Supreme Court, Terroir vs. Weaver, p. 107.
5. Where it appears from the record that the lower court had jurisdiction, and the proceedings were regular, a writ of prohibition will not issue from the Supreme Court on an application based on the ground that the lower court had usurped jurisdiction and

 State ex rel. Levot vs. Lapeyrolerie.

authority, etc. 34 Ann. 782; 33 Ann. 257, 1356, and authorities there quoted; 36 Ann. 768; 32 Ann. 555, State ex rel. vs. Falls.

6. Relator is now estopped from seeking relief by writ of prohibition, because he submitted to the jurisdiction of the appellate tribunal by pleading all his defenses to said appeal. He should have desisted at first and applied for the remedy he now seeks. He took the chances of a judgment in his favor, and he now complains because he has been disappointed. State ex rel. vs. Judge, 36 Ann. 768.

The opinion of the Court was delivered by

POCHÉ, J. The facts are as follows:

At a sale for partition of a tract of land hitherto owned in indivision by relator and the father of the respondents Lapeyrolerie, the parties hereto purchased two contiguous parcels of the land thus partitioned. With a view to establish proper boundaries between their respective estates they employed a competent surveyor, who found an excess of land beyond the quantity called for by their respective titles. That excess, which was a strip of land twenty feet in width, was awarded by the surveyor to the contiguous owners in proportion to their respective quantity of land as shown by their titles.

On the refusal of the relator, Livet, to accept the surveyor's plan, suit was brought against him for the purpose of obtaining a judicial enforcement of the boundaries as settled by the surveyor. The trial in the District Court resulted in a judgment against plaintiffs, who thereupon took an appeal to the Court of Appeals.

In that court the relator herein, who was the appellee there, moved for a dismissal of the appeal on the ground that the jurisdiction of the cause belonged to the Supreme Court. His motion was overruled and the judgment appealed from was reversed.

In due course execution was issued on the judgment of the Court of Appeals. Hence this application for a writ of prohibition, under the provisions of Article 853 of the Code of Practice. The question of jurisdiction depends upon the determination of the precise matter in dispute between the parties to the original suit.

The counsel of both parties are in accord that the action was one of boundary, and the record shows that the strip of land which the plaintiffs claimed under the surveyor's report, and which the defendant refused to yield, was of the value of three hundred dollars. Relator's contention is that the test of jurisdiction is the value of the two contiguous estates, which in this case is shown to exceed two thousand dollars, and not in the value of the narrow strip of land which may be the bone of contention between the parties; and his main reliance is on Articles 824 and 825 of the Civil Code, which assimilates the action

State ex rel. Livet vs. Lapeyrollerie.

of boundary to the action of partition. Hence he argues that, as in the action of partition the value of the whole estate is the test of jurisdiction, so in an action of boundary the value of the two contiguous estates is the criterion of jurisdiction.

Under the two articles referred to, there are only two features in common between the two actions. They are both derived from the same source; the principle that no one is bound to live in indivision with another (Art. 824), and neither can be met by the plea of prescription. (Art. 825.) But in all other respects they are essentially and materially different.

The case in hand is a fair illustration of the correctness of this proposition, and of the fallacy of relator's contention. Before the partition sale the two estates were held in indivision between Livet and the Lapeyrolleries. For the purpose of the partition the whole property was under the control of the court, and at the partition sale each estate went to the respective purchasers. When the owners proceeded to establish their boundaries, which act was a necessary result of the partition, and when they differed as to the proper boundary, and went into court a second time, their respective titles which had been settled by the partition sale, were not before the court for its action, for there was no contest touching them. But the only matter submitted to the court for adjudication was the settlement of the boundary line which was to separate the two contiguous estates, or to determine what proportion of the surplus land discovered by the survey, was to accrue to each of the contiguous estates. Each of the purchasers at the partition sale was then and is yet in possession of all the land which his title calls for, hence the value of either or of both of the contiguous estates has ceased to be a factor in the litigation. Hence it follows that the only matter in dispute before the District Court, and on appeal therefrom, was that portion of the twenty feet surplus land which the plaintiff claimed, and which is shown not to exceed three hundred dollars in value.

If it be true, as intimated by relator's counsel, that the suit partook more of the nature of an action of partition than that of boundary, the property to be partitioned would be the strip of land twenty feet in width, and he does not even pretend that its value exceeds the jurisdiction of the Court of Appeals. Hence that horn of the dilemma does not favor him. But if it be the action of boundary, on which point we entertain no doubt, the test of jurisdiction is in the value of the tract of land included between the contested boundary lines.

Bankston et al. vs. Folks.

This question came up in the case of Lombard vs. Belanger, 35 Ann. 311, and we there held, as we do now, that "the value of that portion of the adjacent estates which would be involved by selecting either of the contested lines as the true boundary line between the two estates is the real matter in dispute" in the action of boundary.

These considerations lead to the conclusion that the Court of Appeals did not err in maintaining their jurisdiction of the cause, and that therefore there is no ground for the writ of prohibition herein prayed for. It is therefore ordered that the alternative writ of prohibition issued herein be recalled and set aside, and that relator's application be dismissed at his costs.

No. 9652.

S. M. BANKSTON ET AL. VS. CHESTON FOLKS.

38	267
p111	147
38	267
116	1112

He who is in fault and sues for damages resulting from that fault, cannot recover for the injuries inflicted on him, although the perpetrator of them was not justified in law in his own conduct.

In a civil suit for damages for injuries caused by the defendant's shooting the plaintiff, evidence of threats of the plaintiff that he intended to do violence to the defendant, and of their communication to the defendant prior to the shooting, is admissible to shew the impression made on the defendant's mind by the communication.

In such suit the indictment and verdict in a criminal prosecution of the defendant for the offence of shooting the plaintiff are admissible in evidence, not as conclusive of the plaintiff's right or want of right to recover, but as proper to be considered by the jury in determining the issue before them.

A PPEAL from the Fifteenth District Court, Parish of West Feliciana. Yoist, J.

W. W. & H. C. Leake for Plaintiffs and Appellants.

Wickliffe & Fisher for Defendant and Appellee.

The opinion of the Court was delivered by

MANNING, J. S. M. Bankston and his wife sue in behalf of their minor son, Marcus, for \$2,793.20 as damages for injuries inflicted on him by Cheston Folks, by shooting him three times with a pistol. Of this sum \$2,000 are claimed as exemplary damages, \$500 as actual, \$250 for lawyer's fee, and \$43.20 for doctor's bill and medicines. The shooting was in the public streets of the town of St. Francisville, last August, Marcus being then in his twenty-first year. He was confined to his bed four days, to his room a week, and was kept from work three

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weeks. He is a farmer and labourer, rents a few acres of land and works it himself, and says he lost a dollar a day while disabled.

The defence is that the shooting was to protect his own (the defendant's) life and to save himself from bodily harm.

The case was tried by a jury, who refused to give any damages and found for the defendant. A criminal prosecution of Folks preceded this suit, and resulted in his acquittal.

We shall not disturb the judgment.

The testimony conflicts, but it is manifest that Marcus Bankston brought the trouble on himself. He had taken offence because Folks rented a piece of land that he wanted, and yet more "because (to use his own language) you (Folks) ride by me and never speak, and think yourself better and above me." This rankled in his heart, and he often said to others that he would do divers things, such as rub his fist in Folks' face when he next met him, cut his throat from ear to ear, and the like. He even asked his interlocutors to tell Folks what he had said, and they did it.

His own testimony of what he said to one of the witnesses is as follows:

Question. "Did you not then and there call Folks a damn son of a bitch?" and he answered

"I did, and then I said I will take that back. I said to Collier Carr, 'you tell Folks that he is a damn rascal. He laughed and made fun of me, and I can rub my fist in his face.' And I said, 'no, you need not tell him any of this,' and he said no he was not going to tell him."

Of course this is the most favorable version. Several witnesses assert that he used the coarsest and vilest expressions, and with oaths and threats of what he should do to Folks, and which he requested should be communicated to him. They were communicated to Folks, and if this was done even without the dressing and ornamentation usual on such occasions, the delivery of the messages in their undorned brutality was enough to alarm Folks for his safety. This conversation of Bankston we have quoted above was on Thursday night, and not that version but a very different and more truthful one was told Folks on Friday night. The shooting was on Saturday.

Folks passed Bankston and his party of relatives on the road to the town on Saturday, and bought or borrowed a pistol as soon as he got there. On Bankston's arrival Folks went up to him, Folks afoot and Bankston on horseback, not having alighted, and said: "What have I done to you to cause you to talk about me this way?" Bankston's

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reply was: "God damn you, because you ride by me and wont speak to me, and seem to think yourself better and above me." I said, "Bankston you have threatened to rub your fist in my face, and to cut my throat from ear to ear. Is that so?" He said, "Yes, I said it and I can do it." And I said, "Do you feel like doing it now?" And he said, "You can't bluff me."

This is Folks' testimony of what preceded the rencounter. Bankston at that moment put his hand behind him, the movement he would have made if he were about to draw a pistol from his pocket. In fact he had none. Instantly leaning over to one of his party, he reached out and asked for a pistol, and then Folks drew and fired.

The whole affair is a disgrace to any civilized community. Folks should not have armed himself, nor sought Bankston, nor fired. If he apprehended violence from Bankston, his plain duty was to make oath of it before an officer of the law and have him bound over to keep the peace.

But Bankston's threats of violence caused the rencounter and his efforts to get a pistol provoked the shooting, and although Folks was not justifiable in doing what he did, Bankston cannot recover because he was himself in the wrong, and because the difficulty could never have occurred had he not invited it by sending messages to Folks well calculated to alarm him for his personal safety. *Vernon v. Bankston*, 28 Ann. 710.

Bills were reserved to several rulings of the lower court, of which only two need be noticed. The defendant was asked to state what threats of Bankston were communicated to him prior to the shooting, and by whom were they communicated. The objection was that all statements made to the witness out of the presence of the plaintiff are hearsay, and therefore inadmissible, and the court sustained the objection.

The defendant was the witness. The object was to shew what was the impression made on his mind by the communication of threats and other language of the plaintiff, for it matters not, so far as that object was concerned, whether it was true or false that Bankston had said what was reported to Folks as his saying. The evidence shewed the mental impression of the defendant and was admissible for that purpose. A number of other witnesses had already testified of the threats and their communication.

The indictment and verdict in the criminal prosecution were offered in evidence and rejected as irrelevant. They were admissible. They

State ex rel. Goodwin vs. Judges.

were not conclusive of the plaintiff's want of right to recover in a civil action, but it was proper that the jury should consider the result of the criminal prosecution for an offence for the legal consequences of which damages were claimed from its perpetrator. Several witnesses had been interrogated about what they swore on the criminal trial.

These rulings were in favour of the plaintiff, notwithstanding which the defendant had a verdict and judgment.

Judgment affirmed.

9680.

THE STATE EX REL. J. L. GOODWIN VS. THE JUDGES OF THE COURT
OF APPEALS, SECOND CIRCUIT.

When a plea to the jurisdiction *ratione personæ* has been filed in the District Court and referred to and tried with the merits, and judgment has been rendered sustaining the plea and dismissing the demand, the party injured has the right to appeal from such judgment to the proper appellate tribunal. Such appeal vests the latter with full jurisdiction over the case and over all questions of law and fact involved therein, including that of the jurisdiction of the District Court. In determining such question and reversing the judgment appealed from, the judges of said court do not transcend the bounds of their jurisdiction, and the application for the writ of prohibition has no foundation.

APPPLICATION for prohibition.

C. J. and J. S. Boatner, for the Relators.

Millsaps & Sholars, for the Respondents.

The opinion of the Court was delivered by

FENNER, J. Relator alleges that in a certain attachment suit pending in the parish of Ouachita, he, a resident of the parish of Jackson, was served with interrogatories as garnishee; that he filed his answers to the same denying indebtedness; that, thereupon, the plaintiff filed a rule traversing his answers which was served on him; that he pleaded to the jurisdiction of the court, *ratione personæ*, on account of his residence beyond the jurisdiction of the court and right to be sued at his domicile; that the plea was referred to and tried with the merits and, after hearing, the District Judge sustained the plea; that plaintiff took an appeal to the Circuit Court, which, after hearing, reversed the judgment of the District Court, overruled the plea to the jurisdiction, and gave judgment on the merits against relator.

 Henkel vs. Sheriff et al.

We omit other allegations touching the existence of the writ of attachment, because they involve questions of fact not touching the jurisdiction.

There is no charge that the case, in its nature and amount, was unappealable, or that it was appealable to any other court than the Court of Appeals for the Second Circuit, or that it was not appealable to said court. Hence the Circuit Court's jurisdiction over the case and over all questions of law and fact involved therein, was perfect and complete, and, in determining them, it did not transcend the bounds of its jurisdiction.

There is, therefore, no foundation for the writ of prohibition applied for.

It is, therefore, ordered that the restraining order herein granted be set aside, and that the writ of prohibition be denied.

 No. 9685.

A. D. HENKEL VS. F. P. MIX, SHERIFF, ET AL.

When parties really intend to create a mortgage for the security of an existing or contemplated debt and adopt the form of a sale with a counter letter which, taken together, exhibit such intention, the contract will be construed as a mortgage and effect will be given to it accordingly.

But when the act of sale and the counter letter both concur in asserting that it is a sale, the latter containing the agreement that the vendor may redeem within a given time, it must be held to be a sale with the right of redemption, and if the right is not exercised within the time agreed on it is forever lost.

When the vendee or his representative, he being dead, attempts to sell the land before the expiration of the time for redemption, and the vendor enjoins the sale on other grounds and the time expires before the trial of the suit, the defendant will be mulcted in costs that were incurred before the expiration of the time.

A PPEAL from the Eighteenth District Court, Parish of Tangipahoa,
Thompson, J.

Reid & Reid, for Plaintiff and Appellant.

T. C. W. and S. D. Ellis, for Defendant and Appellee.

The opinion of the Court was delivered by

MANNING, J. This is an injunction restraining the sheriff and the administratrix of B. S. Gullett from selling a tract of land.

In October, 1880, Henkel sold to Gullett the tract of land for \$2,079 69 cash, and on same day Gullett made and signed an agreement reciting that he had bought the land but would reconvey it if within two years Henkel paid him the purchase price with eight per cent interest, and

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meanwhile Henkel might occupy it as his tenant free of charge except the interest specified.

Gullett died in 1881 and his widow, as administratrix, inventoried the land as the property of the succession, and in the spring of 1882 she obtained an order of court for its sale, and advertised it, whereupon Henkel filed this suit.

Henkel died in July, 1883, and his widow and heirs were made parties. The case was tried in January, 1886, and the defendants had judgment dissolving the injunction.

Henkel had declared and recorded this property as his homestead in June, 1880. In the following autumn he wanted to buy a stock of goods of Gullett, and offered to mortgage this property to secure the debt. Gullett refused to take it. It was then agreed that Henkel would sell the land to Gullett in payment of the debt he was about to contract, and the latter would reconvey it at the expiration of two years if the price he had given for it should then be paid.

The ground of injunction is that "it was not the intention of the parties" that the act passed by the notary as a sale and having that form should be a sale, but "that it was intended by both parties thereto to constitute a mortgage or pledge of the land for the payment of the indebtedness of \$2,079 with interest," and that the "legal effect of the act and counter letter is to operate a mortgage or pledge of the land," which is null and void as contravening the constitutional prohibition against mortgaging a homestead. Art. 222. Should the contract, however, be deemed a sale or giving in payment with privilege of redemption, he alleges that it is void for want of delivery.

This Court has held over and over again that when parties really intend to create a mortgage for the security of an existing or contemplated debt, and adopt the form of a sale with counter letter, which, taken together, exhibit such intention, the sale will be construed as a mortgage and effect be given to it accordingly. The whole subject with numerous decisions thereon was reviewed in *Parmer vs. Mangham*, 31 Ann. 348, and very lately we applied the doctrine in *Crozier vs. Ragan*, not yet reported.

But the plaintiff, under cover of those decisions, wishes us to announce a very different doctrine, viz: That when the authentic act is in form a sale, and the counter letter repeats that the intention of the parties is that it shall be what it purports to be, and emphasizes the expression of that intention by a preamble, "Whereas, B. D. Gullett has this day *purchased* of A. D. Henkel the tract of land," and he promises to *reconvey* after the lapse of a certain time and on certain

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conditions, and Henkel expressly and in terms accepts the position of tenant to the vendee, that then and in such case the intention of the parties shall be disregarded and the act shall be declared to be a mortgage. The injunction explicitly rests upon what is alleged to have been the intention of the parties. The counter letter as explicitly declares that intention to have been wholly different from what is now alleged.

The notary was offered to prove what was said to him by the parties when the act was about to be drafted and the defendant objected and the court admitted the testimony. It is unnecessary to consider the objections since the defendant is not hurt. The notary confirms the the counter letter and says he asked Gullett if he should draw a mortgage and was answered, "No, he would not take a mortgage, it must be a sale." The act was recorded in the book of sales and not in the mortgage book.

If it were true that the parties intended the contract to be one of mortgage, but they or one of them put it in form of a sale to evade the prohibition of mortgaging a homestead, we should give effect to the intention, and let the party who tried to evade the law take the consequences. But the counter letter, the repository of the direct intention, rebuts and precludes the belief that either of them intended it to be a security for a debt, but both understood and designed that it should be a sale with delivery and a faculty of redemption. Unquestionably one may sell property and immediately lease it from his vendee at a stipulated rent, and Henkel did this, accepting the tenancy in express terms.

Neither of the parties treat the contract as one of exchange. It was a sale with right of redemption, and as that right was not exercised within the time agreed on the buyer became irrevocably owner. Rev. Civ. Code, Art. 2570.

The sale of the property by the administratrix was advertised in April, 1882, before the expiration of the time for redemption—two years from October, 1880—and the lower judge in consequence ordered the defendant to pay all the costs. He answers the appeal praying that the plaintiff pay the costs.

Neither is right. The defendant must pay the costs incurred up to October 19, 1882, the date of expiration of the time for redemption, and the plaintiff must pay all other costs.

The equities of the case are all with the defendant. The plaintiff made with him a contract that he deemed highly advantageous to himself. The defendant without concealment or subterfuge declared

State ex rel. Heirs of Gee vs. Judge

what the contract was and as plainly what it was not, and the plaintiff agreed and assented, reaped the benefit of it, and the instant it was to be enforced swore it was not what he had asserted it was. He could lawfully sell his homestead and having sold it and received and enjoyed the price, he cannot find shelter under a law that has no application to such a case as his.

It is therefore ordered and decreed that the judgment of the lower court is amended in this, that the defendant is condemned to pay the costs incurred prior to October 19, 1882, and the plaintiff to pay all others, and as thus amended it is affirmed.

9617.

THE STATE EX REL. HEIRS OF GEE VS. R. C. DREW, JUDGE OF SECOND DISTRICT COURT, AND G. W. THOMPSON.

The writ of prohibition is the proper remedy to restrain a District Judge who attempts to enjoin the execution of a judgment rendered by the Supreme Court, on the alleged ground that said judgment is not yet final.

District Judges are absolutely powerless to judicially investigate and determine the validity of the official acts of any of the clerks of the Supreme Court. The certified copy of a judgment of this court issued by one of its clerks and forwarded to the court whence the appeal was taken, is the mandate of this court for the execution of the judgment, and it must be obeyed by the lower court.

That court has no power or authority to ascertain in an injunction proceeding or in any other mode whether the mandate issued properly or otherwise. Complaints for alleged errors of any of the clerks of this court, in issuing such certificates or in the performance of any of their official functions must be addressed to this court only; the power to correct such errors is lodged in no other authority. A district judge will not be held in contempt for assuming powers which he honestly but erroneously believed to be of the essence of his court.

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PPPLICATION for Prohibition.

Cunningham & Moise, for the Relators.

Watkins, Scarborough & Carver, on the same side.

Merrick, Foster & Merrick, for the Respondents.

The opinion of the court was delivered by

POCHÉ, J. The following facts have given rise to these proceedings:

On the 26th of October, 1885, this court rendered at Shreveport a final judgment against G. W. Thompson, one of the respondents herein, in the matter of the "succession of B. L. Saunders, on opposition of

the Saunders heirs and of the Gee heirs," and that term of the court was adjourned at midnight on the next day.

On the 29th of the same month the clerk of this court, at Shreveport, forwarded to the lower court a certified copy of the opinion and decree of the Supreme Court, on which execution was issued at the instance of the Gee heirs, relators herein, on the 4th of November following. That execution was enjoined on the 25th of the same month by the order of the Respondent Judge in injunction proceedings instituted by Thompson, the respondent herein, the defendant in execution under the decree of this court.

The substantial ground of the injunction is that our judgment was not final, and that the certified copy thereof had been prematurely issued by our clerk.

Relators charge that in entertaining Thompson's application for injunction the District Judge has exceeded the bounds of his jurisdiction, and that he has officiously and illegally impeded the execution of a mandate of this court, from which he should be prohibited, and for which he should be punished as in case of contempt.

Respondents, after disclaiming any intention of contempt of the authority of this Court, urge in their answer that the writ of prohibition is not the proper remedy, and that the District Court was fully vested with the legal power to enjoin the execution because it had been issued under a judgment not yet final.

Their grounds for the latter assertion are in substance as follows:

That when the clerk's copy of our judgment was issued, three judicial days had not elapsed since the day on which the judgment had been rendered.

They take cognizance of the fact that a waiver of two of the three judicial days granted by law for applications for rehearing at the county terms of the Supreme Court, had been made in writing, in common with all the attorneys having business before the court at that term, and in accordance with a long established custom as an acceptable courtesy to the members of this tribunal, by the law firm of "Watkins & Watkins," whose names were attached to the brief, who were attorneys of record in the case, and by one of whom the cause was orally argued before the court. But they deny the right, and even the intention of the members of that law firm to bind the respondent Thompson by the waiver in question. Their contention is that the firm of "Jack & Dismukes" were the only authorized attorneys of Thompson in the case, and that "Watkins & Watkins" had been connected with the suit by "Jack & Dismukes" as their representa-

State ex rel. Heirs of Geo vs. Judge.

tives, and had never been employed as counsel by Thompson. These allegations are supported by affidavits subscribed by J. D. Watkins, the senior member of "Watkins & Watkins," and by W. H. Jack, the senior member of the firm of "Jack & Dismukes."

But, in justice to relators, and in justification of our own course, in allowing J. D. Watkins, Esq., to present an oral argument in the cause, we must state that by inspection of the briefs in the case, of the transcript, of our docket, of our minutes, and of the petition of appeal, which is part of this record, it appears that the firm of "Watkins & Watkins" figured in the case throughout as the counsel of Thompson and not otherwise. The answer to both of the propositions which are discussed by the counsel is suggested by a consideration of the pivotal ground of the injunction.

No complaint is made of the mode of execution, and no error is suggested as to the manner of executing the writ, after its issuance from the District Court, or in the order of the clerk for execution.

The substantial and exclusive complaint is that our judgment was not yet final for the reasons which we have herein above stated in detail, and that therefore our clerk at Shreveport had committed an error in prematurely issuing the certified copy of the opinion and decree of this court which is the only mandate to the District Court for the purpose of proceeding to the execution of the judgment. C. P. Art. 915. As soon as this certified copy reaches the court whence the appeal had been taken, that court is fully empowered, and can be required without option on its part, and without further orders from this court, to issue execution of the judgment which has been rendered here.

Under the textual provisions of the Code, the certified copy of the judgment of this court, forwarded to the lower court by our clerk, is the mandate of this court for the execution of the judgment which it has rendered.

"The functions of the District Court in relation to a mandate which has issued from this court to have a judgment executed, are merely ministerial. It cannot render any new judgment which would authorize or render an appeal necessary." *State ex rel. Bank vs. Mayor*, 35 Ann. 408; *Lovell vs. Taylor*, 6 Rob. 92; *Cox's Executors vs. Thomas*, 11 La. 366.

It follows from these rules and principles which find their strongest sanction in common sense and in natural order, that the District Court to which a mandate from this court has thus issued has no other alternative but to obey its behest, and that it has no power to examine into

our minutes or records to ascertain or determine the manner in which our clerk executes our orders, or performs his legal functions.

If that officer commits a wrong, or unjustly deprives a party of his legal rights, he is amenable to this tribunal and to no other power, and it is to this court alone that complaints against him for any alleged wrong should be addressed. Whence does the District Court of Bossier parish derive its power to judicially control the clerk of the Supreme Court? Whence comes its authority to say to this court, "Your judgment is not final, hence I must decline to obey your mandate which directs its execution?"

It is too plain for further argument that District Courts are utterly and absolutely powerless to entertain, by means of injunctions any complaint of alleged errors of one of the clerks of the Supreme Court. We can but repeat that these clerks, in the performance of their official duties are exclusively under the control of, and amenable only to, the court whence they hold their appointments.

We note the great reliance placed by respondents and their counsel in our recent decision in the case of *Sentell vs. Judge*, not yet reported. The grounds on which the District Judge rested his injunction in that case were alleged errors charged against the sheriff for acts committed or omitted *after* the writ had been placed in his hands; but in the instant case the complaint charges errors committed in this court, before execution had been ordered, and in the very proceedings which were intended to direct the execution of the decree of this court. We quote the following language from the *Sentell* case: "If the injunction issued was based on any grounds assailing the plenary authority of our judgment or its absolute title to be executed according to law, the contention might have force. But we have examined the petition for injunction and we find no such questions raised. The attack is leveled exclusively against the form of the writ and the proceedings under the writ."

As it is very clear that the injunction issued in this case places the District Judge in the attitude of regulating the proceedings of this court, and of controlling the official acts of one of our clerks, it is equally undeniable that he has exceeded the bounds of his jurisdiction, hence the writ of prohibition is the proper remedy, and it must therefore issue.

Having thus concluded that the Respondent Judge had no power or authority to issue the injunction complained of, it becomes unnecessary to judicially consider the validity of the reasons urged therefor by the respondent Thompson. Until the proper proceeding is resorted to we

Chaffe & Sons vs. McGehee & Co.

are spared the painful duty of deciding how far an attorney of record can be allowed to repudiate the legal effects of his own acts; how far he may be counsel for certain purposes and not for others in the progress of a suit; and to what extent a litigant may be allowed to divide the responsibility of counsel who appear of record in his cases. We must now dispose of the rule for contempt.

From our knowledge of the character of the Respondent Judge we are satisfied and quite confident that he had not the remotest intention of resisting the authority of this court.

The palpable error which he has committed arises from a confused idea of the line of demarcation between his authority and that of the Supreme Court, and is doubtless the result of hasty conclusions on a question which was perhaps new to his legal mind. The law does not contemplate the correction of such errors by rigorous punishment. But as the repetition of such errors would doubtless have a tendency to hamper the speedy administration of justice in the State, we entertain the reasonable hope that we will not often be called to correct similar irregularities.

It is therefore ordered that the preliminary writ of prohibition issued herein be made perpetual, and that the respondents be forever restrained from enforcing the injunction granted by the Respondent Judge in the matter of the execution of the judgment of this court rendered on the 26th of October, 1885, in the case entitled "The Succession of B. L. Saunders on opposition of the Saunders heirs and of the Gee heirs." It is further ordered that the rule taken herein for contempt against the respondents be discharged; and that respondents be condemned to pay all costs of these proceedings.

No. 9686.

JOHN CHAFFE & SONS VS. MCGEHEE & CO.

A conventional mortgage granted by a debtor upon property which, at its date, constituted the duly registered homestead of the debtor, though inoperative while the conditions of the homestead exist, may be enforced against the property when the homestead therein has ceased by reason of the removal of the debtor and his family to another State.

A PPEAL from the Eighteenth District Court, Parish of Tangipahoa.
Thompson, J.

Thos. C. W. Ellis and S. D. Ellis for Plaintiffs and Appellants.
Reid & Reid for Defendants and Appellees.

The opinion of the Court was delivered by
 FENNER, J. The sole question presented by this appeal is whether
 a mortgage granted by a debtor upon his duly registered homestead

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under the Constitution of 1879, can be enforced against said property after the homestead therein has ceased to exist and the debtor, with his family, has removed from the State.

The contention of the debtor is that under Art. 222 of the Constitution, the mortgage was an absolute nullity *ab initio*, insusceptible of ratification and incapable of acquiring effect by any subsequent event.

We cannot concur in this view, which was entertained by the judge *a quo*.

Article 222 of the Constitution simply says: "The homestead shall not be susceptible of mortgage."

If we were asked to enforce a mortgage upon a homestead, the article would be a conclusive bar. But a homestead is something more than a piece of property—it is property of a certain kind and value, owned and occupied by the debtor and set apart and registered according to law. The ownership and the other prescribed conditions must co-exist in order to constitute the homestead; and we have held that whenever any of the prescribed conditions cease to exist, the property loses the quality and privileges of a homestead. *Gallagher vs. Payne*, 34 Ann. 1057; *Bossière vs. Roins*, 37 Ann. 263.

Hence, the homestead only exists *sub modo*; and while the Constitution prohibits the mortgage of the homestead, it does not prohibit the mortgage of the property subject thereto, which will bind it as against everything but homestead rights, and which, though inoperative so long as the property is subject to the conditions constituting the homestead, will become operative the moment those conditions cease to exist. Thus a judicial mortgage, while inoperative against the pre-existing homestead, would unquestionably attach to the property when it ceased to be a homestead, and we cannot see why the same effect should not be given to a conventional mortgage.

A different construction would extend the operation of the law entirely beyond the necessities of the case, and beyond the reason and policy of the legislation.

A citizen of Texas, residing with his family in that State, certainly assumes an anomalous position when, in any proceeding and against any right, he sets up a homestead claim in property in this State.

We may observe that the case before us is exclusively between the debtor and his mortgage creditor, and presents no claims or rights of intervening creditors.

 Barnes vs. Beirne.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be amended by striking therefrom all that portion thereof which follows the words "with recognition of plaintiffs' rights as special mortgagees upon all the lands described in the act of mortgage filed with and made part of plaintiffs' petition;" and that, as thus amended, the same be affirmed, appellee, Spiller, to pay costs of this appeal.

 9505.

JAMES BARNES VS. OLIVER BEIRNE.

The owner of a building is responsible for personal injury sustained by the fall of part of it, when the accident is the result of his neglect to repair, or of a vice in the original construction.

Ignorance of the condition of the building, or the circumstance that it could not be easily detected, is not exculpatory. Notice is not required as a condition precedent for the recovery of damages.

A PPEAL from the Civil District Court, for the Parish of Orleans, *Rightor, J.*

Breaux & Hall, for Plaintiff and Appellee:

1. An owner is responsible for damages caused by the ruin of his building, when it is due to vice of construction, or want of necessary repairs. C. C. 2322; C. N. 1336; 37 Ann. 39.
2. Absence of owner and his agent from the city, so that notice cannot be given them of peril, is no excuse from liability for damage.
3. No notice necessary under the Code or required, to render owner liable. Toullier, vol. 16, p. 263, 6 Ed., Paris.
4. Amount of damages in such cases left to discretion of Court or Judge. Pike & Co. vs. Doyle, 19 Ann. 363; Rayne vs. Taylor, 18 Ann. 26.

Henry Chiapella, for Defendant and Appellant:

- "The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it or when it is the result of a vice in its original construction." R. C. C. 2322.
- "The owner of a slave, hired to another and drowned while employed, with the consent of his master, in a work not proved to have been of a dangerous character, cannot recover his value." Hudson vs. Grout, 5 Rob. 499.
- "Where an action is brought to recover damages on account of injury done by the accidental falling of a structure, proof that there was no fault or negligence imputable to the defendant, and that there was no original imperfection in the structure, is sufficient to avoid liability on his part." Burton vs. Davis, 15 Ann. 448.
- "La ruine du bâtiment doit résulter, soit du défaut d'entretien, soit du vice de construction. Si elle était arrivée par cas fortuit et force majeure, si le propriétaire n'avait point négligé de l'entretenir et qu'il l'eût construite suivant les règles de l'art, il cesserait d'être responsable. Aussi, le demandeur doit-il commencer par établir que la ruine du bâtiment est arrivée par une suite du défaut d'entretien ou par le vice de sa construction. C'est là une condition essentielle de laquelle dépend le fondement de son action.

Barnes vs. Beirne.

sauf au défendeur à administrer toutes preuves du contraire." 5 Larombière (obligations), p. 795; Ibid, pp. 800, 801.

"Si une maison qui menaçait ruine, et pour laquelle le voisin avait dénoncé, est ensuite abattue par un cas fortuit, comme par un débordement, ou par la violence des vents, et que sa chute abatte la maison voisine, le propriétaire de la maison dont la chute a abattu l'autre, ne sera pas tenu de ce cas fortuit, si ce n'est que le débordement ou l'orage ne l'ait abattue, qu'à cause du mauvais état où elle se trouvait." 1 Domat (Lois Civiles), Livre II, Section III, No. 6, p. 478; Ibid, Section IV, No. 7, p. 491.

The opinion of the Court was delivered by

BERMUDEZ, J. This is an action in damages against the owner of a building.

The charge is, that the front cornice, which had been for some time in a dangerous condition, fell, struck and injured plaintiff, who was then a wayfarer to his home, and that the injury was occasioned by the neglect of the owner to repair.

The defendant pleaded the general issue and appeals from a judgment against him for \$580, which plaintiff, by joinder, asks to be increased to \$5,000.

It appears that early in the morning of October 21, 1884, the cornice of certain buildings, owned by defendant, on one of the principal thoroughfares of the city, suddenly tumbled down on plaintiff, who happened to be just at that moment passing on the sidewalk, seriously wounding him. The wound on the head was severe and the bruises on the body were numerous and painful. They are shown to have been dangerous, susceptible of occasioning lock-jaw, and such as required the attendance of a competent physician for some twelve days. The plaintiff remained confined to his bed about a week and to his room a fortnight. It was not, however, until two months afterwards, that his wounds healed and that he ceased to resent materially the injury and pain to his body, although, as soon as he was able to gather some strength, he went back to his occupation, (that of a private watchman), he being poor and his family needing his assistance.

The City Surveyor, a witness for defendant, testifies that the rafters were not tied together with collar-braces; that the heel-plates receiving the ends of the rafters had rotted away; that the nails fastening the heels of the plates to the ceiling joist had rusted; that had there been collar-braces and the nails not rusted, the accident would not have happened; that the defect is in the construction and could have been detected; that he could have discovered it and suggested a remedy which could have prevented the occurrence.

His testimony is corroborated by other witnesses. So that the evidence leaves no doubt that the building was, as regards the cornice, in a dangerous condition, due both to a vice in the construction and to a want of necessary repair, and that this state of things could have been detected and remedied.

Article 670, R. C. C., provides that every person is bound to keep his buildings in repair, so that neither their fall, nor that of any part of the materials composing them, may injure the neighbors or passengers, (passans), under penalty of all losses and damages which may result from the neglect of the owner in that respect.

Article 2322, R. C. C., is to the further effect: That the owner is responsible for the damage occasioned by its ruin, when this is caused by neglect to repair, or is the result of a vice in its original construction.

The owner however is entitled to exoneration from liability when the accident is the result of a fortuitous event or *vis major*. Larombière, 5, 795; Domat, 1, p. 481, N. 7; also 15 Ann. 448, Burton's case.

The defendant contends that he cannot be held liable, because the defect was not apparent from the outside, because he was ignorant of it, and because he had not been notified of the condition of the cornice.

The law makes it his duty to keep his building in proper order, so that no one may be injured thereby. The defect could have been detected on inspection, if not outside, at least inside. He was bound to know whether repairs were or not necessary. Actual knowledge and willful neglect would have aggravated his responsibility. R. C. C. 670.

The law does not direct that any notice be given, or that any actual knowledge be shown, as a condition precedent for recovery. R. C. C. 2322; Toul. 6 l. 3, til. 4; Marcadé, vol. 5, 272; Laurent, etc.

While commenting on article 1386 of the French Code, which is reproduced in ours, Marcadé says:

"Le propriétaire est de plein droit, présumé en faute. Il a dû savoir que sa maison n'était pas en bon état; il a dû connaître les vices dont elle était affectée et les réparations dont elle avait besoin et il ne serait pas admis à prouver qu'il avait été trompé et qu'il les ignorait. Vol. 5, p. 272, II; also Toul., vol. 317; Laurent, vol. 20, p. 695, n. 642.

It is established, however, in this instance, that several attempts were made by the main tenant to notify the owner or his agent, but that neither could be found.

The circumstance that the property was acquired by inheritance by the defendant is not at all exculpatory and cannot be invoked in miti-

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gation of damages. It may serve perhaps to alleviate the acuteness of the pain which the infliction of damages may occasion and which would otherwise be more keenly resented.

The defendant has failed to show fortuitous event, or *vis major*, which was not even pleaded.

The authority of Sourdat (Responsabilité) vol. 2, p. 15, No. 256, and the ancient precedent (1810) of the Court of Liege, have been well considered and given all the weight to which they are entitled.

A perusal of a more recent opinion (1857) of a previous Supreme Court, in which heavy damages were allowed for injury sustained by the falling of a wall, will prove of interest to the parties in this case. *Howe vs. City of New Orleans, Mrs. Graihle et al.*, 12 Ann. 481. It is no doubt because the application of article 2322 of the Civil Code does not appear in the syllabus, that the case is not alluded to in the Digests.

The defendant can derive no benefit from the ruling on the Burton case, 15 Ann. 448, in which it was held that proof that there was no fault or negligence imputable to the defendant and that there was no original imperfection in the structure, is sufficient to avoid liability.

We adhere to that doctrine but fail to perceive how it can be applied to a case where neglect and vice of construction are shown.

The defendant complains that the allowance of the district judge is excessive and should be reduced to \$50, actual damages, sustained in physician's and druggist's bills paid, wages lost, etc., etc.

It is no great venture to answer that had he been injured and had he suffered as much and as long as plaintiff has, the indemnity allowed would surely not have sufficed to placate him. We will not however, increase the judgment as asked.

The lower court properly applied the law to the facts found. 18 Ann. 26; 19 Ann. 363.

Judgment affirmed.

 No. 9539.

CAROLINE LABATT VS. CITY OF NEW ORLEANS.

Certificates of indebtedness issued by the Board of Directors of the Public Schools of the city of New Orleans during the years 1874, 1875 and 1876, are not evidences of debt against the city. Holders of such certificates have no other claim against the city of New Orleans, beyond the right to participate in the unpaid portions of the taxes levied by the city, in obedience to law, for the respective years in which the certificates were issued; but they have no right to recover judgment against the city thereon with a view to have the same converted into bonds under the provisions of Act 67 of 1884, which is.

38	283
44	187
38	283
48	1078
38	283
51	1803
38	283
121	770

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an act amendatory of Act 133 of 1880, intended to authorize the liquidation of the indebtedness of the city of New Orleans.

That portion of Act No. 74 of 1880, which places the unpaid salaries of school teachers, subsequent to 1872 and prior to January 1, 1880, on the same footing with the valid indebtedness of the city of New Orleans, is unconstitutional and therefore null.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

D. C. & L. L. Labatt for Plaintiff and Appellant :

1. The duty of establishing and maintaining public schools throughout the State was imposed by the Constitution of 1868 on the General Assembly, and it was authorized to provide legislation for their support throughout the State by taxation or otherwise. This has been done by legislation in 1870, 1877, and other acts, and the corporation of New Orleans directed to provide public schools and to levy taxation sufficient for their support and maintenance, and they have been levied. These city taxes, after eight or ten years, prove utterly insufficient to pay the teachers, meet expenses incurred, in 1874 and subsequent years, as part of the city's obligation, and in 1879 there resulted a "floating indebtedness or claim," which the convention framing the Constitution of 1879 required the city to liquidate, and the Legislature of 1880 recognized their validity, and that of 1884 has authorized the city to issue bonds, at fifty years, to retire and cancel these "debts" when merged into judgments.
1. Now, the city contends that it is not a "debt," or "claim," or "floating indebtedness," meant by the act, and resists plaintiff's right to any judgment whatever. Plaintiff makes the following points:
 - a. "The right to incur an obligation implies the right to raise money by taxation, or to issue bonds for payment." 111 Mass. 460, *Lowell vs. Boston*, and 98 U. S. 395: "*Ranger Case*," 25 Wis. 122; *Hughes*, 282, *Parsons vs. Charleston*.
 - b. "It is always to be assumed, in the absence of clear restrictive provisions, that when the Legislature grants to a city the power to create a debt, it intends that the city shall pay it, and that the payment shall not be left to its caprice or pleasure." C. J. Waite in *Parsons' Case*, *Hughes*, 282.
 - c. "When a power to contract a debt is conferred, it must be held that a corresponding power of providing for its payment is also conferred." 98 U. S. 395.
 - d. "When a legislative act provides that certain uncollected revenues of a corporation, which have been declared to be 'vested rights' of certain creditors or claimants, may be diverted and lodged with the syndicate of its public debt by substituting bonds of the corporation therefor, and the claimants are willing to accept, the act is just, valid and constitutional, and furnishes 'adequate compensation,' relieving it from repugnancy to any constitutional objection, Federal or State." 33 Ann. Taxpayers vs. City.

Walter H. Rogers, City Attorney, *Wynne Rogers*, Assistant City Attorney, and *Sam'l P. Blanc*, for Defendant and Appellee:

School certificates of indebtedness issued by the Board of Directors of the Public Schools of New Orleans for salaries and expenses due for the years 1874, 1875 and 1876, are not debts due by the city of New Orleans, and can form no part of her floating indebtedness.

It is beyond the power of the Legislature to impose as debts upon the city of New Orleans claims which she does not legally owe.

Such legislation would be unconstitutional, as violative of the provisions of Section 45 of the Constitution of 1879.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff declares on certificates issued by the Board of Directors of the Public Schools of the city of New Orleans, during the

years 1874, 1875 and 1876, amounting together to \$4,475.85, for which she seeks to recover judgment; the ulterior object being to obtain therefor bonds of said city to be issued under the provisions of Act No. 67 of the Legislature of 1884, which is amendatory of Act No. 133 of 1880, passed for the purpose of liquidating the indebtedness of the city of New Orleans.

The defense is a general denial, and the judgment is in favor of the defendant.

Two of the certificates in suit are copied in the transcript as samples; both were issued by the board of which H. C. Dibble was president, the largest in amount being for \$738.01, payable to Henry Perry or bearer, "for supplies on account of expenses of November, 1874;" and is dated December 3, 1874.

The main contention hinges upon the question as to whether such certificates evidence, or not, an indebtedness of the city of New Orleans.

Plaintiff's argument is that these certificates constitute a part of the city's indebtedness, but that if, when issued, they were not debts of the city, they have acquired that character under a correct construction of Article 254 of the Constitution of 1879, and of Section 3 of Act No. 74 of 1880, which purports to enforce the provisions of Article 254 of the Constitution.

The first line of her attack is to demonstrate that these certificates are not a debt of the State, or of the school board, or of any other person or juridical being, *ergo* they must be a debt of the city of New Orleans.

The argument has at least the merit of novelty; it may be ingenious, but candor compels us to say that we have not been impressed with the force of such a demonstration.

It might be shown on the other hand that they are not due by any one, and that no recovery could be had thereon under any circumstances.

Hence, we shall follow another line of inquiry, and we shall at first consider the proposition that, when issued, these certificates did evidence an indebtedness of the city of New Orleans.

The system of public schools which then prevailed in the State was the result of the legislation of 1870 (Act No. 6, extra session of that year) and of 1873 (Act No. 36).

The most striking feature of that legislation, a feature which distinctly characterized the legislation of that disastrous period of Louisiana's history, was to strip the city of New Orleans and the parishes of the State of all power of effective management and control of the

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public schools and of other local affairs within their respective corporate limits, and to concentrate all powers connected therewith in the State authorities.

Under that legislation, the only power vested in the city of New Orleans touching the management of the public schools was the authority to select some of the component parts of the board of directors.

Plaintiff's contention that the schools of those days were municipal institutions has consequently no foundation in law, and is therefore erroneous.

Through compulsory taxation, the city of New Orleans contributed the principal means for the support of public schools established within her limits, but her council had no control over the funds thus collected.

The law required the estimate of probable expenses to be made annually by the board of school directors, and to be presented to the city council, which was required to levy the tax necessary to cover the estimate, which tax could not be less than one-fourth of one per cent on the taxable valuation of all property in the city. Secs. 2, 4, of Act 36 of 1873.

No thought was further remote from the minds of the promoters of that system than the idea of establishing public, city or municipal schools in the city of New Orleans. Section 37 of the Act of 1870 contains the following significant language: "The city of New Orleans, and other incorporated cities or towns, as well as all parochial authorities, are prohibited from organizing or maintaining separate public schools from those organized under this law, and controlled by the boards created hereby."

An exhaustive examination and a close analysis of that legislation has forced a clear conclusion on our minds that the whole system of public schools created thereunder was decidedly a State institution, under the exclusive control and management of superintendents and boards of directors who derived all their powers directly from the State, and who were responsible for their management to the State only.

Hence, they were absolutely powerless to fasten any indebtedness on the city of New Orleans or on any of the parishes of the State. In Act No. 36 of 1873, which provides additional regulations for the Board of school directors of the city of New Orleans, Sec. 10 contains the following language: "That the board of directors of the public schools shall not be empowered to make contracts or debts for the year 1873, or any subsequent year, greater than the amount of the revenue provided for according to this act, or other school laws existing, it being

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the intent hereof that parties contracting with said board shall take heed that due revenue shall have been provided to satisfy the claims, otherwise they shall lose and forfeit the same."

This section is very strongly suggestive of the correctness of our remark that perhaps these certificates might not be enforced against any one.

The record shows that in accordance with the annual estimates made by the board of school directors, the city of New Orleans levied for the years included in plaintiff's certificates, a tax aggregating \$928,816, and collected a total of \$842,411, leaving a delinquent list amounting to only \$80,405.

In this connection we note the assertion, made by the city's counsel, that the amount of unpaid outstanding school certificates for said years aggregate the sum of \$400,000. This is not denied by plaintiff, but she exclaims: "What a confession of official negligence is here discovered!" We think it amounts to something more grievous. But the record and Sec. 10 of Act 36 of 1873, point to a different set of officials than those who are in plaintiff's mind. To qualify their conduct, official negligence is a very mild term.

Hence, it is obvious that under the provisions of Act 123 of 1874, as well as under the effect of the section of the act of 1873, just transcribed, the holders of school certificates can look only to the uncollected appropriations of the respective years for which the same have been issued. This shows the fullest extent of plaintiff's claim against the city of New Orleans, which is simply a collecting agent, owing no other account to the State or to any other authority, beyond an effort to collect and a payment of the amounts collected.

But plaintiff next argues that under subsequent legislation these certificates have been declared legal claims against, or valid indebtedness of, the city of New Orleans. Article 254 of the Constitution, relied on by her, reads: "The General Assembly * * * shall enact such legislation as may be proper to liquidate the indebtedness of the city of New Orleans, and apply its assets to the satisfaction thereof."

It can hardly be argued that by this language the convention can be construed to have meant that the Legislature could provide for the liquidation of claims which were not part of the *indebtedness* of the city of New Orleans, or that such language could possibly be strained to mean that the Legislature was therefore vested with the power to coerce the city of New Orleans into the settlement of school certificates which had been issued without her authority or consent, by an irresponsible board or corporation, for or without valuable consideration,

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and perhaps in direct violation of the very law whence such board could derive its only legitimate authority. It is admitted that in drawing against a fund of a possible aggregate of \$922,816, based on its own annual estimate and demand, this board has issued certificates amounting to the enormous sum of \$1,242,816.

The language of the Constitution can authorize no such deductions; and its proper construction would at once strike with nullity any attempt of the Legislature to fasten on the city of New Orleans the obligation to settle or liquidate any claims which are not legally and unequivocally included in the term *indebtedness* of the city of New Orleans. The very letter and the undoubted spirit of the Constitution are most obviously adverse to any such proposed legislation; they go to the extent of forbidding such action even with the consent of the corporation.

Article 45 provides in substance as follows: "The General Assembly shall have no power * * * to authorize the payment of any claim against the State, or any parish or municipality of the State, under any agreement or contract made without express authority of law; and all such unauthorized agreements or contracts shall be null and void."

The framers of the Constitution were familiar with the history of the profligate legislation which had marked the era of the "rule of the stranger," which is referred to by plaintiff's learned counsel, and they intended to close all avenues to a successful realization of the many schemes of plunder which had been concocted during those dark days of misrule.

Hence, under a proper construction of constitutional provisions, plaintiff can draw no strength or derive no comfort from Sec. 3 of Act No. 74 of 1880, which reads: "That the said bonds may be issued to take up the unbonded indebtedness of the said city of New Orleans, and the unpaid salaries of school teachers and expenses of maintaining the public schools created since 1872 and prior to January 1, 1880." * *

The proposition that such an enactment touching school certificates in a law avowedly intended to carry Art. 254 of the Constitution into effect, is a contradiction in terms and is shockingly unconstitutional, is indeed too plain for argument.

But in addition to this consideration, that legislative provision, in so far as it refers to school certificates, can be stricken with nullity under another point of view, which is considered in our decision of the case of the Taxpayers' Association, 33 Ann. 568.

An inspection of the list of plaintiff's certificates shows that a number of them, amounting to \$932 only, were issued previous to the con-

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stitutional amendment of November 2, 1874, under which the city of New Orleans was forbidden to "increase her debt in any manner or form, or under any pretext."

Now, in reviewing this very legislation in the Taxpayers' case, we held that any legislative enactment which tended to legalize any debt contracted by the city of New Orleans after the prohibited date, November 2, 1874, was unconstitutional and therefore null. Strange to say, plaintiff seeks relief under the very terms of that decision. It must have been sadly misconstrued in her mind.

For her certificates which were issued after that date were either debts of the city or they were not. If they were debts, they are null because issued in violation of the Constitution, and the funding of the same is forbidden under the terms of the decision; if they are not debts of the city, they find no place under the provisions of a constitutional mandate which is therein held to contemplate exclusively the valid indebtedness of said city.

We therefore conclude that plaintiff has utterly failed to make out a case of indebtedness against the city of New Orleans, and that she is not entitled to the relief which she asks of the courts.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

The mainstay of this application is the following expressions in our opinion: "Hence it is obvious that, under the provisions of Act No. 123 of 1874, as well as under the effect of the section of the Act of 1873, just transcribed, the holders of school certificates can look only to the uncollected appropriations of the respective years for which the same have been issued. This shows the fullest extent of plaintiff's claim against the city of New Orleans," the quotation in the brief ends here, but the sentence in the opinion continues thus, "which is simply a collecting agent, owing no other account to the State or to any other authority, beyond an effort to collect, and a payment of the amounts collected." The last words of the paragraph were doubtless inadvertently omitted in the quotation; it appears that they materially modify and restrict the meaning of the opinion as construed by plaintiff's counsel under the incomplete quotation. The inference drawn from our language is that we recognized thereby some right of action by holders of school certificates directly against the city of New Orleans, and it is suggested that such a judicial recognition should have been "*preserved by a consistent decree.*"

Greening vs. Elliott et als.

We can but regret the faint hope which our inartistic language has inspired to plaintiff.

It is the more unfortunate from the fact that we had labored with great pains and caution to impress in our opinion the undisputed theory that there was no earthly privity between the city of New Orleans and any holders of school certificates, who were exclusively creditors of the school board, and not of the city.

We have been unfortunate in the use of language if our utterance can be fairly construed to mean that any certificate holder could personally enforce any claim against the city for uncollected appropriations of the respective years for which his certificates had been issued; we had thought that the formal declaration that the city was but a "collecting agent owing no account to the *State or any other* authority beyond an effort to collect," etc., would leave no doubt of our real meaning, which was that the right to urge any claim for collected or uncollected balances on any one of, or the three years' appropriations, rested in the State or the school board only, and that the funds thus received would be distributed *pro rata* among all the holders of valid school certificates.

We can but repeat our unshaken conclusion that the school certificates for the years 1874, 1875 and 1876, which are yet outstanding and unpaid, never have been a part of the valid floating indebtedness of the city of New Orleans, and that no constitutional legislative enactment thus far adopted has had the legal effect to make them debts of, said city. Hence the holders of such certificates can under no possible contingency obtain, through the courts of this State, valid judgments therefor against the city of New Orleans.

A second and very thorough study of the case has satisfied us of the entire correctness of our views as expressed in our first opinion.

Rehearing refused.

9684.

MRS. S. A. GREENING VS. J. M. T. ELLIOTT, ET ALS.

When a widow residing in one parish entrusts the management of a plantation situated in another parish to her son, who makes the purchases for the plantation and ships the crops thereof in his own name, she will not be thereby estopped from claiming the working animals or the crops on the place when seized for the debt of the son and manager, especially when such debt has not been incurred in the business or administration of the plantation.

A PPEAL from the Tenth District Court, Parish of Red River.
Hall, J.

Logan & Head, for Plaintiff and Appellee.

L. B. Watkins and Pierson & Hull, for Defendants and Appellants.

The opinion of the Court was delivered by

TODD, J. Schmidt & Ziegler, of New Orleans, having a judgment against one J. R. Greening, issued execution thereon and caused to be seized a lot of mules and a number of bales of cotton on a plantation situated in the parish of Red River, as the property of the judgment debtor.

Mrs. Sarah A. Greening, the mother of J. R. Greening, enjoined the execution and claimed the ownership of the property thus seized and \$1,000 damages for the illegal seizure.

The injunction was perpetuated, the plaintiff's title to the property recognized and her demand for damages rejected.

Schmidt & Ziegler have appealed, and no motion is made for an amendment of the judgment.

The plaintiff's residence is in the town of Mansfield, DeSoto parish, where her husband had resided before his death, and where he died. The plantation referred to was an acquet of the community between the spouses, and was purchased by the plaintiff at succession sale.

After her husband's death, J. R. Greening took charge of the plantation, working stock, etc., and was manager and agent for his mother. He attended to the cultivation of the plantation, made the purchases therefor, gathered and shipped the crops and applied the proceeds thereof to the support of his mother and family in Mansfield. The mules seized were some of those purchased by the agent and manager for his mother, and the place cultivated on her account, and the crops belonged to her. These facts are established by the testimony of both mother and son, and the plaintiff's title to the plantation and the purchase of the mules thereon at the time of the sale of the place was a matter of record.

Her claim to the movables embraced in this suit is resisted on the sole ground that the plaintiff, by permitting her son to manage the plantation, to make the purchases and ship and sell the crops in his own name was estopped from disputing his title to the movables on the plantation seized in this case.

We see no force in this proposition, conceding that it was fully sustained by the evidence.

Tulane Education Fund vs. Board of Assessors et als.

There was a peculiar fitness in plaintiff, an aged woman and in precarious state of health, consigning her plantation after the death of her husband to the management of her oldest son. The plantation and the movables, the stock or working animals were purchased by her, as stated. Her title thereto has never been diverted by any way known to the law, and Schmidt & Ziegler have no mortgage or privilege thereon. Though this is so, she, it is contended, cannot set up a claim to the property because it has been seized for her agent's debt, a debt, the consideration of which has not been shown to be in any manner connected with the cultivation or administration of the plantation. Whether the agent and manager conducted the business in his own name or in that of his principal, under the circumstances of the case, it could not affect the title of the plaintiff to the property or her right to claim it against her agent, his creditors or anyone else.

Judgment affirmed.

9716.

ADMINISTRATORS OF THE TULANE EDUCATION FUND VS. THE BOARD
OF ASSESSORS ET ALS.

The University of Louisiana is a public institution that the Constitution has recognized, and commanded the Legislature to maintain and support it.

By the Act of July 5, 1884, a contract was made by and between the State and the Administrators of the Tulane Education Fund whereby the State delivered to the Administrators the rights, privileges, franchises, immunities and property of the University, and the Administrators engaged to dedicate all their revenues to its maintenance and development. This is a consecration of the income of the Administrators to public use, and the property from which that income is derived is therefore exempt from taxation.

The character or quality of taxability is not ineffaceably stamped on property and it may be removed by the act of its owner. The Legislature cannot exempt from taxation property that is constitutionally liable to it, but an owner of property may translate it to the domain of constitutional exemption by dedicating it to a public use.

Primarily the Legislature determines what is a public use, and when it has declared what may be so regarded, courts will not interfere except in clear cases of usurpation or abuse of authority. What is for the public good and what are public purposes are for the Legislature to say, and it has a large discretion in determining these questions, which will not be controlled by the courts unless under the exceptions above noted and such like.

Although the title to property be not in the public, if the revenues of it are dedicated wholly to public use and purposes, it is public property within the intentment of the Constitution, and possesses all the immunities and is entitled to the exemptions from taxation of public property.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

E. D. White, James McConnell and E. H. Farrar, for Plaintiffs and Appellants.

M. J. Cunningham, Attorney General; *W. H. Rogers*, City Attorney, and *Blanc & Butler*, for Defendants and Appellees.

The opinion of the Court was delivered by

MANNING, J. The Board of Assessors of New Orleans placed upon the tax roll for 1885 the property given by Paul Tulane to the plaintiffs to promote the education of the white youth of that city. The object of the present suit is to annul that assessment on the ground that the property is exempt from taxation.

The same property was assessed in 1883 and the plaintiffs then claimed the exemption of it from taxation and we held the claim not good. *State ex rel. Board of Admrs. Tulane Ed. Fund v. Bd. of Assessors*, 35 Ann. 668.

Since that decision was rendered the General Assembly have passed an elaborate Act, the evident purpose of which is to effect an exemption of the plaintiffs' property from taxation, and our construction of that Act will determine the question whether the machinery adopted has accomplished the intended purpose.

It is scarcely necessary to say that the General Assembly cannot exempt property from taxation by its own will. Unless the expression of that will is in accord with the Constitution, it can accomplish nothing.

There has been for many years an educational institution in New Orleans called "The University of Louisiana." It was founded by the State and has been fostered by it. For some time only two colleges were in operation in it, those of law and medicine. Later a college for the humanities has been added under the humble name of an academical department. Successive Constitutions of the State have repeated the injunction to the Legislature to maintain it. The last Constitution has emphasized this command and made it imperative—the General Assembly shall from time to time make such provision for the proper government, maintenance and support of the University of Louisiana as the public necessities and well-being of the people may require. Const. 1879, Art. 230. The pecuniary aid was limited to ten thousand dollars a year, and every Legislature since has appropriated the full sum, and we have held that these appropriations have the character and rank of constitutional appropriations. *State ex rel. Ad. Un. v. Burke*, 35 Ann. 457.

Tulane Education Fund vs. Board of Assessors et als.

The Act of the General Assembly of 1884 begins its title with the expression that the fostering, maintaining and developing the University of Louisiana is one of its objects, and its preamble recites that the Administrators of the Tulane Fund are willing and desirous to take charge of that institution and to devote all the revenues they now have or may ever have to its expansion and development. It then exacts that the Tulane Administrators shall hereafter have full control and the exclusive government of the University of Louisiana, and shall have all the powers, privileges, franchises and immunities that are now vested in the Trustees of the University, and also all of its property ; and in order to enable the State to realize the full benefit of the intention of the Tulane Administrators to devote all their revenues to the public purpose of maintaining the University, the Act declares that a contract is thereby made by and under which the Tulane Administrators are irrevocably vested with all the franchises, privileges and immunities theretofore granted them, and in consideration therefor they bind themselves also irrevocably to devote all their revenues to the public purpose already stated. And then in recognition of the beneficence of Mr. Tulane and of the fact that the Administrators of the fund created by that beneficence were hereafter to devote it exclusively to fostering and developing this institution of the State, the name of the benefactor was directed to be hereafter prefixed to its ancient name so that the future designation of it shall be the Tulane University of Louisiana. Acts 1884, pp. 48 *et seq.*

Our learned brother of the lower court construed this Act as being a charter of a new University to which was transferred all the property and privileges of the University of Louisiana. If that be so, the University of Louisiana is abolished, for if all its privileges are transferred to another institution and all the property it had to make those privileges effective and useful to the public is likewise transferred, there will be nothing left but the name. We cannot attribute to the Legislature the intention to denude of its powers and privileges an institution which the Constitution has commanded them to maintain, and thus to make of it a simulacrum without vitality or power. Nor can we attribute to the Legislature a purpose to evade the Constitutional recognition of the existence of the University. Obviously the Legislature cannot abolish the University. It has its root in the fundamental law and that law has ordered the Legislature to foster and develop it. But if without assuming to destroy, the Legislature desiccates it by removing the fecundating sources of its strength and growth, it does practically destroy it.

Tulane Education Fund vs. Board of Assessors et als.

No doubt the Legislature had in mind the creation of a new University as a consequence or result of the Constitutional amendment that it has directed to be submitted to a popular vote, for among the objects of this act of 1884 expressed in its title is:

"To give said Board of Administrators of the Tulane Education Fund, upon the adoption of said Constitutional amendment, *not only the full powers of administration over the University of Louisiana*, conferred by this Act, but also the power to *create*, develop and maintain a great University in the city of New Orleans, which University *so to be created* shall perpetually be under their full and complete control."

But the Legislature so far from attempting to abolish the University, by its own Act expressly includes its maintenance in the objects of its legislation, and remitted to a Constitutional amendment the derivation of authority to replace the former University by a new creation.

The legislative purpose to preserve the University of Louisiana is unequivocally and constantly manifested in every part of the Act of 1884. The title mentions it, the preamble gives prominence to it, and the enacting clauses confirm it. The University is delivered to the Tulane Administrators with all its franchises immunities and property to be governed and developed by them. Its existence is continued, and if it is not perpetuated, the Constitutional amendment alone will confer the power to replace it by another.

But the real question lies behind this, and it is whether the dedication by the Tulane Administrators of all their revenues to the support and maintenance of the University of Louisiana is such dedication to public use as will exempt their property from taxation *proprio rigore*.

It is thus apparent that the question presented in this case is wholly different from that considered and decided in the former one—the question then being whether the property of the Board was taxable, its income being devoted to education, and we held that it was because it was private or corporate income.

The first exemption from taxation by the Constitution is "all public property." Art. 207. The University of Louisiana is not only a public institution but the Constitution has taken it under its protecting care. The entire revenues of the Tulane Administrators are dedicated to its support. The State has contracted with them to deliver this public institution into their hands on the condition that their revenues shall be wholly applied to its maintenance and development, and they have accepted the contract and thereby made the University the usufructuary of all their property. Whatever taxes are payable upon this property must necessarily be paid out of these revenues that have thus

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been dedicated to a public use, that is to say, must be paid by the University. Whatever diminution of these revenues is made by the payment of taxes is a diminution *pro tanto* of revenues that have been consecrated to public use, and it is admitted that the taxes for 1885 and 1886 exceed the sum that the State has annually appropriated to the University. So that if taxes are collected from the Tulane Fund and the State continues its appropriation, she will receive money only to pay it back. But the plaintiffs have refused to receive this annual donation from the State since the passage of the Act of 1884, and they have expressly waived all right to it and all right to any future appropriation, and this waiver is stated in the Act to be an additional consideration supporting the contract made therein. Sec. 6.

The plaintiffs have complied with their part of that contract. From August 1, 1884, when they took charge of the University to the close of 1885 they have expended near a hundred thousand dollars (exact figures \$98,259.50) upon it, including the cost of insurance and repairs of the buildings, and these were the property of the University before it was turned over to them. Their revenues have conserved its property, paid its current expenses, and have begun to develop a languishing and resourceless institution into vigorous and healthy life.

The usufructuary is bound to pay all the taxes on the property that is subject to the usufruct, Rev. Civ. Code, Art 578, and as the University of Louisiana is the usufructuary of the Tulane property, it follows necessarily that whatever taxes are paid will be paid by the University. The only reduction or diminution of the revenues of the University possible under the contract of the plaintiffs with the State is the diminution that would be wrought by the sanction of the State's demand for taxes. Now the University cannot be taxed. The Constitution created it. Its property is public property within the intendment of the Constitution.

But the property of the Tulane Board is not the property of the University, and it is the property of the Tulane Board of which taxes are demanded.

The title of property does not invariably fix the person who is obliged for the taxes upon it. As we have just stated, the usufructuary and not the titular owner pays on property held in usufruct. Familiar illustrations of the rule are found in those instances where private property is taken for a public road, or a dedication of a lot of ground is made on condition that a court-house is built on it. The ownership remains where it was but the owner pays no taxes.

And these illustrate another proposition, viz: that private property which is subject to taxation becomes exempt by the change that is made in its use. The character of taxability is not ineffaceably stamped on property, and it may be removed by the act of its owner. Whenever he dedicates it to public use it passes under the dominion of the exemption that is accorded to public property. And that is what we meant when in the earlier part of this opinion we said that the question was whether the consecration of the plaintiffs' revenues to a public use did not *proprio vigore* operate an exemption. The Legislature cannot exempt from taxation property that is constitutionally liable to it, but an owner of property may translate it into the domain of constitutional exemption by dedicating it to a public use.

And primarily the Legislature determines what is a public use, and when it has declared what may be so regarded, courts will not interfere except in clear cases of usurpation or abuse of authority. Inhab. of Wayland v. Co. Com. Middlesex, 4 Gray, 501. The Act of 1884 declares that the plaintiffs' revenues are devoted to public use, and as a legal consequence the property that produces them is exempt from taxation unless we are prepared to say that the legislative discretion has been unlawfully or evasively exercised, for that is said to be the criterion by which a court is to test it.

Says Cooley: "Taxes should only be levied for those purposes which properly constitute a public burden. But what is *for* the public good, and *what are public purposes*, and what does constitute a public burden, *are questions which the Legislature must decide upon its own judgment*, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where its action is clearly evasive, and when under pretense of a lawful authority it has assumed to exercise one that is unlawful." Const. Lim., p. 157.

We do not announce a new legal principle when we hold that property, dedicated to a public use, the revenues of which serve a public purpose, is public property although the title be not in the public. When a judgment creditor of the Charity Hospital levied on its property, we maintained an injunction of its sale saying, "It may not be that the title to the property from which their revenues may in whole or in part be derived is literally in the State; but nevertheless the State owns them, or holds them in trust, though it be for the benefit of those they were established to serve."

"If, then, this Hospital is a State institution, maintained and administered as we have seen by State authority, it is the first duty of

Tulane Education Fund vs. Board of Assessors et als.

the State to secure and preserve to it the essential conditions of its existence for the purpose for which it was established." * * *

"It is utterly inconsistent with this duty and the protection that the State owes to this institution to suffer it from any cause or at the instance of creditors or other persons, to be deprived of its property, without which its work of beneficence and charity cannot be accomplished." *State v. Finlay*, 33 Ann. 114.

If it is the first duty of the State to prevent others despoiling the property of an institution under its protection, much more is it its duty to abstain from despoiling that property itself. The sale of the property of the Charity Hospital at the instance of its creditor would have deprived it of a part of its revenue, and the sanction of the State's demand for taxes of the Tulane property will have a like effect upon the revenues of the University. As we did not allow the one, neither can we the other, and the plaintiffs are entitled therefore to a judgment decreeing the exemption of their property from taxation.

We felicitate ourselves that the way to this consummation has been timely cut by the Legislature so that the stream of Paul Tulane's bounty shall flow on undiminished, while the children of our State through successive generations shall "rise and call him blessed."

It is therefore ordered and decreed that the judgment of the lower court is avoided and reversed, and that the plaintiffs now have judgment against defendants annulling the assessment of the property donated them by Paul Tulane and decreeing the same exempt from taxation. It is further decreed that the plaintiffs recover their costs in both courts.

Fenner, J., recuses himself, being one of the administrators.

CONCURRING OPINION.

POCHÉ, J. Without yielding any of my views as expressed in my dissenting opinion in the case between the same parties in the 35th Annual p. 672, and believing now as I did then that the property donated by Paul Tulane for the purpose of education of the white youth in the city of New Orleans, is exempt from taxation under the provisions of Article 207 of the Constitution, irrespective of the subsequent contract between the Board of Administrators and the State of Louisiana under the provisions of the Act of the General Assembly of 1884, I concur in the opinion and decree in this case.

State vs. Harrison.

No. 9612.

THE STATE OF LOUISIANA VS. CELIA HARRISON.

The State, having once taken proceedings for the forfeiture of a bail bond in a criminal case, and having obtained a judgment against the parties, which is final and has never been, in any mode, annulled, avoided or reversed, cannot recover another and new judgment on the same bond against the same parties.

A PPEAL from the Second District Court, Parish of Webster.
Drew, J.

M. J. Cunningham, Attorney General, and *J. A. W. Lowry*, District Attorney, for the State, Appellee.

Watkins & Watkins, for Surety on Bail Bond, Appellant.

The opinion of the Court was delivered by

FENNER, J. The facts of this peculiar case are as follows :

Celia Harrison, having been arrested on a charge of petty larceny, furnished a bond in the sum of \$75 with T. B. Neal as surety for her appearance before the District Court. Subsequently she was indicted and appeared in the District Court and furnished the usual bail bond in the sum of \$150, with Neal as surety. Of course, this terminated and discharged the former bond.

At the April term of 1883, Celia failing to appear and she and her surety having been duly called, her bond was declared forfeited, and a judgment was regularly entered and signed by the Judge, but, in drawing it up, no doubt by clerical error, the amount inserted was \$75 instead of \$150, which the bond called for.

On this judgment the State issued execution under which property of the surety was seized.

Neal, the surety, then brought an independent injunction suit restraining the execution on several grounds ; amongst others, that the judgment purported to be on a bond for \$75, and that the only bond in that amount which he had given was terminated and discharged. In this suit a simple judgment was rendered perpetuating the injunction, without, however, annulling the judgment or stating the grounds on which the injunction was sustained.

Thereafter at the June term of 1884, the Court entered a new judgment for \$150, without any reference to the former judgment, but based on the failure to appear and other proceedings at the April term of 1883, and purporting to be signed *nunc pro tunc*.

On this judgment *fi. fa.* issued and Neal brought another injunction suit, pleading, amongst other grounds, the former judgment as *res*

38	299
44	897
38	299
49	1570

State vs. Harrison.

adjudicata and the existence of two judgments against him on the same forfeiture, and also the nullity of the last judgment. From a judgment dissolving his injunction, Neal appealed to the Circuit Court of Appeals. That Court looked upon the last judgment as an attempt to correct the clerical error of the former judgment, but held that, even if such correction were permissible, it could not be made except by contradictory proceedings after due notice to the parties. Hence it reversed the judgment appealed from and perpetuated the injunction, reserving, however, to the State the right "to take such proceedings *as may be proper according to law*, either upon the original judgment or upon the bond for \$150."

Acting under this reserve, the State elected to take entirely new proceedings on the bond, and on fixing of the case for trial at the December, 1885, term of the court, called the principal and surety to appear as directed by the law. The surety, Neal, did appear and opposed the forfeiture, pleading, as a bar thereto, the former judgments.

The court, nevertheless, proceeded to pronounce the forfeiture and rendered judgment against the parties for \$150, from which the present appeal is taken.

We think the judgment must be reversed.

The State has had her day in court on the forfeiture of this bond, and has obtained a judgment against the parties, which is final and which has never, in any manner, been annulled, avoided or reversed.

Referring to Neal's injunction suit against the execution of the first judgment, we find that the prayer of his petition to have the nullity of the judgment decreed, was not granted in the judgment thereon which simply perpetuated the injunction against the threatened sale of the property; nor has it been otherwise set aside. While that judgment stands, the State cannot recover a new judgment against the parties on the same bond.

This is not, in the slightest degree, inconsistent with the reserve contained in the decree of the Circuit Court, which merely extended to "such proceedings as may be proper according to law," without determining, in advance, whether they would be legal or not.

So we shall reserve the right of the State to correct the alleged clerical error in the original judgment, if it can be legally done, without deciding whether or not it can be legally done, and also to take such further proceedings in execution thereof as may be legal. We have mentioned the proceedings in the Circuit Court, only as part of the

narrative of the case, without intimating an opinion as to their jurisdiction in such a case.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed at cost of the State in both courts, without prejudice to the right of the State to proceed legally for correction of the original judgment of forfeiture, or otherwise in execution thereof.

No. 9615.

THE STATE OF LOUISIANA VS. JOSEPH SMITH.

38 301
112 335

Oral testimony is admissible to prove the official character of the witness on the stand, when his capacity is not a matter at issue.

A witness cannot be permitted to testify to part of a conversation, his memory being deficient as to the other parts, unless such part of the conversation be essentially to make up a deficiency or connecting link, which otherwise would remain unexplained and a foundation has been previously laid.

A motion for a new trial on the sole ground that the verdict is contrary to law and evidence, is not entitled to notice in this court.

Where it is charged that an offense was committed at a certain point, the word *at* means *in*. In an indictment it is not necessary to specify that the deceased (Martha Calhoun) was a human being.

The words, "Foreman Grand Jury," following the signature of the foreman, mean Foreman of the Grand Jury.

A verdict finding the prisoner guilty is a verdict against the defendant.

A PPEAL from the Fourteenth District Court, Parish of Calcasieu.
Read, J.

M. J. Cunningham, Attorney General, and *Andrew J. Kearney*, District Attorney, for the State, Appellee.

Randall H. Odom, for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant was indicted for murder, found guilty of manslaughter and sentenced to ten years hard labor. He appeals from the verdict and sentence.

The record contains four bills of exceptions.

I.

The first bill is to the admission of oral testimony to prove that the witness on the stand was a *magistrate*, it being claimed, that the best evidence, namely, his commission, should have been produced to prove that fact.

State vs. Smith.

The official capacity of the witness was not at issue. The office of which he was the incumbent was known to the law and the object in view was to show that the witness was at the time in office and to establish his identity. It is difficult to perceive how the production of the commission would have proved those two facts. The evidence was properly received.

II.

The second bill is to the exclusion of the testimony of a witness who had declared that she could make a partial statement only, of a conversation—not recollecting the whole substance of the same.

The rule is that garbled testimony should not go to the jury, unless perhaps where it is essential to fill up a gap, or form a connecting link, which otherwise would not be explained.

There is nothing alleged to justify an exception to the rule.

The object of the question which the court did not permit to be answered, was to establish a conversation with the deceased who had, it is claimed, threatened to poison herself, if the accused whipped her.

The bill does not show that any foundation had been laid for such an inquiry; for instance, that the deceased had come to her death by the taking of poison.

Laying such basis was a condition precedent, in the absence of which the testimony was inadmissible.

III.

The third bill is to the refusal of the Judge to grant a new trial because the verdict was contrary to law and evidence.

It is entitled to no consideration in this court, as it refers to facts which went to the jury and over which this court has no jurisdiction.

IV.

The fourth bill is to the overruling of the motion in arrest.

The *first* ground on which this motion was based is that the indictment charges that the offense was committed *at* instead of *in* the parish of Calcasieu.

The *second* ground is, that the indictment does not show that the deceased was a human being.

The *third* ground is, that the indictment does not show that H. C. Gill was the foreman of the grand jury.

The *fourth* and last is, that the verdict is illegal, as it finds the *prisoner* guilty of manslaughter.

It is sufficient to answer:

1. That the word *at* means *in*, charging that Joseph Smith *at* the parish of Calcasieu * * * unlawfully, feloniously, etc., did kill and

Weil vs. Lapeyre et al.

murder, etc., clearly charges that Joseph Smith, in the parish, did, etc. If the use of the word was objectionable the accused should before trial have opposed it. He has not done so, but has gone to trial without any protest.

2. It was not necessary to have specified in the indictment that the deceased, *Martha Calhoun*, was a human being.

Those are a Christian and a surname which can be legitimately given to a human being only. The offense charged is *murder*. The use of the term implies the killing of a human being:

The accused must have understood it so, for he did not object to the indictment by a motion to quash before trial.

3. The indictment is indorsed: "*A true bill*. Signed, H. C. GILL, Foreman Grand Jury." The preposition "*of*" was not necessary and is implied.

4. A verdict finding the *prisoner* guilty of manslaughter is unobjectionable. The prisoner is the accused and the accused is the defendant. The prisoner is therefore the defendant.

Quibbles of that character cannot avail the defendant.

It is due to his counsel to say that he has not attempted to support them in this court, either by oral or printed argument.

Judgment affirmed.

No. 9653.

MEYER WEIL VS. JOSEPH LAPEYRE ET AL.

38	303
47	265
47	1286
47	1466
38	303
113	917

All things which the owner of a tract of land has placed upon it for its service and improvement, such as working animals, implements of husbandry, machinery and other appurtenances, are immovable by destination, and are covered by a pre-existing mortgage which attaches to the realty.

But the effect of the mortgage on such movables is maintained only as long as the condition of immovable by destination continues, hence the owner may remove them from the mortgaged premises, and if the removal is done in good faith, and if by means of a sale, it is followed by delivery to the purchaser equally in good faith, the effect of the mortgage thereon is destroyed.

Hence, in such a case, the creditor can not pursue such things in the hands of a third party, purchaser and possessor in good faith, so as to subject them to his mortgage.

But his right to prevent, by legal proceedings, the removal of such movables from the mortgaged premises, or to pursue them in the hands of a third possessor in bad faith, is fully recognized.

A PPEAL from the Twenty-third District Court, Parish of Iberville
Talbot, J.

Singleton, Browne & Choate and David N. Barrow, for Plaintiff and Appellee.

Alex. Hebert, for Defendants and Appellants.

Weil vs. Lapeyre et al.

The opinion of the Court was delivered by

POCHÉ, J. Defendant charges error in a judgment decreeing certain articles of machinery and implements of husbandry, which he had purchased from one Thompson, to be liable to a conventional mortgage which plaintiff had on a plantation owned by Thompson, which plantation was sold in executory process under the mortgage held by plaintiff.

The machinery and implements had been placed, by the owner, Thompson, on the mortgaged premises for the service and improvement of the plantation, but having no further use of the same he had sold and delivered them to the defendant Lapeyre, a little over a year before the foreclosure of plaintiff's mortgage.

The question for solution is whether the mortgage which affected the machinery and implements as soon as they became immovable by destination, through the act of the owner of the soil, by attaching them thereto as appurtenances, continued to affect and to attach to those things in the hands of a third party, purchaser. From the evidence it appears to our satisfaction that the sale by Thompson to Lapeyre was made in good faith, and that the latter became the true owner of the things thus sold to him, and for which he gave valuable consideration.

Nothing in the record could even justify a suspicion that in selling these things, Thompson had any intention to defraud his mortgage creditors, but on the contrary, it appears that his object was exclusively to obtain the means necessary to cultivate his plantation, and that he had no other source from which he could secure the funds which he needed for the cultivation of his crop.

But plaintiff contends that, as these movables had become immovable by destination, his mortgage rights thereon had become irrevocable, and that no subsequent act of his debtor could have the legal effect of destroying or impairing the security which he had thus obtained on the same as part of the realty to which his mortgage attached, to the knowledge of the defendant.

Under the system of agriculture which prevails in this State, and which is the foundation of all the prosperity which we can expect for our people, the question is one of vital importance, to the consideration of which we have given much thought and study. Article 468 of the Civil Code provides that, "Things which the owner of a tract of land has placed upon it for its service and improvement, are immovable by destination."

"Thus the following things are immovable by destination when they have been placed by the owner for the service and improvement of a tract of land, to-wit: " * * * "Implements of husbandry." * * * Under Article 3289, "immovables subject to alienation, and their accessories considered likewise as immovables," are susceptible of mortgage.

In accordance with these principles it has been held, and it is now settled, in our jurisprudence, that working animals, implements of husbandry and other appurtenances placed by the owner on his farm or plantation for its service and improvement, become immovables by destination and are as such affected with a pre-existing mortgage which attaches to the realty.

But after the most patient search we find in our reports but one case which deals with the question of the right of the owner of a mortgaged plantation to destroy by his own act, by means of a sale, or of a removal in good faith of such accessories, the character of immovables by destination which he had impressed on such movables, and to restore them to their original character or nature, free of the mortgage to which they had once been subject.

That power was recognized and judicially enforced by this court in the case of the Citizens' Bank vs. Knapp, 22 Ann. 117.

But as the opinion in that case is not reasoned at great length or supported by authority, and in view of the violent attack made on it by plaintiff's learned counsel, we have deemed it our duty to extend our researches and to treat the subject as though it were a new question. Articles 468 and 3289 of our Code are derived from Articles 524 and 2118 of the Code Napoleon, and we have therefore sought for light on this subject from French commentators on the Napoleon Code and from the adjudications of French tribunals. And we have there found a clear solution of the question in the same sense which was followed by our predecessors in the case just referred to.

The theory of French writers, predicated on numerous adjudications of the Court of Cassation is, that the principle under which a movable can become immovable by destination is a pure fiction of the law, and that its effect in reference to mortgages, exists or lasts only as long as the condition under which it is produced continues, that is, as long as the movable remains, under the will of the owner, attached to the realty subject to the mortgage, as an appurtenance or an accessory.

Hence they conclude that a sale in good faith by the owner, followed by actual delivery to the purchaser, of movable effects which he had converted into immovables by destination, does liberate the things

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thus sold from the effect of the mortgage to which they had been subjected only because they were attached to the land burdened with the mortgage.

The doctrine is thus laid down by Paul Pont, the co-laborer of Marcadé, in his Treatise on the Napoleon Code :

“Une autre conséquence du principe, c'est que les objets mobiliers immobilisés ne sont grevés de l'hypothèque assise sur l'immeuble qu'autant que l'immobilisation continue. Les objets mobiliers viennent ils à être détachés de l'immeuble on cessent—ils d'être appliqués à la culture ou à l'exploitation du fonds dont ils formaient les auxiliaires ou les dépendances, ils rentrent dans leurs nature primitive de biens meubles ; en sorte que la cause qui les avait rendus susceptibles d'hypothèque venant à cesser, la charge hypothécaire cesse par cela même de les atteindre. Ainsi, Paul a mis sur sa propriété des bestiaux, des utensiles aratoires, pour son exploitation ; ces objets sont par là devenus immeubles par destination, et comme tels, ils ont été grevés de l'hypothèque dont la propriété était affectée au profit de Pierre. Mais Paul, entièrement libre de ses droits, vend, sans fraude, ces bestiaux et les utensiles, les objets reprennent leur nature primitive, car, n'appartenant plus au propriétaire du fonds, et n'étant plus attachés à ce fonds, ils cessent d'être dans la condition qui les avait immobilisés : le gage de Pierre est diminué d'autant.”

The same view of the subject finds ample support from the pen of several very respectable French commentators, and in a current of uniform adjudications of French courts.

Paul Pont. “Explication du Code Napoleon,” vol. 2, p. 374 *et seq.*; Troplong “Droit Civil Expliqué,” No. 399 ; Court of Cassation, decrees of, 5 August, 1829 ; 3 August, 1831 ; 25 May, 1841 ; Bourges, 31 January, 1843 ; Paris, 5 August, 1852.

In accepting these conclusions which, in our opinion, rest on solid grounds of reason, as well as on authority, we wish it to be well understood that nothing in this opinion can be interpreted to mean that the protection which is herein granted to the defendant, can be extended to any third party purchaser who is not entirely in good faith, and who has not been placed in actual and legal possession of movable effects which, to his knowledge, had been attached as appurtenances to a predial estate burdened with a mortgage, and had thus become immovable by destination.

In this ruling we must not be understood as holding any doctrine which could in the least impair or abridge the legal right of a mortgage creditor to prevent by legal proceedings the removal by his debtor, in

State vs. Tanner et al.

good or in bad faith, from the mortgaged premises, of the movable effects, such as working animals, farming implements or machinery, which had been placed by the owner on the realty, as appurtenances thereof, or to pursue these objects in the hands of third parties, not purchasers of the same in good faith, so as to subject them to the effect of his mortgage.

In this case, as the record shows, we are dealing with a debtor, who has sold in good faith, some machinery and implements which he had attached to his plantation, with which he could subsequently dispense, and which he disposed of with the intention of raising the funds necessary to cultivate his crops, and hence we conclude that his purchaser is entitled to protection.

The judgment appealed from is therefore amended, avoided and reversed, and it is now ordered that plaintiff's demand be rejected and his action dismissed at his costs in both courts.

No. 9639.

THE STATE OF LOUISIANA VS. ALLEN TANNER ET AL.

To determine whether the venue was proved or not would require this court to consider the evidence on this point, and this the court cannot do however the evidence may be presented in the record.

A verdict will not be set aside because the jury was taken into a room to deliberate on their verdict where there were a number of law books on the subject of crimes and criminal proceedings, where there is no evidence that the books were read or examined by the jury.

A PPEAL from the Fourth District Court, Parish of Caldwell, Burgess, J.

M. J. Cunningham, Attorney General, and *George Wear*, District Attorney, for the State, Appellee.

J. E. Barry, for Defendants and Appellants.

The opinion of the Court was delivered by

TODD, J. The defendants were convicted of forgery, and from a sentence of two years' imprisonment at hard labor have appealed.

There are only two grounds urged in support of the appeal.

1. That the venue was not proved.

We have no means of ascertaining whether this is true or not. The record does not show it, and even if it contained evidence on the subject this court could not consider it. The ground, substantially, is that the evidence does not support the verdict. Under the constitu-

38	307
45	983
38	307
49	1010
38	307
107	327
38	307
109	604
109	617
109	618
38	307
112	335
112	337

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tional restrictions and the repeated decisions on the point it is idle to make such objections before this court.

2. The second complaint is that the jury was carried into the sheriff's office to deliberate on their verdict, and that there were several law books in the room on the subject of crimes and offenses that they might have examined or consulted, and that this was such an irregularity as to vitiate the verdict.

There is no merit whatever in this contention. It is not shown or suggested even that there was an examination of any of the books by any of the jury; on the contrary it appears that the jury was ready in five minutes after retiring to return a verdict, and it is not likely that in that brief interval they resorted to books or consulted authorities to assist them in reaching their verdict. This court has already ruled on this point, and adversely to the pretensions of the defendant's counsel. *State vs. Nelson*, 32 Ann.

Judgment affirmed.

No. 9448.

CARONDELET CANAL AND NAVIGATION COMPANY VS. THE CITY OF
NEW ORLEANS.

38 308
52 1047

The City of New Orleans has control of its streets and drainage and may improve the one and alter the other as circumstances require.

The City can change its system of drainage and do whatever is essential to perfect it, but it cannot wantonly and unnecessarily disregard the rights of its inhabitants.

The City can widen a ditch lying along the border of the plaintiffs' Canal Company, but must cover it, as without a covering ingress and egress to and from the canal would be impeded or prevented. In widening the ditch to improve the drainage the city cannot needlessly interfere with the rights and privileges of the Canal Company.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

H. D. Ogden and Blanc & Butler, for Plaintiffs and Appellees.

Walter H. Rogers, City Attorney, for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The plaintiff Company has enjoined the City of New Orleans from "widening the ditch between the northeast side of Toulouse street from Claiborne to Galvez and from digging or in any manner working on said ditch so as to increase the width beyond nine feet at the top at Claiborne street, and thence gradually widening to twelve feet at the top at Claiborne street (*sic*) and from doing anything

Canal and Navigation Company vs. New Orleans.

on said ditch contrary to the terms of the compromise by Act of May 16, 1872."

The writ of injunction copies the above verbiage of the prayer in the petition but it is apparent that the last mention of Claiborne should be Galvez street.

Prior to the above date the city began digging a draining ditch in the locality mentioned and the plaintiff stopped the progress of the work by an injunction. That litigation was terminated by a compromise by which it was agreed and stipulated that the ditch should not exceed the dimensions above specified, should be covered with four-inch plank, and should be cleaned in sections of not more than a hundred feet at a time, etc.

The present injunction was taken in 1884, the averment being that the city is violating its agreement and is widening this ditch to fifteen feet at Claiborne street and to eighteen feet at Galvez, and has not repaired the covering but that the planking has rotted and fallen away and the ditch is now uncovered.

Toulouse street forms the bank of the canal. They run side by side and the gravamen of the plaintiff is that the widening of the ditch encroaches upon its landing, and the uncovering of it prevents ingress and egress to it so that its commerce is obstructed and the owners of vessels navigating it are incommoded to the great injury of the company.

The evidence abundantly establishes the existence of this obstruction and its prejudicial effect upon the business of the plaintiff. The defence is that the ditch-widening is essential to the proper drainage of the city and to its health, and that the ordering and prosecution of the work is within the corporate powers of the city, and the execution of it cannot be prevented or impeded lawfully even though the city has formerly agreed not to do the work as it was proceeding to do when enjoined.

The space between Claiborne and Galvez streets has been used as a landing for vessels running through this canal from the beginning, and this privilege is one of the rights among others that the company derived from the State by lease in 1857, and the company remained in undisputed enjoyment of this right until the city attempted to widen the ditch in 1872.

Unquestionably the city has control of its streets and may determine in what manner they shall be improved, and it has equal power over its drainage and can perfect a system that will conduce to the health

Insurance Company vs. Gerson et als.

and comfort of its inhabitants. *Inhab. of Melpomene st. v. New Orleans*, 14 Ann. 452; *Dillon Munic. Corp.* 393.

But it cannot exercise this power recklessly and in wanton disregard of the rights of its inhabitants. The need of enlarging this ditch as a part of a plan to improve the drainage of the city is demonstrated by the testimony, but that may be done and all the benefits derivable from it can be realized without injuring the plaintiff. The company has a right to require that the ditch shall be covered in every part where it was formerly covered for its convenience and that the landing between Claiborne and Galvez streets, which it has always used and which is necessary for its operations shall be covered as it claims, and the street crossings shall be also covered that lead to its landing.

The judgment of the lower court dissolved the injunction against widening the ditch and maintained it in all other particulars.

Judgment affirmed.

No. 9655.

MECHANICS AND TRADERS' INSURANCE COMPANY VS. NATHAN
GERSON, ET ALS.

When a third person, under color of a pretended sale of immovables by destination subject at the time to a mortgage, unaccompanied by delivery and removal, subsequently, removes them fraudulently and sells and converts the price to his own use, the mortgagee, on establishing the fraud, the insolvency of the debtor and the insufficiency of the remaining mortgaged property to pay the debt, may recover from the third person the price received by him for the property fraudulently removed.

This case compared *Well vs. Lapeyre* recently decided and shown to be in accordance with the principles there announced.

A PPEAL from the Fifteenth District Court, Parish of Pointe Coupée,
Yoist, J.

Olivier O. Provosty, for Plaintiff and Appellant

Thos. H. Hewes, Contra.

The opinion of the Court was delivered by

FENNER, J. The gravamen of the petition is that plaintiff held a mortgage for \$35,000 on a plantation belonging to George Gerson and, as a legal consequence, on all the immovables by destination attached thereto; that Nathan Gerson, a brother of George, fraudulently colluding with the latter, under color of a pretended sale, illegally removed certain mules and horses from said plantation, shipped them to New Orleans, sold them and pocketed their proceeds; that George Gerson,

the debtor, was insolvent, that the remaining mortgaged property was utterly insufficient to satisfy the debt, and that he, therefore, claims from Nathan Gerson the value of the property thus illegally and fraudulently subtracted from the mortgage security and converted to his use.

The petition presents a perfect cause of action, and all its allegations are sustained by the evidence in the case. A large part of this testimony was excluded by the lower court, but it is embodied in, and brought up with, the bill of exceptions. The ruling of the lower judge was erroneous. Some of the testimony is irrelevant, but discarding that, we find much that is pertinent, and should have been admitted.

The utter insolvency of George Gerson does not admit of dispute.

The insufficiency of the denuded mortgaged property to satisfy the debt is fully established.

The mules and horses, whether bought before or after the date of the mortgage, were bought by George Gerson, attached to the plantation and became subject to the mortgage.

Nathan Gerson admits that he carried to New Orleans twenty-two mules and two horses, sold them, received the proceeds and converted them to his own use.

He founds his claim of right upon a pretended sale which had been made to him by George in 1882, after the date of the mortgage, which is one of the most transparent shams and frauds that ever stared from the face of a record.

George Gerson was insolvent prior to 1882. He had brought his thoroughly impecunious brother from New Orleans to the plantation, and not long afterwards, executed to him a written sale of the mules and horses on the place, besides certain agricultural implements and machinery, at prices named, amounting in the aggregate to \$3770, pretended to have been paid in cash. A few days afterwards, Nathan executed a lease of the same mules and horses to George, and so, saving the paper change of title, matters remained *in statu quo*.

The plaintiff's mortgage notes had all matured in 1881, but payment was extended from time to time. In December, 1884, plaintiff sent an agent to the plantation to examine into its condition with a view to determine as to its further renewal.

The agent was received by George Gerson; was shown over the plantation. The buildings, implements, working animals, etc., were exhibited to him, and every thing done to convince him that the plantation was well equipped and in good working order, and the plaintiff's mortgage secure. Much of the conversation took place in the presence

State ex rel. Plaisent vs. Railroad Company.

of Nathan, and the agent's impression was that he joined in the representations. When, twenty-five days afterwards, the plaintiff came to foreclose its mortgage, it found the plantation stripped of every movable thing. All the mules and horses had been spirited away; the corn-cribs had been emptied; the horned cattle had been secreted in the woods; the agricultural implements had been removed and sold; even the iron tanks and syrup pumps of the sugarhouse had disappeared.

We have no concern in this case with anything but the mules and horses which Nathan Gerson removed to New Orleans and sold. They were subject to plaintiff's mortgage, to his full knowledge; his pretended title was a sham and fraud, and utterly insufficient to divert the mortgage; the removal was fraudulent. If the mules were in his possession, the plaintiff might still subject them to his mortgage; and, as he has sold them and received the price, he must answer for it to the mortgagee.

We had occasion, in a very recent case, to consider the effect of sale and removal of immovables by destination upon the rights of mortgagees, and we there held that such sale and removal when done in good faith would defeat the mortgage; but we carefully excepted from the operation of that principle, fraudulent acts; and this case presents a conspicuous example of the kind of acts excepted. See 1st Paul Pont, No. 420.

See Weil vs. Lapeyre, not yet reported.

We fix the price received by defendant at two thousand dollars, and judgment must go accordingly.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now ordered, adjudged and decreed that plaintiff recover judgment against defendant, Nathan Gerson, for two thousand dollars with legal interest from judicial demand, and costs in both courts.

No. 9613.

THE STATE EX REL. J. PLAISENT VS. THE ORLEANS RAILROAD
COMPANY.

A *mandamus* will issue to compel a Railroad Company to allow the transfer, on its books, of shares in the name of the Relator, when it is established that a party, to whom the company says the stock belongs in part, has been finally adjudged not to have any interest therein.

The judgment, although foreign, having acquired the force of *res judicata*, must be given that effect. On a charge that it is erroneous, this court will not go behind it to test its correctness.

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State ex rel. Plaisent vs. Railroad Company.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

T. Gilmore & Sons, for the Relator and Appellant.

F. D. Chrétien, for the Respondent and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *mandamus* to compel the company to permit the transfer on its books of 117 shares of its stock, owned by the relator.

The company refuses to allow the transfer on the ground that part of said shares belong to a daughter of relator, Mrs. Chéron, now in France, for having inherited the same from her mother, relator's deceased wife.

In answer to this objection the relator says that his said wife died on the 5th of March, 1876, and that he acquired 75 of those shares on the 16th of June, 1877, and the remaining 42 on November 8, 1878.

It appears that with a view to silence what pretensions Mrs. Chéron had to part of the 117 shares standing in the name of relator, the latter instituted proceedings before the "Tribunal Civil de l'Arrondissement de Montpellier, Département de l'Herault," against his daughter and her husband, for the purpose of having said shares to be decreed to be his exclusive property, and that after due proceedings, the judgment of that court was rendered accordingly on August 8th, 1885, and duly recorded on the 20th following.

It is not pretended that the court was without jurisdiction, or that the forms of law were not observed, or that the judgment is not final and executory; but it is claimed that it is erroneous, inasmuch as part of the shares actually belongs to Mrs. Chéron. We cannot review it. The judgment concludes Mrs. Chéron and can not be vicariously attacked by the company for her benefit when she cannot do so herself. *Res adjudicata, pro veritate habetur.*

The record does not show that Mrs. Chéron ever signified any discontent to the company, and she is not heard to complain presently.

The judgment is a finality and is full protection to the company.

It is to be observed that two of the children of the relator, born of his marriage with his deceased wife, have joined in the petition which sets forth the exclusive ownership of the shares by their father, the relator.

The District Court made the *mandamus* peremptory as to one hundred and four shares, but refused it as to the remaining thirteen. The *mandamus* asked should have been absolute in every respect.

State vs. Helveston and Duplessis.

It is therefore ordered and decreed that the judgment appealed from be amended, so as to make the *mandamus* peremptory absolutely, and that accordingly the company allow the transfer on its books of the one hundred and seventeen shares (including the thirteen excepted by the lower court) standing in relator's name thereon, and that the amended said judgment be affirmed with costs.

Judgment amended.

No. 9478.

THE STATE OF LOUISIANA VS. J. R. HELVESTON AND CHARLES
DUPLESSIS.

The pleas of *autrefois convict* and *autrefois acquit* have derived from the common law principle that no person shall be twice put in jeopardy of life or limb for the same offense, and neither of the pleas can be sustained unless the previous trial invoked as a plea in bar shall have been for the same charge contained in the new indictment or information, and unless the evidence required in one charge would be sufficient to establish the other.

Hence the plea in bar is not good to defeat a charge of "assault with a dangerous weapon, to-wit: a knife, with the intent to kill and murder and inflicting a wound less than mayhem," when it appears that the previous trial of the accused set up in bar, had been on a charge of robbery, although at the same time and on the same person.

A PPEAL from the Tenth District Court, Parish of Rapides.
Blackman, J.

M. J. Cunningham, Attorney General, for the State, Appellant.

J. C. Bayne and *R. P. Hunter*, for Defendants and Appellees.

The opinion of the Court was delivered by

POCHÉ, J. The defendants were accused in the same information of the crime of assault with a dangerous weapon with intent to commit murder and inflicting a wound less than mayhem. A *nolle prosequi* was entered as to Duplessis, and Helveston pleaded in bar that he had been tried on the day before on the charge of robbery on the same person and at the same time and place, and on the same facts, to be proven by the same witnesses; that he had been convicted of larceny, and acquitted of robbery; and that therefore the said conviction and acquittal were a bar to this prosecution.

The State demurred; the plea was tried on the face of the papers and sustained, and the State appeals.

The District Judge seems to have misapprehended the exact scope and meaning of the charge propounded against the accused in the present case. In his reasons contained in the bill of exceptions reserved by the District Attorney we find the following language: "The

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 State vs. Helveston and Duplessis.

evidence required to convict for robbery was the same as that required to convict on the indictment for assault with a dangerous weapon with the intent to kill and murder."

Tested under the tenor of the information in this case, the reasons of the District Judge quoted above contain two serious errors, one of fact and one of law. In the first place, the accused is not therein charged with "an assault with a dangerous weapon with intent to kill and murder," but the charge is "an assault with a dangerous weapon, to-wit: a knife, * * * with the intent * * * to murder, and with said dangerous weapon to have inflicted a wound or wounds less than mayhem."

As understood by the trial judge the charge did not necessarily imply or include actual violence or a battery, and in the information, actual violence, such as blows, cuts or thrusts are necessarily included, and must be proved, in order to convict under the charge therein propounded.

It takes no argument to convince the legal mind that the elements of that charge do not constitute the necessary ingredients required in the crime of robbery, and that therefore they do not denounce the same offense as the latter crime.

As defined at common law, robbery "consists in the felonious and forcible taking from the person of another, or in his presence, against his will, of any chattel, money or valuable security to any value, by violence or putting him in fear." Archibald Crim. Plead. 224.

The charge under which the accused was convicted of larceny, read in substance that, "with force and arms * * * he did wilfully and feloniously and by force and by putting in fear * * * take and carry away from the person and in the presence of said Spencer," etc. It is therefore apparent that both at common law and under that charge, the essence of the crime of robbery could have been made out without proof of actual violence or blows, but simply by showing or displaying of force or threats and a putting in fear.

Hence we conclude that in order to substantiate the charge of robbery as contained in that information the State was not, and could not have been, required to prove the use of actual violence by blows, shooting or otherwise, in the absence of which proof the charge in the subsequent information, to-wit: an assault with a dangerous weapon, to-wit: a knife, with the intent to kill and murder, and inflicting a wound or wounds less than mayhem, could not have been made out, and proof of actual violence such as blows, cuts or thrusts with the intent as described in the information, was of the essence of a legal

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conviction. The pleas of *autrefois acquit* and *autrefois convict* are founded on the common law principle, which was subsequently consecrated in the Constitution of the United States, and which has been retained in the criminal practice of this State, "that no person shall be twice put in jeopardy of life or limb for the same offence," and in order to support either of these pleas the accused must show that the previous trial which he sets up in bar was precisely for the same offense which had been charged in the subsequent proceedings; and that the same proof would be sufficient to establish either of the charges for which he is put on his trial. Hence it has been held that a plea in bar to a charge of entering a dwelling house by day time with intent to steal was not good when the previous charge on which the accused had been acquitted was for larceny. State vs. Shaw, 5 Ann. 342.

The verdict of the jury on the trial for robbery, shows that in their belief the violence, if any, was not immediately connected with the offence of larceny which they found against the defendant. Hence it is clear that they did not, as they could not, pretend to acquit the defendant of an assault with intent to murder and inflicting a wound less than mayhem. Our conclusion is therefore that the offences charged in the two informations are not the same, and that the judgment sustaining the plea in bar is erroneous.

It is therefore ordered that the judgment of the District Court be annulled, avoided and reversed, that the plea in bar interposed by the defendant herein be overruled, and that this cause be remanded for further proceedings according to law.

No. 9705.

THE STATE OF LOUISIANA VS. R. T. BACKAROW.

Section 805 R. S. denounces 1st, The forcible seizing and carrying a person against his will out of the State. 2d, The forcible seizing and carrying a person against his will from one part of the State to another; and 3d, The imprisoning or secreting a person without authority of law. It is not necessary to charge that the person imprisoned or secreted was forcibly seized and imprisoned or secreted.

It is sufficient to charge in the language of the Statute that the person was carried from one part of the State to another and not from one parish to another, and proof that the carrying of the person was from one part of a parish to another, or from part of a city or town to another, will sustain the charge in the bill on this count. This Court cannot determine whether the evidence does or does not justify the verdict.

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

M. J. Cunningham, Attorney General, for the State, Appellee:

A.—An indictment charging that the prisoner "with force and arms, wilfully, forcibly, unlawfully and against her will, the person of Mrs. Iuez Watkins, a married woman, did

State vs. Backarow,

seize, secrete and convey whilst in transit from Claiborne parish, in said State, to the State of Texas, and whilst in the city of Shreveport, State of Louisiana, from the depot of the Vicksburg, Shreveport and Pacific Railroad Company, in a hack waiting at said depot for that purpose, forcibly and against her will, to the house of ill-fame of Fannie Roos in said city," etc., does not charge the Common Law crime of abduction as defined and denounced by the Statutes of England and the American States. 24 and 25 Vict. C. 100. S. 53; Wharton's Cr. L. 8th ed. § 586; Bishop on Statutory Crimes, §§ 616, 617, 619, 620, 622; Desty's Am. Cr. L. § 136, b. 137, a. 138.

- B—The indictment charges the offense laid down in Section 805 R. S. This section denounces three separate and distinct crimes: 1st. The forcible seizing and carrying of a person out of the State. 2d. The forcible seizing and carrying of a person from one part of the State to another. 3d. The imprisonment or secretion of a person without authority of law.
- C—In an indictment under this section no specific intent need be alleged. The general criminal intent presumed to be involved in the commission of all crimes is implied in this one, but "intent" is not of the essence.
- D—The word "forcible" is necessary to the description of the two first two acts, as without it the Statute would not denounce a wrongful act. Differently with the last. It charges an aggravated form of false imprisonment.
- E—Imprisonment is an unlawful restraint put upon one's personal liberty. Coercion is necessarily involved in the act. Therefore, force being included in the term, it is unnecessary in the indictment to allege a "forcible false imprisonment."
- F—The indictment need not allege that the carrying was from one to another parish of the State. Any two points in the State alleged in the indictment is sufficient.
- G—The indictment sufficiently lays the venue in the parish of Caddo as to both counts.
- H—The Supreme Court cannot review questions of fact.
- I—The Supreme Court cannot determine a question of law necessarily based upon certain facts, unless the evidence is properly presented to them for review. *State vs. Redwine*, 37 Ann. 780.
- J—The last count charges the offenses laid down in both Sections 805 and 796, R. S.

M. S. Crain, District Attorney, and *W. H. Wise* on the same side.

John H. Hicks, *M. C. Elstner* and *R. J. Looney* for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant appeals from a sentence of three months imprisonment in the parish jail.

He was tried and convicted under an indictment which charged that he, the accused (quoting): "with force of arms wilfully, forcibly, unlawfully and against her will, the person of Mrs. Almez Watkins, a married woman," did seize, secrete and convey whilst in transit from Claiborne parish in said State, to the State of Texas, and whilst in the city of Shreveport, State of Louisiana, from the depot of the Vicksburg, Shreveport and Pacific Railroad Company, in a hack waiting at said depot for said purpose, forcibly and against her will to the house of ill fame of Fannie Roos in said city, conducted and known as the Fannie Roos House, or otherwise as the Lewis House, with intent for-

State vs. Backarow.

cibly and against her will the said Almez Watkins to abduct and secrete."

The prosecution was instituted under Sec. 805 of the Revised Statutes of 1870, which reads:

"Whoever shall *forcibly seize* and carry out of this State, or from one part of this State to another, or imprison or secrete any person without authority of law, and all persons aiding, advising *and* abetting therein, on conviction shall be imprisoned," etc.

There was a motion to quash the indictment on the following grounds:

1st. That the indictment charges defendant with abduction, a crime unknown to the laws of Louisiana.

2d. That there is no penalty fixed by the laws of the State for abduction.

3d. That the indictment does not charge that the abduction was for any unlawful purpose, either for the purpose of lucre or prostitution.

4th. That the second count does not charge that the defendant forcibly seized or detained the person mentioned in said bill and in consequence no offense is charged.

a. The three first grounds may be considered and disposed of together.

Whether the indictment charges the crime of abduction or not, or whether there is any penalty prescribed for such offense, or whether abduction is a crime under our laws, is immaterial, if the acts charged in the indictment constitute an offense under the laws of the State. We have critically compared the charge in the indictment with the language of the Statute referred to, and by whatever name we may call the crime therein denounced, whether "abduction," "kidnaping," or other name, there can be no doubt that the averments contained in the indictment do make out the precise statutory offense embraced in the section quoted above.

Nor does the law prescribe that any unlawful purpose, whether of lucre or prostitution, shall be expressed or mentioned in the indictment, or shall in fact exist or prompt the acts denounced, in order to complete or make up the offense.

b. The indictment does charge that the accused did forcibly seize the person therein named. It was not necessary to charge that he did forcibly imprison or detain—both of those words or terms necessarily imply force (Bishop Cr. Law, vol. 1, sec. 555), and there is nothing in the language of the section that requires that those terms and the acts they define should be thus qualified.

II.

There was a motion in arrest of judgment filed. This motion embraced, substantially, the same grounds as the motion to quash, together with the following additional ones, which we quote:

"The indictment charges defendant with no offense under Sec. 805, R. S., in this: That it does not charge that defendant forcibly seized and carried away any person out of the State of Louisiana into another State, or from Caddo parish, in said State, into another parish in said State, or from one part of said State to another part of said State."

This ground is evidently suggested by the crime of kidnapping, as constituted and defined by the common law. One of the elements of that crime was, that the party abducted or kidnapped should be carried away out of the realm of England into some other country. The counsel for defendant seem to deduce from this—but not logically as we conceive—that since the common law offense has been so modified by the Statute referred to as not to make it essential to the constitution of the crime that the carrying away of the person should be from one country to another, or from one State to another, but may be committed by the carrying from one part of the State to another part of the State that the part or parts of the State referred to mean the political or geographical divisions of the State.

Where the words of a Statute are plain and unambiguous it is not at all necessary to resort to the history of similar laws or Statutes to arrive at its meaning—nor is permitted to invoke those rules of construction which are provided as a means or guide to clear away ambiguities or obscurities in a law. If its language is plain and clear, that language alone is to be consulted.

We find not the least obscurity in the language of the Statute under consideration. It denounces, 1st, the act of forcibly seizing and carrying a person out of the State; 2d, the forcibly seizing and carrying a person from one part of the State to another part of the State; and 3d, the imprisonment or secreting a person without lawful authority.

It was intended to secure the personal liberty of the citizen. The terms, from one part of the State to another, has a broad signification and was evidently so intended. If the law maker intended that it was the removal from one parish of the State to another parish of the State that constituted the offense, it seems to us it would have been so declared. It was intended to give it a broader sweep with a view to provide ampler individual protection.

It strikes us that it is just as gross a violation of personal liberty to seize and drag a person from one part of a parish to another, from one

 Bourke et al. vs. Wilson.

place to another, or from one house to another, even if in the same parish, town or city, as it would be to carry him out of the parish or even out of the State. Nor can the definitions in dictionaries or the principles and rules of philology make the matter plainer.

The Statute declares: "Whoever shall forcibly seize and carry * * from one part of the State to another." The indictment charges that the defendant did so seize and carry the person named therein from the railway depot in the city of Shreveport to a certain house named and described in said city. This was sufficient, and it was clearly from one part of the State to another, within what we conceive to be the clear meaning and intendment of the law.

It is a construction that addresses itself to common sense and common justice, and we have no doubt of the correctness of our conclusion.

III.

In the motion for a new trial it was urged that the evidence was insufficient to convict, and especially to show any forcible seizure of the person or any intent to carry the person against her will to the house of ill-fame designated, and in the bill of exceptions taken to the overruling of the motion for a new trial portions of the evidence of the person against whom the offense was alleged to have been committed is copied and pointed out to show the failure on the part of the State to make good the charge.

We have said once and over again that we cannot consider such evidence, even if brought up in this manner. It is the sole province of the jury to deal with and consider the evidence adduced on the trial of the case and bearing on the guilt or innocence of an accused. A careful reading of the Nelson case, cited to sustain the counsel's pretensions in this respect, will be found to be direct authority against it. If a jury will convict on insufficient evidence or against the evidence, this Court is without power to afford relief, unless the error of the jury in this respect has been caused or is connected with the charge of the trial judge seasonably excepted to.

Judgment affirmed.

No. 9689.

J. E. BOURKE, ADM., ET. AL. VS. JOSEPH M. WILSON AND EUGENIA WILSON.

To constitute a presentation of a will in the sense of the Code it is not necessary that it shall be delivered to the witnesses by the testator with his own hand, and no particular words or set form of speech is necessary to constitute a declaration that the instrument is the testator's will.

Bourke et al. vs. Wilso.

It is sufficient if the will, having been written by another at the request of the testator and out of the presence of the witnesses, shall have been read aloud by one of the witnesses in the presence and hearing of the testator and of the other witnesses, and is then held towards the testator by the writer of it who asks, "Is this paper that has just been read your will?" and the testator answers, "It is," and it is then signed by the testator and is attested by the witnesses in his and their presence.

The object of the law is to guard against a false instrument being exhibited instead of the true will, and that object is accomplished by the formalities above recited.

The circumstance that the writer of the will read it aloud a second time after the witness had so read it is not an interruption or turning aside to other acts.

Where only some of the heirs contest, it is not good ground of exception that all are not joined for *non constat* that the others wish to contest.

A PPEAL from the Ninth District Court, Parish of Concordia.
Young, J.

J. N. Luce, for Plaintiffs and Appellees.

Dagg & Mason, for Defendants and Appellants.

The opinion of the Court was delivered by

MANNING, J. This case involves the validity of a will.

Hughes Wilson died in October, 1884, without any but collateral heirs and bequeathed the bulk of his property to Eugenia Wilson, one of the defendants. The plaintiffs are the administrator and some of the heirs of the deceased. Hughes Wilson and the other defendant J. M. Wilson were planting-partners in the cultivation of a place called Moro, and J. M. Wilson is also the husband of Eugenia.

Pending the application for probate of the will, the plaintiffs brought this suit to recover the property left by the deceased, alleging that the defendants have illegally taken possession of it. The probate proceeding was consolidated with this suit and the lower court annulled the will.

The will is nuncupative under private signature and the objections to its validity are that there was no presentation and declaration of it as a will—that the affirmative answer of the testator to the question whether it was his will is not such presentation and declaration as the Code requires—that if such answer can be deemed equivalent to a presentation and declaration, it can only be so when the question is asked by one of the witnesses after the will has been read aloud by him in the presence of the others and of the testator—that the reading of the will by the writer of it after one of the witnesses had read it was an interruption and "turning aside to other acts"—that the testator did not cause the will to be written as the Code prescribes.

Bourke et al. vs. Wilson.

The will was written by Nathan M. Calhoun an attorney-at-law at the request of the testator who told him the disposition he desired to make of his property.

All the witnesses to the will and the writer of it concur in their statement of the circumstances of its writing, reading, etc., which are these:

Mr. Calhoun wrote the will in the bed-room where the sick man was lying. Just as he was finishing it the five witnesses entered the room. After they were seated Mr. Calhoun handed the paper writing to Z. W. Holmes, one of them, and requested him to read it, and he read it aloud in the presence and hearing of the testator and of the other witnesses. Calhoun then took it from Z. W. Holmes and read it himself aloud and in the presence and hearing of the testator and of all the witnesses. The room was small about 16x18 feet in size. Calhoun then went to the bedside of the testator and held up the paper to him and asked, "Is this your will that Mr. Holmes has just read?" and he answered "It is." Calhoun then handed the paper to the testator and he signed it in the presence of the witnesses, all of whom immediately signed their names in the presence of the testator and of each other.

We do not perceive in what particular there was a failure to comply with the requirements of the Code for this kind of testament, which are that it will suffice if in the presence of five witnesses the testator presents the paper on which he has written his testament or caused it to be written out of their presence, declaring to them that that paper contains his last will. Rev. Civ. Code, Art. 1581.

To constitute a presentation of the will in the sense of the Code it is not necessary that it shall be delivered to the witnesses by the testator with his own hand, and no particular words or set form of speech is necessary to constitute a declaration that the instrument is the testator's will. The will was written by the request of the testator after he had given the scribe directions of the dispositions he wished to make, and was immediately twice read aloud by two different persons, one of them a witness, in the presence of the testator and the witnesses. The testator's affirmative answer to the question whether it was his will is as complete a declaration as if he had held the paper aloft and asserted that it was his will. The object of the law is to guard against a false instrument being exhibited instead of the real will, and that object is accomplished when the testator, having heard the will read before all the witnesses, indicates by his response to a question that it is his will. *Bouthemy v. Dreux*, 12 Mart. 639; *Falkner v. Friend*, 1 Rob. 48.

Charnock vs. Levee Company.

The circumstance that the writer of the will read it aloud after the witness had read it is not an interruption or turning aside to other acts.

The caveators rely confidently on McCaleb v. Douglass, 16 Ann. 327, and the digest of that decision by the reporter certainly sustains them. That case has been commented on in Buntin v. Johnson, 28 Ann. 796, and Wood v. Roane, 35 Ann. 865, where it was said the facts in that case do not shew a presentation. However that may be, the decisions in the Bouthemy and Falkner cases already cited amply justify our ruling in the case at bar.

Other questions are presented in the record which need not be noticed because they concern the ownership of the property in the event of the annulment of the will.

Exception was made to the capacity of the administrator to claim the nullity of the will which seems not to have been pressed. Some of the heirs joined him and exception was made that all of them should have joined him. It is presumable that the non-joiners did not wish to contest and those that did are not deprived of the right to do it because others would not contest.

It is ordered and decreed that the judgment of the lower court is avoided and reversed, and that the instrument presented for probate as the last will of Hughes Wilson is hereby declared to be valid in form and is entitled to be probated and executed. It is further decreed that the plaintiffs' demand is rejected and that the defendants have judgment against them for their costs in both courts.

No. 9618.

HENRY CHARNOCK VS. FORDOCHE AND GROSSE-TÊTE SPECIAL LEVEE DISTRICT COMPANY.

Acts No. 78 of 1876 and 46 of 1877, creating the Fordoche and Grosse-Tête Levee District for the purpose of constructing and maintaining certain special levees and authorizing the levy of a contribution upon the lands protected thereby, are not inconsistent with the Articles of the Constitution of 1879 on the subject of taxation.

Such local assessments for public works, levied not on taxable property generally for mere common public benefit, but only on particular property specially benefited by the works, as an equivalent for the direct benefit conferred, are not considered as taxes within the meaning of constitutional restrictions on the power of taxation.

A PPEAL from the Fifteenth District Court, Parish of Pointe Coupée. Yoist, J.

Olivier O. Provosty, for Plaintiff and Appellant :

1. Acts 78 of 1876, and 46 of 1877, create a special levee district, and authorize the levy of a specific tax per acre on the lands protected by the levee of the district.

38 323
46 1302
46 1566

38 323
49 434

39 323
51 826
51 1919
51 1930

38 323
404 292

38 328
108 437
38 323
51 808

38 323
121 1001
121 1002

38 323
124 639

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2. It is not deniable that said tax is a local assessment levied for the benefit of the locality affected; nor is it deniable that such assessments are not as a general rule embraced within the meaning of the provisions of State constitutions on the subject of taxation.
3. But the authority to levy said local assessment must be referred to some one of the known powers of the Legislature, by which private property may be taken for public use. These known powers are, the eminent domain, the police power and the taxing power. Any power outside of these exercised by the Legislature in the taking of private property is vagrant power, or, in other words, unconstitutional power. *Dill Mun. Corp.*, § 587, (455); *Sedgwick, Const. Constr. 3d Ed.* Pomeroy's notes, p. 473; *Chicago vs. Larned*, 34 Ill., 203.
4. Said assessment is not levied by an exercise of the eminent domain; the taking under this power must be preceded by direct compensation paid in money. Resulting benefits cannot be made to take the place of the cash. *Sedgwick*, 469; *Dill*, § 738, (455); 7 Ann. 76, opening of *Roffignac* and *Euphrasine* sts.; *Const.*, Art. 156.
5. Said assessment is not levied under the police power, this power though unlimited and unrestrained within its proper sphere of action, yet must be confined to its legitimate functions; and these do not extend to the raising of money for levee purposes. If they do the constitutional restrictions on taxation for levee purposes may be easily circumvented. The subject of *taxes under the police power* is fully gone into, and the following authorities are cited: *Cooley, Taxation*, Chap. XIX; *State vs. Blaser*, 36th Ann. 364; *State vs. Hoboken*, 33 N. J., L. 280; *Dill Mun. Corp.*, § 141, (93); *Cooley Const. Lim.*, 633, (7508); *Judge Martin in Morgan vs. Livingston*, VI. O. S., 235; same in his *History of Louisiana*, p. 213, *Gresham's Publication*; *Wallace vs. Shelton*, 14th Ann. 499; *Gillespie vs. Concordia*, 5th Ann. 403; *Police Jury vs. Cumming*, 9th Ann. 503; and *Bishop vs. Marks*, 15th Ann. 147.
6. Said assessment is therefore levied by an exercise of the taxing power. The settled doctrine is that local assessments are levied under the taxing power. *Cooley, Tax.* p. 430; *Dill Mun. Corp.*, § 738 (596) *et seq.*; *Sedgwick, Const. Constr.* p. 426.
7. The exercise of the taxing power is limited by Art. 209 *Const.*, and said assessment is authorized in excess of that limit; the Acts authorizing it are therefore inconsistent with the Constitution, and consequently were repealed by the adoption of the Constitution. *Laycock vs. Baton Rouge*, 36 Ann. 329.
8. The fact that said assessment is levied for local benefit does not liberate it from the operation of Art. 209, for its purpose, though local, is still a purpose, and falls within the all-embracing expression of Art. 209, "for all purposes whatsoever." *Folsom vs. New Orleans*, 33 Ann. 713; *Witkowski vs. Sheriff*, 35 Ann. 904; *Morgan R. R. vs. Cage, Sheriff*, 34 Ann. 506; *Municipality vs. White*, 9 Ann. 446; *Taylor vs. Chandler*, 9 *Heisk. Tenn.*, p. 366.
9. The meaning of Art. 209, as embracing local assessments, is further emphasised by the proviso which permits additional taxation for the purpose of erecting and constructing public buildings, bridges and works of public improvement. The levee of defendant is a work of public improvement such as the proviso has reference to. It is either that or it is a work of private improvement, and in the latter case the assessment would be for a private purpose, and on that score null and void.
10. The permission so cautiously and limitatively doled out to the Legislature by Art. 214, to divide the State into levee districts, and to "levy a tax not to exceed five mills on the taxable property situated within the alluvial portions of said districts subject to overflow," is an affirmative pregnant with the negative that the Legislature may not divide up the State into special levee districts, and authorize the levy of unlimited specific taxes for levee purposes. The Legislature has the right to special-levee-district the State in that manner, if the Constitutional provisions on the subject of taxation do not apply to local assessments for local purposes.

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11. By Article 203, Constitution, "The valuation put upon property for the purposes of State taxation shall be taken as the proper valuation for purposes of local taxation in every subdivision of the State." This article *ex vi terminorum* has reference to defendant's assessment, which is a local tax. Said assessment, therefore, if it can be levied at all, must be levied *ad valorem*.
12. Acts 78 of 1876 and 46 of 1877, were never submitted for approval or ratification to a vote of the inhabitants of the district affected by their provisions. They are, therefore, wholly dependent for their validity on the Legislative authority.
13. The bonds issued by defendant were issued for a debt contracted posterior to the adoption of the Constitution of 1879; there can be, therefore, no question in this case in regard to the impairment of the obligation of contracts.

Thomas H. Hewes, for Defendant and Appellee :

The "contribution" which the defendant is authorized by law to levy upon all lands protected by its levees, etc., is not a "tax, toll or impost" within the meaning of the Constitution. *Board, etc. vs. Lorio*, 83 Ann. 276.

The opinion of the Court was delivered by

FENNER, J. The defendant is the same corporation which figured as plaintiff in the case of *Board of Levee Commissioners vs. Lorio Bros.*, decided by us in 1881 and reported in 33d Ann. 276.

Although the present case comes up in somewhat different shape, and although some other questions are raised in the pleadings, the only point insisted on before us is the same which was determined in the *Lorio* case, viz: the constitutionality of the assessment or contribution levied by defendant upon lands protected by its levee, in conformity with Acts No. 78 of 1876 and 46 of 1877.

Plaintiff, however, calls our attention to the fact that although the *Lorio* case was decided after the adoption of the Constitution of 1879, yet the assessment there concerned had been made prior thereto and was governed by the Constitution of 1868. Hence he insists that with regard to the assessment now in contest, which was levied in 1884, it is governed by the present Constitution, and as the provisions of the latter instrument on the subject of taxation are different from, and much more extensive than, those contained in former constitutions, his case presents a new and different question from any hitherto determined. His contention is technically correct in the limited sense that the particular question as to whether local assessments of the character here presented are governed by the provisions of the present Constitution on the general subject of taxation, has not yet been distinctly decided.

After much reflection, however, we conclude that the principles on which such contributions were excluded from the operation of similar provisions in former constitutions, apply equally to that now in force.

We concede, at once, the first proposition of plaintiff, viz: that the

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exaction of such contributions is an exercise of the taxing power, in its broadest sense. There is nothing in this case to support the assessment as an exercise of the police power or of the power of eminent domain, and unless we are to attribute it to some "vagrant power," there is no other source from which it can spring except the power of taxation.

Indeed, this has never been seriously contested. In referring to the cases in which it was held that such contributions were not governed by provisions of statutes and constitutions on the subject of taxation, Mr. Burroughs says: "An examination of the cases in which these expressions were used will show that it was not claimed that these burdens imposed upon the citizen were not imposed in the exercise of the taxing power, but merely that the word tax, or taxes, as used in some statute or in the Constitution of a State, was not intended to include local assessments; it was a question of intention to be deduced from the instrument in which the word tax is used." Burroughs Taxation, § 5.

In a very able argument counsel for plaintiff refers to the original cases in which this doctrine was established in this and other States, and shows that many of the reasons assigned would have been inapplicable to the provisions of our present Constitution; and we are free to confess that as an original question, it would be difficult to support the exclusion of local assessments from the operation of these provisions.

But, in the course of time, the matter has been considered over and over again in our own courts and in the courts of our sister States and by an inveterate course of decision, with rare exceptions, it has ripened into a settled principle of constitutional construction, that local assessments or contributions provided for the purpose of constructing public works for the advantage of particular districts and levied on property benefited thereby and with reference to such benefit, are not considered as taxes within the meaning of constitutional restrictions on the power of taxation. Board vs. Lorio Bros., 33 Ann. 276; Railroad vs. Board of Health, 36 Ann. 666; Burroughs on Taxation, Chap. 22; Cooley on Taxation, Chap. 20.

We are bound to assume that this principle was present to the minds of the framers of our present Constitution, and that they were well aware that, in the absence of special provision to that effect, the restrictions which they placed upon the exercise of the taxing power, would not be considered as applicable to assessments of this character.

We have carefully scrutinized the unusually elaborate provisions on the subject of taxation and the careful restrictions which have been

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placed upon the taxing power of the State, of parishes, and of municipalities, not only for general purposes of government but also for works of public improvement; but we find none which cover or exclude local assessments of the character presented in this case.

Such assessments are not to be confounded with ordinary local taxation. The distinction is well pointed out by Mr. Burroughs: "A tax for the local purposes of a county is imposed on the persons or property within the county, as distinguished from other parts of the State, but it is usually imposed on all the subjects on which the State imposes a tax for State purposes. In local assessments, on the contrary, the tax is imposed on the real estate alone and only on such real estate as is benefited by the local improvement. * * The benefit of the improvement is not only local but also specific, benefiting particularized property, and therefore the tax may be levied on this property which receives a benefit. * * Assessment is not considered as a burden, but as an equivalent or compensation for the enhanced value which the property derives from the improvement." Burr. Tax. p. 460.

When we closely examine the provisions of our Constitution we find that they apply only to ordinary local taxation, levied in particular districts, it is true, but levied on all taxable property within such districts without reference to special benefit to particular property. Such taxation must submit to the restrictions imposed thereby. Thus, under Article 209, a parish or municipality desiring to levy an increased tax on all the taxable property within its limits for some work of public improvement, could not do so without compliance with the requirements of that Article under legislation carrying the same into effect. And so we have held. *Surget vs. Chase*, 33 Ann. 233.

But these provisions have no application to that kind of taxation which falls under the denomination of strict local assessments which are not levied upon taxable property generally for the common public interest, but upon particular property specially benefited, as an equivalent for the benefit conferred.

Assessments of this kind are not referred to in the provisions of the Constitution upon the subject of taxation, which relate only to taxation upon property generally, whether throughout the State or within particular districts. If we were to deny the legislative power to ordain or sanction such assessments we should destroy a common and most useful function of government. Thus it would not be possible for the city of New Orleans to pave or widen a street or sidewalk without first submitting the question to a vote of all its taxpayers and without making the burden common to them all, although only a particular part of the property would monopolize the benefits.

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Such was not the intent of the Constitution, nor the interpretation placed on it in practice and legislation.

The assessments involved here belong strictly to this class, as appears from the Acts authorizing them and from the evidence in this record.

We have the satisfaction of knowing that the legislative department of the government, under the existing Constitution, concurs with us in sustaining the constitutionality of these Acts and assessments, as shown by Act No. 97 of 1882, referring to and confirming the same.

Judgment affirmed.

Rehearing refused April 5, 1886.

No. 9531.

CITY OF NEW ORLEANS VS. U. KOEN & CO.

Merchants who indiscriminately transact business, both as *wholesale* and as *retail* dealers, are liable to a license in each capacity.

A PPEAL from the First City Court of New Orleans. *Rosier, J.*

Walter H. Rogers, City Attorney, and *Branch K. Miller*, Assistant City Attorney, for Plaintiff and Appellee.

A. J. Lewis, for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The city sues the defendants as wholesale tobacco dealers for a license of \$50 for the year 1885. The defense is that the city ordinance which levies it, is illegal as it violates Article 206 of the Constitution and Act 4 of 1882.

From an adverse judgment, defendants appeal.

The record contains the following statement of facts, viz:

"It has been proved herein that long prior to the institution of this suit, defendants procured from plaintiff their license as retail dealers in tobacco, cigars, etc.; that they have but one place of business in this city; that they sell to any customer, whomsoever, any quantity desired, whether one cigar, or one or more boxes of cigars, or a pound or bale of tobacco, or any portion thereof, and not by the original or unbroken package or barrel only; but in both modes, that is, they sell a single cigar or dozen thereof, or a box, besides selling to dealers in original and unbroken packages; that this is the manner in which their business has been conducted during the year 1885; that they have paid no license for the year 1885 to the city of New Orleans as wholesale dealers."

88	328
106	21
38	328
112	226
38	328
121	657

Under that condition of things the defendants argue that, as they have already obtained from plaintiff the requisite license for the same year, 1885, as retail merchants, they cannot legally and constitutionally be called upon to pay license as *wholesale* merchants, as the 6th section of Act No. 4, approved January 4, 1882, of the General Assembly of this State, under the 17th class, page 64, specially provides that no license as wholesale dealer can be required of one who sells by retail, that is, 'by other than by the original or unbroken package or barrel only' and who sells to others than 'dealers for resale' and that, 'if they sell in less quantities than original and unbroken packages or barrels, *they shall be considered retail dealers and pay license as such*;' and Art. 206, Constitution of 1879, limits the city ordinance to the terms of the State law.

The section invoked reads as follows:

"Seventeenth class, when gross sales are less than one hundred and fifty thousand dollars, the license shall be fifty dollars (\$50); provided, that no person or persons shall be deemed wholesale dealers, unless he or they sell by the original or unbroken package or barrel only; and provided further, that no person or persons shall be deemed wholesale dealers unless he or they sell to dealers for resale.

"If they sell in less quantities than original and unbroken packages or barrels, they shall be considered retail dealers, and pay license as such."

The last portion of Art. 206 of the Constitution is in these words:

"No political corporation shall impose a greater license than is imposed by the General Assembly for State purposes."

It is manifest that the intention clearly expressed of the Legislature, was to require a license, as well from wholesale as from retail dealers.

The law distinctly provides that, shall be deemed wholesale dealers, those who sell *only* by the original or unbroken package and those who sell to dealers for resale, but it wisely adds *ex industria*, that if they (such dealers) sell in less quantities than original and unbroken packages or barrels they shall be considered retail dealers and pay license as such.

The argument that the word "*only*" found in the first part of the Act, must be read also in the concluding provision, as to who shall be considered retail dealers, for although it is omitted therefrom, the connecting sense requires it to be understood—far from helping, demolishes and gives away the defense completely.

Indeed, if it were true that, are to be considered as retail dealers *only* such as sell in less quantities than original and unbroken packages

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or barrels, it would irresistibly follow that, as the defendants do not sell *only* in such quantities, but also otherwise—they are to be deemed *wholesale dealers* and thus are amenable and chargeable.

The city ordinance (No. 1048, C. S.) follows the State law and is not therefore illegal or unconstitutional.

Under the statement of admitted facts it is impossible to arrive at any other conclusion than that the defendants carry on the tobacco business, both as wholesale and retail dealers.

As the law reaches dealers who transact operations, either as wholesale or as retail merchants, separately, it undoubtedly affects them when they do both indiscriminately.

Judgment affirmed.

No. 9482.

HENRY BEER VS. THE LOUISIANA LIGHT AND HEAT PRODUCING AND MANUFACTURING COMPANY AND THE UNITED GAS PRODUCING COMPANY OF PENNSYLVANIA.

The two defendant companies entered into a contract whereby the Louisiana company transferred to the Pennsylvania company certain valuable rights and privileges in consideration of the Pennsylvania company's agreement to pay to the bond subscribers of the Louisiana company, who would transfer their subscriptions to it, a certain amount of money.

Held: That this created an obligation on the Pennsylvania company to pay the money, subject to the suspensive protestative condition of the bond subscribers' transferring their subscriptions, and no term having been fixed, the obligation was not discharged by the failure and refusal of the plaintiff, a bond subscriber, for a time, to accept the benefit of the contract. Having subsequently offered to perform the condition by transferring his subscription, the Pennsylvania company's obligation to pay became complete, it having received and enjoyed the full consideration of its contract, and plaintiff's vacillation and delay having placed it in no worse condition.

Inasmuch as plaintiff's suit is in affirmance of the contract which it was alleged the Louisiana company had no right to make, and as it is not the latter's fault that plaintiff has not long since received the stipulated consideration, plaintiff's claim against the Louisiana company has no foundation.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

E. B. Kruttschnitt for Plaintiff and Appellee.

John M. Bonner for the Louisiana Company, Defendant and Appellant:

1. Where two parties enter into an agreement to have certain things done for a certain price, if nothing has been done under the agreement and nothing has been paid on

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account of the agreement, it is competent for these parties, by mutual consent, to cancel and annul said agreement on any terms they may deem proper.

And where said agreement is an imprudent one, it is the duty of the contracting parties to cancel and annul it and not to execute it.

2. The plaintiff was neither a stockholder nor a property holder in the Louisiana company, and therefore could not interfere in its management.

The most favorable light in which he can be considered is that of a creditor, and as a creditor he could not interfere with the management of the corporation. *Morawetz on Corp.* § 560.

But when the amount he paid on his subscription had been returned to him, he was not even a creditor.

Should plaintiff be considered a stockholder, he was bound by the act of the majority. *R. C. C. Art. 444.*

3. "It is not necessary to make a tender when it is reasonably certain that the offer will be refused." 106 U. S. 202; 105 U. S. 321; 99 U. S. 186; 26 Ann. 453.

The doctrine of tender cannot be invoked when plaintiff was offered a certain price, to be paid within a certain time, for his bond subscription, and he unconditionally declined to accept the offer. *R. C. C. Arts. 1801-1803; 15 Ann. 609.*

4. Suppose the action taken by the defendants on the 5th of February and the 16th of April gave the plaintiff a right of action, then what was his proper remedy? He certainly cannot sue in affirmance of a contract that he refused to make, and cannot treat a proposition that was rejected as the equivalent of a proposition that had been accepted.

His remedy was either to have sued for damages for the violation of his agreement, or to have brought suit to recover the amount he had paid upon his subscription, as having been paid upon a consideration that had failed. 20 *Central Law Journal*, p. 35 and authorities there cited.

Plaintiff has not sued for damages, and he refuses to receive back the amount he paid upon his subscription.

5. Plaintiff was not injured in any manner by the resolutions of the 16th April, 1883 for his own evidence shows that the Philadelphia company had advanced the money that paid for the real estate, then standing in the name of the Louisiana company.

Kennard, Howe & Prentiss and John M. Bonner for the Pennsylvania Company, Defendant and Appellant:

1. The action is not by a stockholder, or for specific performance, or for damages, but on an alleged contract to pay a fixed sum.
2. A contract is an agreement or convention, which is, essentially, the consensus of two or more persons with respect to the same object—the being of one mind as to one thing. *Dig. 2, 14, § 1; Larombière, T. 1, p. 3; C. N. 1101; C. C. 1761.* Such mutual assent must co-exist at the same moment of time. *Benjamin on Sales*, 2d ed. p. 33. A proposition is rejected even by a modified assent, and still more by a refusal to accept, and comes to our end. *Id.* p. 49. Its force is exhausted. *Wharton on Contracts*, § 9, a.
3. The Pennsylvania company, in this case, simply made a proposition to the plaintiff to pay severally to him and the other bond subscribers, who would transfer to it their subscriptions within sixty days, a certain sum.
4. So far from accepting this proposition the plaintiff rejected it, and it was "at an end." *Benjamin on Sales*, pp. 33-49; *Wharton on Contracts*, § 9 a.
5. Where a proposition is rejected, it is at an end and its force is exhausted, and no tender by the proposer is necessary to prevent the person rejecting it from afterwards coming back and accepting it so as to make it binding. *Id.*
6. There was no stipulation *pour autrui* by the companies to the profit of plaintiff. Even if the Louisiana company acted in the premises as mandatory of plaintiff, yet this state

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of facts does not result in a stipulation *pour autrui*. Pothier on Obl. No. 74; Laurent. Vol. 13, No. 335

7. But if a stipulation *pour autrui* was made by the companies in favor of plaintiff, it was a proposition, and when rejected by plaintiff it came to an end. Larombière, Vol. 1, 119; Wiggin vs. Flower, 5 Rob. 413.
8. The Pennsylvania company cannot be held herein, on any assumption of the obligations of the company, because—
- a. There was no debt from the Louisiana company to plaintiff to be assumed.
- b. Even if there were such a debt, the promise to pay it by the Pennsylvania company being a promise to pay the debt of another, must be in writing, duly signed, and no parol evidence can be received, and if received, even without objection, can have no legal effect. Rev. Stat. of La. Sec. 1443; Mers vs. Labusan, 23 Ann. 747; Dillon vs. Dillon, 32 Ann. 645; Laidlaw vs. Hatch, 75 Ill. 11.

The opinion of the Court was delivered by

FENNER, J. For the proper decision of a case like this, a clear and exact statement of the pertinent facts is all-important.

The Louisiana company (above named) was a body corporate under the laws of Louisiana, organized for the purpose of manufacturing and vending gas in this State.

It had held some contract with the National Petroleum and Water Gas Company, of New York, which is not presented in this record, and is unimportant and mentioned only for the understanding of the case. We have no concern with the history or conduct of the corporation prior to November 16, 1882, on which date a contract was entered into between it and the Pennsylvania company, defendant herein, of which the following were the salient features:

1st. The Pennsylvania company bound itself to erect gas-works in the city of New Orleans, specified and described in the contract, the work to be immediately begun and to be completed by June 1, 1883.

2d. The Pennsylvania company conveyed to the Louisiana company licenses to the exclusive use in this city and State of certain patented processes for the manufacture of gas, including the Hanlon, Johnston, Low, Edgerton and other processes, owned or controlled, or to be owned or controlled, by said Pennsylvania company.

3d. It transferred to the Louisiana company all the rights and privileges conferred by a certain ordinance of the city of New Orleans, No. 6824, Administration Series.

4th. As a consideration for the foregoing, the Louisiana company agreed to pay \$270,000 in money and \$850,000 of its full-paid stock—\$26,000 of the stock to be paid at once, and the money and the remaining stock to be paid monthly and proportionately as the work progressed.

The contract contained many other stipulations not material to our present purposes.

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Of course, the execution of this contract required a provision of funds to meet its obligations, and on the following day, November 17, 1882, the directors of the Louisiana company passed a resolution for the issuance of \$750,000 of bonds of the company, having forty years to run, bearing six per cent interest, payable semi-annually, and secured by mortgage "on all the property, machinery, mains, rights, privileges and franchises now owned by this company, or that may be hereafter acquired." The subscribers to these bonds were to pay ten *per cent* on December 1, 1882, and the rest in installments not exceeding fifteen *per cent* monthly, as called for by the board when required to make payments as the work progressed.

Plaintiff, Henry Beer, subscribed to \$30,000 of these bonds, and paid the ten per cent due on December 1st, and no other call thereon has ever been made.

Under the contract between the Louisiana and Pennsylvania companies, the \$26,000 of stock stipulated to be paid in cash were duly delivered, but no further payment was ever made or called for, because, before much progress had been made in the work, an entire change of plan was resolved on between them. It is to be observed, however, that the Louisiana company had never made any default, and its rights under the contract subsisted unimpaired.

It appears that Edgerton, patentee of the process bearing his name, and which was the one contemplated to be used by the companies, objected to its use on the ground that under his contract with the Pennsylvania company he had stipulated that, where old companies existed, before new companies should have the benefits of its patents, he should first have the privilege of offering them to the old companies; and he claimed the exercise of that right. To settle this difficulty, Gibbs, the manager of the Pennsylvania company, came to New Orleans, and after consultation with Edgerton and the old New Orleans Gas-light Company, concluded that an arrangement might be made satisfactory to all parties concerned.

The basis of this arrangement was an agreement of the New Orleans Gas-light company to buy from the Pennsylvania company the same exclusive license to use in the city of New Orleans the processes for manufacturing gas which had already been transferred to the Louisiana company. What was the price paid by the New Orleans Gas-light Company is not revealed by the record, but it may be assumed to have been sufficient to justify the subsequent proceedings.

Of course it was essential to cancel the contract with the Louisiana company and to obtain a retrocession of these processes before they could be validly transferred to the New Orleans Gas-light Company.

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To this end the Pennsylvania company, through Gibbs as its manager, entered into a contract with the Louisiana company, the exact terms of which will best appear by the following extract from the minutes of the Board of Directors of the latter company, of date February 5, 1883:

"Mr. W. W. Gibbs submitted the following proposition:

"The United Gas Improvement Company, of Philadelphia, would return to the subscribers to the bonds of this company all the instalments paid by them and twenty-five per cent on the amount of their subscriptions to the bonds of this company, payable in cash within sixty days from this date in consideration of certain changes and modifications in the contract between this company and the United Gas Improvement Company (and the transfer of said subscriptions to said company).

"On motion of W. W. Gibbs, seconded by Mr. H. O. Seixas, the following resolution accepting said proposition was adopted by a vote of eight yeas to two noes:

"In consideration of the U. S. Gas Improvement paying a sufficient sum to return to subscribers all the instalments paid by them, and the further payment by said company of twenty-five per cent cash for each of said subscribers on the amount of their subscriptions to the bonds of this company, who will transfer their subscriptions to the U. S. Gas Improvement Company:

"*Be it resolved*, That so much of the contract now existing between this company and the U. S. Gas Improvement Company as requires the erection of gas-works for this company, and so much of said contract as gives to this company the exclusive use in this city of the processes and patents mentioned therein be cancelled and annulled; and in full satisfaction of all payments to be made under said contract by this company, that the president and secretary be and are hereby authorized and empowered to issue to said U. S. Gas Improvement Company, 2340 shares of the full paid stock of this company, said stock to be in full payment and satisfaction of said above-mentioned contract and the exclusive use of the processes and patents mentioned therein in the State of Louisiana, outside of the city of New Orleans.

"On motion of Mr. Gibbs, seconded by Mr. Laplace, the following resolution was unanimously adopted:

"*Be it resolved*, That the resolution adopted by this Board on the 17th day of November, 1882, authorizing the issue of bonds to the amount of \$750,000, be rescinded, cancelled and annulled."

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The foregoing embodies the contract between the companies, which was never reduced to more authentic form. It has been fully executed. The Philadelphia company has received under it everything which it stipulated to receive. The former contract stands cancelled and annulled. The Philadelphia company got back the exclusive right to use the patents and processes referred to in this city and State, and, so far as the city is concerned, has sold and transferred them to the New Orleans Gas-light Company. It has paid to every bond subscriber, except Beer, the amount of cash paid on their subscriptions and the twenty-five per cent additional, and has received the transfer of their rights under said subscriptions.

Beer, at first and for a considerable time, refused to ratify or abide by the contract, but subsequently changed his mind, and on December 13, 1883, offered to surrender his subscription and demanded payment according to the contract, which was declined. He, thereafter, made a formal tender, and then brought the present suit for \$10,500, being \$3,000 cash paid and \$7,500 as twenty-five per cent of his subscription for \$30,000, asserting the solidary liability of both the defendant companies.

The gist of the defense of the Louisiana company is: that, in its contract with the Pennsylvania company, of February 5, 1883, it acted within its powers and did what it had a right to do; that plaintiff was not injured, but was benefited thereby; that if he failed to receive the benefit to which he was entitled under the contract, it was not the fault of the company, but his own in refusing to receive it when it was offered to him; and that, therefore, the company is, in no manner, liable.

Inasmuch as plaintiff sues in affirmance, and not in avoidance, of the contract, and inasmuch as the record fully establishes that plaintiff's failure to reap its benefits is due exclusively to his own fault, we consider the defense perfect, and the judgment against this company must be reversed.

The defense of the Pennsylvania company rests on the assumption that in its contract of February 5th with the Louisiana company, it merely made a *proposition* to the bond subscribers, which was not a contract and could only become so upon the acceptance thereof by said subscribers; and that when Beer, instead of accepting, rejected the proposition, the latter was at an end and all obligations arising from it were terminated.

It is impossible for us to take this view of the case. The relations of the parties and the terms of contract imperatively forbid it. The

Beer vs. Light and Gas Companies.

obligation of the Pennsylvania company to pay the sum herein claimed arises, not from a mere proposition, but from its completed contract with the Louisiana company.

It is vain to say that the proposition was made to the subscribers. The record shows that it was made to the Louisiana company at a meeting of its board of directors, and was then and there accepted and ripened into a complete contract, under which the Pennsylvania company, in consideration of value received, bound itself absolutely "to pay a sufficient sum to return to subscribers all the instalments paid by them and to pay twenty-five per cent cash for each of said subscribers on the amount of their subscriptions, who will transfer their subscriptions to the U. S. Gas Improvement Company."

The only condition affixed was the transfer of the subscriptions. No term was set within which this condition was to be performed. Whether considered as a *stipulation pour autrui* or as the act of a *negotiorum gestor* or unauthorized mandatary, the obligation of the Pennsylvania company, the consideration of its contract, was to pay, not merely to offer or *propose* to pay. The company seeks to discharge its obligation to pay by pleading a former offer to pay and refusal to receive.

Beer, offering to perform the only condition to which the company's obligation was subjected, is denied payment because he had previously refused to perform it. But the Code says: "An obligation to pay money, without any stipulation for time, may be enforced at the will of the obligee." Art. 2050. And again: "The contract of which the condition forms a part is, like all others, complete by the assent of the parties; the obligee has a right of which the obligor cannot deprive him; its exercise is only suspended, or may be defeated, according to the nature of the condition." Art. 2028. "If there be no fixed time the condition may always be performed, and it is not considered as broken until it is certain that the event will not happen." Art. 2038. "The condition being complied with, has a retrospective effect to the day that the engagement was contracted." Art. 2041.

Discarding the untenable theory that the company's dealing was a mere proposition, and holding that it incurred, under its contract, an obligation to pay money, subject to a suspensive protestative condition on the part of the obligee, without a term, which condition is accomplished by plaintiff's tender of transfer of his subscription, we consider that the foregoing textual provisions conclusively demonstrate the company's liability.

Indeed, upon principles of equity and justice, it is difficult to discover any reason why the company should escape its obligation, voluntarily

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incurred, to pay to plaintiff the sum claimed. It has received and enjoyed the full consideration of its contract, the value of which has been in no manner impaired by plaintiff's vacillation and delay in availing himself of its benefits. The only effect of the delay has been to leave the money in the company's hands for a considerable period without interest.

There would seem to be an acknowledgment of plaintiff's right in the offer of the company to pay plaintiff the three thousand dollars which he had paid on his subscription, because, under the terms of its contract, if it is liable for so much, it is liable for the whole.

Under every view, the law and justice of the case are with the plaintiff. It is therefore ordered, adjudged and decreed that the judgment appealed from, in so far as it condemns the Louisiana Light and Heat Producing and Manufacturing Company, be annulled, avoided and reversed, and that in other respects it be affirmed, plaintiff and appellee to pay costs of appeal.

No. 9469.

THE STATE EX REL. NEW YORK GUARANTY AND INDEMNITY COMPANY
VS. ALLEN JUMEL, AUDITOR.

The courts of this State have no jurisdiction over a suit by an individual, the object of which is to enforce specific performance of a contract with the State, where the latter is not a party to the suit, has not consented to be sued and is not represented therein by a State functionary duly empowered to do so, at the bringing of the action.

The power conferred to represent may be recalled. The withdrawal thereof leaves the once constituted agent without authority to further represent.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Kennard, Howe & Prentiss, for the Relator and Appellant:

1. The relator does not ask that the Auditor should levy a tax, but simply that he should estimate and collect one already levied. Such antecedent levy has been customary since 1852, and has been repeatedly held valid by this court. *Hamlin vs. Board*, 30 Ann. 445; *State vs. McGinnis*, 26 Ann. 558; Acts Nos. 176, 177 and 179 of 1853, and No. 134 of 1857.
2. The rights of relator cannot be affected by the 14th and 15th Articles of the Constitution of 1879, because:
 - a. The duty invoked is not legislative.
 - b. The Constitution of 1879 cannot impair a contract right acquired in 1871. *White vs. Hart*, 13 Wallace, 646; 37 Ann. 440; 111 U. S. 716; 32 Ann. 884.
3. Nor can such rights be affected by Acts Nos. 3 and 55 of 1874. 4 Wall. 535; 10 Howard, 190; 102 U. S. 672; 105 U. S. 301; 16 Wall. 314.
4. Nor can they be affected by repeal of State aid by same Acts of 1874. *Id.*
5. Nor by subsequent limitations of the rate of taxation. 13 Wall. 646; 4 Wallace, 535 102 U. S. 672; 105 U. S. 300; 103 U. S. 355; 34 Ann. 1149.

38	337
44	260
38	337
47	115

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6. The rights of relator not affected by adverse decision in its suit against the Funding Board. *Manning's Unreported Cases*, p. 199; 105 U. S. 622.
7. The Act No. 116 of 1869 provided adequate means under Article 111 of Constitution of 1868. *Mather's case*, not reported, 29 Ann. 690; 30 Ann. 443; 25 Ann. 70.
8. The power existing to issue the bonds, and the bonds themselves purporting to have been issued in pursuance of the power, the presumption in favor of the *bona fide* holder is conclusive, and entitles the relator to the relief demanded. 1 Wall. 83, 393; 15 Wall. 355; 92 U. S. 487; 113 U. S. 237.
9. This is not a suit against the State. 14 Ann. 249; 92 U. S. 531.

M. J. Cunningham, Attorney General, for the Respondent and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *mandamus* to compel the State Auditor to perform what is represented as a ministerial duty.

The relatrix company charges that it owns \$250,000 of the bonds of the State, issued under the provisions of Act No. 116 of 1869; that the interest has been paid thereon up to 1873, none being paid since; that by the seventh section of said act it is made the duty of the State Auditor to calculate the rate of taxation on the total assessed value of taxable property in the State, sufficient to pay the interest, and to notify said rate when fixed to the tax collectors, requiring them to collect the same in the manner prescribed by law.

The Auditor, among other defenses, sets up substantially: that this is a proceeding to enforce a State contract; that the State is not a party to the suit; that he has no authority to represent the State in it; that whatever duty and power were once imposed on the State Auditor by the seventh section invoked, have ceased to form part of his functions, because forbidden by the State Constitution, which prohibits the levy of State taxes for any purpose in excess of six mills; that the Court has no jurisdiction over the subject-matter and cannot compel him to make the computation asked and issue instructions for the collection of the tax thus ascertained.

From an adverse judgment the relatrix company has appealed.

It is proper to premise, that it appears from the record that the present plaintiff, as the holder of the same bonds, took steps to have them funded at the rate of sixty cents on the dollar, as a compromise, under the terms of Act No. 11 of 1875, contradictorily with the State Board of Liquidation, but was not allowed to do so, the court holding that the bonds had not issued "in strict conformity to law and for a valid consideration," and that want of knowledge of the fraud and acquisition for a valid consideration would not relieve third parties. *Manning's U. R. C.* p. 118.

On writ of error, the United States Supreme Court, after reviewing the facts, considered that the question was not whether in an authorized action against the State, Act 11 permitted the State to prove, as against a *bona fide* holder, that the bond was invalid; but whether such holder was entitled to the funding offered to holders of securities, valid in the hands of the first taker.

The court held that every legal right which the original holder acquired still remained and was enforceable by the company,—this obligation of the State to pay continuing to exist and the judgment refusing the funding being no bar to any *proper* proceeding for payment.

The court, on the federal question, distinctly observed that the State had a right to say, when she proposed a scheme for the compromise of her debts, what creditors should be included, and that, as the act in question, No. 11 of 1875, did not impair the obligation of the contract with the first taker, it was not to be viewed as unconstitutional.

The federal question having been correctly decided below, the judgment was consequently affirmed.

The present proceeding contemplates the enforcement of the contract of the State with the first takers, insisting on specific performance by the levying and collecting of the required tax.

The State Auditor denies the jurisdiction of the court, because it is a suit against the State, who is not made a party and who has never consented to become such; because he does not and cannot represent the State, the duty and powers conferred by the section relied on having been recalled by the Constitution.)

The fact is that the State is the real defendant in the case, and that she has not been made a party.

Neither does the Act of 1869, nor any other legislation, permit the State to be sued in this or any other similar action.

It would be pure loss of time to reason and to adduce authorities to show that the pretensions of plaintiff cannot be adjudicated upon in the absence of the State; for it is self-evident that the remedy asked could not be allowed without finally determining that the bonds sued on constitute part of the indebtedness of the State which must be paid. This cannot be done.

But the relatrix company claims that suit was authorized by the Act of 1869, sec. 7, against the State, represented by the Auditor; that the suit is thus brought, and that the defense does not hold good.

It is sufficient to say that if this was ever so, the authority to sue, as well as that to be sued, were formally revoked by the State, in the exercise of her supreme political power, as results from the prohibi-

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tions placed by her Constitution against the levy and collection of any State tax in excess of six mills. . See Const., art. 209, and the State debt ordinance.

In the cases of *Louisiana vs. Jumel*, and of *Elliott vs. Wiltz*, both taken from the United States Circuit Court for the Eastern District of Louisiana to the United States Supreme Court, in which it was sought to take from the State Treasury, by proceedings against the Auditor and the Treasurer, money collected to pay coupons of State bonds maturing on January 1, 1880, and diverted by the debt ordinance, which forms part of the Constitution, and applied to other and independent purposes.—the Supreme Court of the United States distinctly held that the ordinance having forbidden the payment of the interest and withdrawn from the State officers the means of carrying her contract into effect, the execution of the contract could not be enforced nor the relief sought awarded in a suit to which the State is not a party and which is brought against officers who are merely obeying the positive orders of the supreme political power of the State. 107 U. S. 712 (XVII Otto); see also 33 Ann. 498, quoted with approbation.

The reply of the relatrix company to this position is, that the doctrine is established and familiar that, as to the contract rights acquired by it, no provision of the Constitution of 1879 can have any legal effect. In support, many authorities are quoted, but they have no bearing. They differ *toto calo*, as not one refers to a suit by an individual to enforce a State contract, affected by some constitutional provision, expressing the adverse *will* of the State to the execution of the contract.

It was long since solemnly announced by the Supreme Court of the United States, through its organ, Chief Justice Taney:

“Those who deal in the bonds and obligations of a sovereign, are aware that they must rely altogether on the sense of justice and good faith of the State, and that the judiciary of the State cannot enforce the contracts without the consent of the State, and the courts of the United States are expressly prohibited from exercising such jurisdiction.” *Bank of Washington vs. Arkansas*, 20 How. 530.

This announcement has never been questioned or gainsaid, so well founded is it on principles of the highest order in political economy. 33 Ann. (511-2.)

In the Virginia coupons cases, 114 U. S. 332, the principle was recognized, the court by a mere majority holding, however, that it did not apply to a case in which the State actively attempted a violation of its contract. The main question there was, after the State had issued her bonds with coupons to be received in payment of taxes, whether the

State could revoke the right to give in payment, and where an offer or tender had been made, whether the State could seize the taxed property and subject it to the claim. The injunction was maintained.

In that case, nevertheless, four Justices dissenting, one of them, Mr. Justice Bradley, well said:

* * "No State can be coerced into a fulfillment of its contracts or obligations to individuals by the instrumentality of the Federal judiciary. It is true it cannot proceed against them contrary to its contract, but on the other hand it cannot be proceeded against on its contract. All those who deal with a State have notice of this fundamental condition. They know, or are bound to know, that they must depend upon the faith of the State for the performance of its contracts, just as if no Federal Constitution existed, and cannot resort to compulsion unless the State chooses to permit itself to be sued.

"Moreover, the Eleventh Amendment is not intended as a mere formula of words to be slurred over by subtle methods of interpretation so as to give it a literal compliance without regarding its substantial meaning and purpose. It is a grave and solemn condition, exacted by sovereign States for the purpose of preserving and vindicating their sovereign right to deal with their creditors and others propounding claims against them according to their own views of what may be required by public faith and the necessities of the body politic. We have no right, if we were disposed, to fritter away the substance of this solemn stipulation by any neat and skillful manipulation of its words. We are bound to give it its full and substantial meaning and effect. It is only thus that all public instruments should be construed."

In the matter now under consideration, we conclude that, as the object in view is the enforcement of a contract of the State, as the State is not directly or indirectly a party to the suit, as the defendant has no authority to represent the State, we have no jurisdiction to hear the cause and determine whether or not the obligation of the contract has been impaired.

Under such circumstances, the judgment appealed from is affirmed, with costs.

No. 9691.

E. J. HART & CO. VS. ANGER & NICOL.

The following clause in an act of partnership does not attest an agreement binding on both parties that the partnership should continue at the death of one of the partners between the survivor and the heirs of the deceased: "In the event of the death of either of the parties to this act, it is to be optional with the survivor whether said co-partnership shall continue or not."

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Such a stipulation does not create an agreement equally binding on both parties, but it gives all the advantage to the survivor, without any corresponding right to the heirs of the deceased. It does not comply with the requirements of the Civil Code touching the right of continuing a partnership after the death of one or more of the partners, and it has no sanction in law. Hence, it cannot be enforced.

A PPEAL from the Twenty-third District Court, Parish of Iberville.
Talbot, J.

Read & Goodale for Plaintiffs and Appellees:

1. That principle of the old Roman law adhering to the laws of Spain and obtaining in Louisiana up to the adoption of the Civil Code in 1823, which treated as nullities stipulations in acts of partnership, providing for the continuance of the partnership between the survivor and the heirs of the partner dying first, was superseded by Art. 2880 (2851) of the Civil Code. The exception in said article, "unless an agreement has been made to the contrary," means that an agreement in the articles of partnership for continuance of the partnership binds the estate of the partner dying first. Code Napoleon, 1863, Duvergier, 440; Troplong, 952, 953; Duranton, 473; Mourlon, 3d vol., p. 401; Zacharie, 2, p. 252, § 384; Lindley on Part., 232 (304), notes; Story on Partnership, §§ 201, 317, note, 319 a, 201 a, note; Burwell vs. Mandeville's Executors, 2 How. 560, and cases therein cited; *ex parte* Garlan, 10 Ves. 110; *ex parte* Richardson, 3 Madd. 138, 157; Thompson vs. Andrews, 1 Myl. and K. 116; Pitkin vs. Pitkin, 7 Conn. 307; Alexander vs. Lewis, 47 Tex. 481; Cook vs. Rogers, 3 Fed. Rep. 69; Jones vs. Walker, 2 Morrison's Trans. 237; Smith vs. Ayres, 101 U. S. 320; Kottwitz vs. Alexander, 34 Tex. 639.

Especially: Laughlin vs. Lorenz, 48 Penn. St. 275; Davis vs. Christian, 15 Gratt. 11; Taylor vs. Castle, 42 Cal. 367; also, Collyer on Partnership, vol. 1, p. 152, note; Butler vs. American Toy Co., 46 Conn. 136; Walker vs. Wait, 50 Vt. 668.

Especially: Scholefield & Taylor vs. Eichelberger, 7 Peters, 594, and 2 How. 560; also, Duffield vs. Brainerd, 45 Ct. 424.

2. Where the administratrix of the estate of a deceased partner, whose surviving partner has elected, under option given in the articles of partnership, to continue the partnership for the term fixed in said articles, makes no objection thereto, but continues the partnership for a term of years, she will be presumed to have ratified such a stipulation, even were such ratification necessary.

Such ratification will also be presumed against the heirs. Grief & Byrnes vs. Boudou-sque & Fortier, 18 Ann. 631; Story on Partnership, secs. 36, 37, 48, 49, 53, 54, 64 and 65; 3 Kent, sec. 43, pp. 31, 33; Richardson vs. DeBuys & Louyer, 4 N. S. 127; 9 Johns. 439; City of New Orleans vs. Gauthreaux, 32 Ann. 1126; Parsons on Part., 30, 31; Robertson et al. vs. DeLizardi et al., 4 R. 300; McDonald vs. Millandon, 5 La. 408; Dodd, Brown & Co. vs. John Bishop & Co. et al., 30 Ann. 1178; 37 Conn. 239; 4 Barn. & Ald. 663; 16 Ves. 49; 17 Id. 404; 18 Id. 300; 19 Id. 291; 6 Madd. 145, n; 4 East. 144; 10 Johns. 226; 16 Id. 34; 1 Story C. C. 371; 1 Cliff. 28; Collyer on Part., sec. 6.

Especially: Alsop vs. Mather, 8 Conn. 587.

3. Such a stipulation, in an act of partnership, is self-operative, is a charge upon the estate, and requires no ratification. Duranton, Cours de Droit Francais, vol. 17, p. 557, *et seq.*, commenting on Art. 1862, C. N., No. 473; Troplong, Livre III, tit. ix, art. 1863, No. 949-964; Mackeldy's Roman Law. p. 329, n; Price vs. Matthews, 14 A. 11.
4. Even minority is no exemption from its provisions. 26 Juill., 1837, Liege (p. 21, 668); Troplong, No. 954, de Fréminville, Tr. de la Minorité, t. 2, No. 1006; Duranton, t. 17, No. 473; Codes Annotes Sirey, ed. 1859. vol. 1, p. 862.

David N. Barrow, contra.

The opinion of the Court was delivered by

POCHÉ, J. The facts are as follows:

In February, 1881, Joseph Anger and T. W. Nicol formed by authentic act a partnership for the cultivation of sugar-cane, for the manufacture of sugar, and for the business of keeping a general country store.

The partnership was to last five years, and the act contained the following stipulation:

"In the event of the death of either parties to this act, it is to be left optional with the survivor whether said co-partnership shall continue or not."

Joseph Anger died before the end of the year 1881, and his widow was qualified as testamentary executrix of his succession.

On the 5th of December, 1881, Nicol, the surviving partner, presented to the District Court of Iberville a petition, in which he recited substantially the foregoing facts, and in which he indicated his intention to continue the co-partnership, claiming the right, as conferred in the act, of the full administration of the business and of the property of the partnership for the unexpired term of five years.

The record does not show what action, if any, was taken by the court on that petition, but it appears that no visible change occurred in the management of the partnership business.

The record shows that after the death of Anger, Nicol, as the ostensible manager of the firm of Anger and Nicol, bought considerable merchandise from plaintiffs for resale in the country store, which continued in the name of the firm, and that up to November, 1884, the aggregate cost of the goods thus purchased amounted to \$2,637 50, the larger portion of which is represented by a promissory note for the sum of \$2,604 26, executed on May 9, 1884, and signed by T. W. Nicol in the name of the firm.

The object of this suit is to obtain judgment on that indebtedness, against the succession of Joseph Anger and T. W. Nicol, *in solido*; and the present appeal is taken by the administratrix from a judgment in favor of plaintiffs as prayed for.

Plaintiffs' contention, which is the theory of the judgment of the district court, is that under the terms of the act of partnership, the co-partnership as formed thereby, continued until the expiration of the five years therein stipulated, and that therefore the surviving partner was clothed with legal authority to contract the indebtedness sued upon, in the name of the partnership.

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As legal authority for the stipulation invoked, we are referred to Article 2880 of the Civil Code, which reads: "Every partnership ends of right by the death of one of the partners, unless an agreement has been made to the contrary."

It is then argued that the stipulation herein above transcribed from the act of partnership has the legal effect of removing the partnership beyond the domain of the general rule, and that it places it under the effect of "an agreement to the contrary" within the scope of the exception contemplated by the article.

Counsel for appellees have made a very thorough and intelligent investigation of the jurisprudence of this and of other States of the American Union, of France, of Spain, and of ancient Rome, touching the legal and binding effect of an agreement between partners looking to the continuation of the partnership, after the death of one or more of the partners, between the survivor or survivors and the heirs of the deceased,—and they call our attention to the dearth of opinions on the subject in our own reports.

Counsel of both parties are anxious that we should discuss the matter, and finally settle the question, which is of unquestionable importance to commerce in this State. But we are constrained to disappoint them, for in our view of the case we are met with a question which overshadows this particular controversy, and on which we must rest our decision. That question is: Does the act of partnership in this case contain a stipulation that in case of the death of one of the partners, the partnership was to continue between the heirs of the deceased and the surviving partner, and are plaintiffs seeking to enforce an obligation arising under such a contract in their present action?

To be well understood, the exception contained in Article 2880 must be read with the provisions of Article 2882, which are as follows:

"If it has been stipulated that, in case of the death of one of the partners, the partnership should continue between the heir of the deceased and the surviving partners, or between the surviving partners only, either of these stipulations shall be observed."

Now, counsel and the district judge all seem to construe the clause on this subject-matter in the act of partnership between Anger and Nicol, as containing such a stipulation. The language of the Code clearly contemplates a positive agreement or contract between the partners that the partnership should continue after the death of one or more of them. But we can draw no such meaning from the language used in this connection in the act now under discussion. That clause reads: "In the event of the death of either of the parties to this

act, it is to be left optional with the survivor whether said co-partnership shall continue or not."

Read in the light of Article 2880, that language means that at the death of either of the parties, the partnership would be dissolved, unless at his option the survivor should choose to make it continue. But it is no where stipulated, as a contract between the parties, that the death of either would not dissolve the partnership. It may have been the intention of the parties to have made such a stipulation. If such be the case, it is plain that the notary did not understand them, or that he was unfortunate in the use of the words which he wrote as containing the agreement of the parties. By an agreement must be understood a stipulation which equally binds both parties, and in the case provided for by the Code, it should have the effect of continuing the partnership after the death of one of the partners, as a continuing contract, without regard to the wishes, desires or option of the survivor. Such is not the import or legal scope and meaning of the language used in the clause under consideration.

Our own courts, and the commentators of the Article 1868 of the Code Napoleon, which is the origin of our Article 2882, have uniformly construed the power thus conferred on a party to burden his heirs by anticipation, very strictly, and have restricted its effect within a very narrow compass.

Troplong says on the subject. "Comme la continuation de société est un état exceptionnel, il ne faut pas étendre la convention d'où elle découle." *Droit Civil Expliqué*, No. 955, v. 2, p. 427.

Commenting on a similar provision in the Code of 1808, this Court said: "This may happen when the heirs are of age, and accept the benefit of a stipulation made in their favor, like any other third person, who would perhaps be at liberty to claim the benefit of such a stipulation. But we are clearly of opinion that according to the laws and usages of commerce, as they prevailed in this country at the time of the adoption of the Code of 1808, no stipulation could be made by partners, absolutely binding on the heirs of one of them who should die, to continue the partnership after his death, and be made responsible for contracts made in the partnership name." *Louisiana Bank vs. Kenner's Succession*, 1 La. 384.

And later on, the Court said on the same subject: "A partnership is dissolved by the death of one of the partners, unless there be a stipulation to the contrary, but where the succession of a partner in a particular partnership is insolvent, and administered with the benefit of inventory, the partnership cannot be continued without the assent of

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all the creditors, though the articles of partnership have provided for its continuance." *Buard vs. Lemée*, 12 Rob. 243.

Keeping in mind that these restrictions have been applied to cases in which there was a stipulation to continue the existence of the partnership, after the death of one or more of the partners, we see that in the instant case we are expected to enlarge the meaning of a clause in a contract, which purports at most to vest discretionary power in the survivor, so as to eke out of it an absolute agreement between the parties to continue the existence and operation of the partnership after the death of one of the partners.

As a striking illustration of the old adage that "the wish is father to the thought," we find that unconsciously the parties who refer to the clause in question change its phraseology and thus shape it so as to impart the meaning of the article of the Code.

Thus, in his petition to the court averring his desire to continue the partnership, the attorney of Nicol refers to the clause as saying: "That by said co-partnership it was stipulated that the death of either party should not dissolve the same unless the survivor so desired." * * *

And in his opinion, the district judge describes the same clause, as follows: "The articles of partnership between Nicol and Anger stipulated that in the event of the death of either, that the partnership should continue for five years."

The difference between the real language and the literal as well as legal meaning of the clause in the act, and the two references just quoted, is so striking that it requires no argument to show that the judge of the lower court had committed a serious error as to the nature of the case which he was trying.

These considerations are perhaps sufficient in themselves to defeat plaintiffs' claim against the succession, but in addition, the record shows that there is no claim of a partnership having continued between the survivor and the *heirs* of the deceased. The right, as conferred by the Code, is restricted to the *heir*, and no provision of our laws can be construed so as to extend the right to executors, administrators or other official representatives of successions. Hence the impossibility of recovering against the executrix in this case.

Under the views which we adopted, we eliminate the question of the kind of partnership which had been formed between Anger and Nicol.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now ordered that plaintiffs' demand against the administratrix of the succession of Joseph Anger be rejected, and their action against her dismissed at their costs in both courts.

Chamberlain vs. Worrell.

CONCURRING OPINION.

FENNER, J. Article 2881 C. C. declares: "Every partnership ends of right by the death of one of the partners, unless an agreement has been made to the contrary."

I think this sanctions any otherwise lawful "agreement to the contrary," and that the mention of particular agreements of that kind in the following Article 2882, is only exemplary and not limitative. Hence, I could see no objection to that feature of the act of partnership herein which subjected the continuance of the partnership to the option of the survivor.

If the deceased partner could have validly created an absolute obligation to continue the partnership, he could have created a conditional one.

But the object of this suit is to hold, not the heirs, but the executrix administering the succession of the deceased, bound under the continued partnership. I think this cannot be done, at least without proof that the succession has no creditors and that the executrix represents no interests except those of the heirs alone. A man may bind his heirs by such agreement, but he cannot bind his creditors.

Thus it was held that the widow and heirs of a deceased partner could not, by voluntary agreement, continue a partnership as to the succession without the consent of the creditors. *Buard vs. Lemée*, 12 Rob. 243.

The administering executrix represents creditors as well as heirs. If the plaintiff has any rights, he must look to the heirs alone, not to the succession or the administratrix.

For these reasons I concur in the decree.

Manning, J., concurs in this opinion.

No. 9669.

D. H. CHAMBERLAIN VS. ROBERT WORRELL.

The general rule governing the measure of damages in actions for tortious conversion is the value of the property converted with interest.

The rule is subject to exceptions where the conversion is accompanied by violence or personal outrage, and perhaps where other particular damage is shown to have been clearly and directly occasioned by the wrongful act.

But in this case we see no reason to disturb the verdict of the jury, which applied the general rule.

State vs. Chapman.

A PPEAL from the Ninth District Court, Parish of Tensas.
Young, J.

Steele & Garrett for Plaintiff and Appellant.

Wade R. Young and Farrar & Kruttschnitt for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. Defendant, Worrell, is the keeper of a public landing on the Mississippi river, in which capacity he received from plaintiff six bales of cotton to be shipped by him to plaintiff's cotton factors in New Orleans, Shattuck & Hoffman.

Plaintiff being indebted to Worrell, the latter, instead of complying with the terms of his bailment, diverted the six bales and consigned them to his own merchants in New Orleans.

This was undoubtedly a tortious conversion, without legal excuse.

Plaintiff brings the present action for damages, claiming the value of the cotton and about \$6000 as consequential damages.

The case was tried by a jury, who disallowed all the damages claimed, except the value of the cotton, for which verdict and judgment were rendered, and from this judgment plaintiff is the appellant.

The jury has simply applied the general rule governing the measure of damages in actions for tortious conversion, which is the value of the property converted with interest. *N. O. Draining Co. vs. DeLizardi*, 2 Ann. 280; *Badille vs. Tio*, 7 Ann. 487; 1 *Sutherland on Damages*, 173; 3 *Id.* 487, *et seq.*

The rule is not without exceptions, as where the conversion is accompanied by violence or personal outrage, or where other damage is shown to have resulted clearly and directly from the wrongful act.

But we have carefully examined the testimony in the case and have considered the various points made by counsel, and without further particularizing them, we are not disposed to disturb the verdict of the jury, which we think is sustained by the law and does substantial justice.

Judgment affirmed.

9596.

THE STATE OF LOUISIANA VS. W. H. CHAPMAN.

This Court has not jurisdiction of a criminal cause when the fine imposed is three hundred dollars. It must exceed that sum.

If the costs added to the fine make an aggregate of over three hundred dollars, that will not confer jurisdiction. The fine must exceed that sum by the express letter of the Constitution.

Insurance Company vs. Gerson et al.

The obligation to pay the costs of a criminal prosecution rests upon a convicted defendant as a necessary consequence of the conviction, and would there abide whether expressed in the judgment or not.

A PPEAL from the Tenth District Court, Parish of Rapides.
Blackmar, J.

M. J. Cunningham, Attorney General, and *J. C. Wickliffe*, District Attorney, for the State, Appellee.

H. L. Daigre and *E. G. Hunter* for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The defendant was prosecuted for retailing spirituous liquors without a license, and on conviction was sentenced to pay a fine of three hundred dollars and the costs, and in default of payment to be imprisoned in the parish jail for sixty days.

Our jurisdiction in criminal cases is restricted to those wherein the punishment of death or imprisonment at hard labour may be inflicted or a fine exceeding three hundred dollars is actually imposed. Const. Art. 81.

The fine imposed on the defendant does not exceed three hundred dollars. It is exactly that sum. We have no more jurisdiction where the fine is three hundred than we should have if it was only three dollars.

The costs cannot be added to the fine so that the aggregate will make a sum within our jurisdiction because the *fine* must exceed three hundred dollars. And besides, the payment of costs by a convicted defendant or the obligations to pay them follows necessarily upon the conviction and rests upon the convicted party whether expressed in the judgment or not.

This Court has uniformly refused to assume jurisdiction in criminal causes unless they fall within the express letter of the Constitution. *State vs. Brown*, 27 Ann 236, and cases therein cited.

There is no motion to dismiss, but consent neither express nor implied can give us jurisdiction and therefore

The appeal is dismissed.

No. 9665.

**MECHANICS AND TRADERS' INSURANCE COMPANY VS. NATHAN
GERSON, ET AL.**

An order refusing or revoking permission to file a supplemental petition is not ordinarily appealable. No doubt, however, the rule would be different if the object of the supplemental petition were to engraft a revocatory action on the principal suit and to make the third persons concerned parties. Such right is given by Arts. 1972 and 1975, C. C.,

Bertrand vs. Knox et al.

and being the only mode in which the revocatory action can be prosecuted before judgment, the right should be protected.
In this case, however, the supplemental petition does not present the features of a revocatory action, and the ruling of the court was correct.

A PPEAL from the Fifteenth District Court, Parish of Pointe Coupée.
Yoist, J.

O. O. Provosty, for Plaintiff and Appellant.

Thos. H. Hewes for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. This record presents a separate appeal taken, in the case just decided, from an interlocutory order of the judge revoking an order previously made by him permitting a supplemental petition to be filed.

The object of this supplemental petition was to make Barbara Sauter and her husband parties with the view of recovering judgment against them.

An order refusing or revoking permission to file a supplemental petition is not ordinarily appealable. *Penrice vs. Crothwaite*, 11 Mart. 547; *Giordano vs. Thomas*, 13 La. 315.

No doubt a different rule would apply where the object of the supplemental petition was to join a revocatory action to the principal demand, and for that purpose to make the third persons concerned parties. Such a right is granted by Art. 1975 and 1972, C. C., and being the only mode by which the revocatory action can be prosecuted before judgment, the right should be protected.

But after careful examination of the supplemental petition, we cannot class it as a revocatory action on the ground either of fraud or simulation. It does not pray for the judgment appropriate to such an action, as stated in Art. 1977, but asks for an independent money judgment against the Sauters.

The matter is of slight consequence, because under the judgment rendered by us in the principal case, plaintiff's remedy, if he is entitled to any, is open in an independent action, which would be as effective as if the case were remanded.

Judgment affirmed.

No. 9372.

C. P. BERTRAND VS. N. K. KNOX ET AL.

In an action to annul a judgment, all parties to the judgment must be made parties to the suit, as a general rule.

Where a married woman is sued, but in the petition she is not so described and no order is asked for her authorization, and more than

MacFarland & Dupré vs. Lehman, Abraham & Co.

a year after the institution of the suit an amended petition is filed, wherein she is alleged, for the first time, to be a married woman, and the court is asked to authorize her to defend the suit, and the order therefor is then entered but no notice of the order is served upon her, and no delay allowed her to prepare her defense—a default being taken against her so soon as the order was signed—and she never thereafter appears in the suit;

Held, that the wife was not a party to the suit.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Sherburne, J.*

Favrot & Lamon for Plaintiff and Appellant.

D. N. Barrow and *Knox & Laycock* for Defendants and Appellees.

The opinion of the Court was delivered by *TODD, J.*

No. 9459.

MACFARLAND & DUPRÉ vs. LEHMAN, ABRAHAM & CO.

In this suit for damages for wrongful attachment, it appearing that, prior to the attachment, the financial embarrassments of plaintiffs were such as to necessitate the stoppage of their business unless they could obtain relief from some source; and it not appearing that there was any source from which such relief could be obtained, they cannot recover damages for breaking up of the business and loss of credit therein as occasioned by the attachment.

The sale of plaintiffs' rice mill, voluntary or forced, being inevitable, and they having tried in vain to find a purchaser before the attachment, and the forced sale thereof having been made after due advertisement and on twelve months credit, and no evidence being produced to show that anyone was or had been ready or willing to buy at a higher price, and none to show any deterioration in value resulting from the seizure, we are bound to accept the price bid at the sale as the criterion of its value, and to reject the demand for damages on that account.

Considering the open and honest dealings of plaintiffs and their faithful efforts to pay their creditors at every sacrifice, communicated to all interested and to defendants themselves, the latter's proceeding by attachment, on the charge of fraudulent intent, was peculiarly injurious and insulting to plaintiffs, and substantial damages are allowed therefor.

A PPEAL from the Civil District Court for the Parish of Orleans. *Rightor, J.*

Percy Roberts for Plaintiffs and Appellees.

White & Saunders for Defendants and Appellants.

The opinion of the Court was delivered by

FENNER, J. This is an action for damages resulting from the wrongful issuance of an attachment, being the same writ of attachment which

MacFarland & Dupré vs Lehman, Abraham & Co.

was considered by us in the case of Lehman, Abraham & Co. vs. MacFarland & Dupré, reported in 35 Ann. 624.

In their petition herein, MacFarland & Dupré aver that they have suffered \$30,000 actual damages from the attachment of which we have spoken. They itemize their claim as follows:

1. For lawyer's fees incurred by petitioners on account of said attachment	\$ 350 00
2. For printing brief in said suit	11 25
3. Paid stenographer for testimony taken by him	64 75
4. Rent paid on building Nos. 141 to 149 South Peters street, from November 14, 1882, to January 25, 1883	396 00
5. For loss of profits in their business caused by said illegal attachment during the term of said attachment and detention	8,000 00
6. For loss caused your petitioners by the forced sale of their said rice mill below its real value	8,000 00
7. For the breaking up of their business, the destruction of their credit and commercial standing, loss of time, trouble and distress of mind, wholly and exclusively caused by said wrongful, illegal and malicious attachment and detention	13,178 00

Making in the aggregate the sum of.....\$30,000 00

There is no serious dispute as to the liability of defendants for the first four items, the respective amounts of which were fully proved, and were allowed by the judge *a quo*. He rejected the fifth item for loss of profits and the seventh item for breaking up of business, loss of credit, etc., and allowed the sixth item for loss on the forced sale of the mill, as claimed.

So far as the loss of profits and the breaking up of their business are concerned, we are constrained to sustain his rulings.

We cannot avoid the conclusion that the breaking up of their business and the consequent loss of profits resulted from the financial embarrassments in which plaintiffs were placed, entirely independent of the attachment.

They could not have been averted otherwise than by obtaining indulgence from their creditors, which the creditors refused to grant, or by a sale of the whole or a part of the mill, which they were unable to effect, and which, even if effected for the whole, would necessarily have terminated their interest in the concern.

MacFarland & Dupré vs. Lehman, Abraham & Co.

Such was the clear acknowledgment of plaintiffs themselves in their defense of the attachment suit, as the excuse for their efforts to dispose of their property, and such was the theory upon which we maintained their defense.

Thus we said in our opinion: "The record shows that the defendant firm, owing to heavy losses sustained in speculation in rice, had become financially embarrassed and so badly crippled that their business could not longer continue. The partners, therefore, concluded to sell their mill for the purpose of meeting their obligations, and this intention was at once communicated to their heaviest creditors, including the plaintiffs in this suit. * * * The record not only fails to show any fraudulent design of defendants, but it proves conclusively an honest, honorable and persistent intention on the part of these unfortunate debtors to make any sacrifice necessary to the payment of all their debts and liabilities."

On these grounds we held that the attachment was wrongful, though, even then, by a divided Court.

We have carefully reviewed so much of the evidence in that case as was offered in this, and it satisfies us that the embarrassment existed to an extent incompatible with the continuance of the business in absence of relief, which was not forthcoming. The refusal of Maxwell & Peale and of Lehman, Abraham & Co. to extend the maturities falling due on Monday, November 13th, undoubtedly brought about a crisis in plaintiffs' business which necessitated its suspension until relieved.

They had no rice on hand and no money to buy with, and their mill must have remained idle unless they could buy rice for milling on credit. Their credit had undoubtedly been good; but their default in paying for defendants' rice sold on ten days' time, which they had already resold and of which they had received the price, together with approaching necessary defaults on similar transactions, must have paralyzed the highest credit. They fully recognized this fact; admitted, in advance of the attachment, that they were "frozen out," and fell back on the desperate alternative of selling an interest in their mill, or the mill itself.

Their claim that, but for the attachment, they could speedily have raised money by such a sale or otherwise, and that their business would then have gone swimmingly on, is sustained by nothing but their own asseverations, honestly believed no doubt, but supported by no proof that any one was willing to buy or to advance them money on any terms. It is true a Mr. Tisne had their proposition of sale under

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consideration, but he had asked for further time, and he is not even produced as a witness to show what his determination would have been. Several other persons to whom the proposition had been offered had positively declined, and these embraced the persons most likely to desire such an investment.

We find nothing to satisfy us that plaintiffs could have found any means of extricating themselves from their embarrassment and of continuing the business. and, therefore, hold that the breaking up of their business and consequent loss of profits, the latter doubtful at best, were not attributable to the attachment.

The judge allowed as damages the sum of \$7,700, the difference between \$18,000, the estimated value of the mill, and \$10,300, the price which it brought at the forced sale.

The sale was effected under a *fi. fa.* issued on a judgment obtained by Maxwell & Peale against the plaintiffs, under the following peculiar circumstances.

Maxwell & Peale were holders of a note having at the date of the attachment about six months to run to maturity. As soon as the attachment was levied, plaintiffs voluntarily substituted for the immature note one past due, on which Maxwell & Peale immediately brought suit and obtained judgment by default, without defense by plaintiffs. On this judgment *fi. fa.* issued, and the mill was seized and advertised for sale. By consent of parties, the leases of the property on which the mill was erected were offered at the same time, and the whole was advertised for sale on twelve months' credit. The property was adjudicated at \$10,300 to the last and highest bidder.

We pretermit consideration of the questions as to whether such proceedings do not present serious features of a consent sale, and whether the attachment can be considered as the legal cause of the damage, if any, occasioned thereby.

Mr. Maxwell testifies he would not have sued if the attachment had not been levied. He could not have sued if the substitution had not been made. Other creditors have not testified that they would not have sued regardless of the attachment. It is very certain that Lehman, Abraham & Co. would have sued, whether they had attached or not. In absence of any proof of the ability of plaintiffs to consummate any arrangements to settle with their creditors and continue the business, we see no reason why other creditors should not have sued, and why Maxwell & Peale, if they had obtained the substitution, should not have done the same.

The evidence satisfies us that the sale of the mill, voluntary or forced,

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was inevitable, unless plaintiffs could raise means to settle their indebtedness and continue the business. While professing great confidence in their ability so to do, they have pointed us to no source from which aid could have been obtained, except to a possible sale of an interest in the mill, which they had tried in vain to make, and they have failed to produce a single person who testifies that he would have given the price demanded or any price greater than that of the adjudication.

Testimony as to the cost of the mill and opinions as to its value are, therefore, ineffective.

If it were clear that, but for the attachment, plaintiffs could have held and used their mill, and that no sale would have taken place, we might accept the value to *them* as the standard by which to measure the loss occasioned by the forced sale.

But if a sale was necessary, the criterion of value is obviously the price that can be obtained. Now we have searched the record in vain for any evidence showing that anyone was ready or willing to pay more for the mill than it brought under the hammer.

The terms of the public sale were of the most advantageous character, well calculated to induce purchasers at the fullest price.

There is no evidence of any injury or deterioration to the property during the seizure, or of any reason why it should not have brought as much at public sale as otherwise. It is not like cotton or dry goods, which have a certain market value at which they are readily convertible into cash, and which, when sacrificed at a forced sale below their value, afford a ready measure of the loss occasioned thereby.

Hence the following cases quoted do not apply: Duperron vs. Van Winkle, 4 Rob. 41; McDaniel vs. Gardner, 34 Ann. 34; Frank vs. Chaffe, Id. 1205.

On the whole we are compelled to conclude that the allowance for alleged loss on the sale of the mill was error.

It only remains to consider the damages claimed for injury to their commercial standing as individuals, and loss of time, trouble and distress of mind occasioned by the wrongful attachment.

Evidence on these points is scanty, but even if fuller, could have thrown little light not reflected from the very facts of the case.

We have never seen an example of debtors who were making more faithful and earnest efforts to pay their creditors, and who were more determined to do so even at the heaviest sacrifice. Their purposes and motives were thoroughly honest, their action was open and above board, communicated to all interested and to the defendants them-

 Succession of Labauve.

selves. Under these circumstances the action of the latter in taking the attachment upon an affidavit that plaintiffs were seeking to defraud their creditors and place their property beyond their reach, was insulting and aggravating in the extreme, and well calculated to wound and incense them. Necessarily, also, it occasioned trouble and loss of time, and cast injurious imputations upon their character as merchants and honest men.

We think they are entitled to substantial reparation for these injuries, which we shall fix at one thousand dollars.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by reducing the principal sum allowed therein from \$8,522 to \$1,822, and that as thus amended the same be now affirmed, appellees to pay costs of appeal.

Todd, J. dissents from so much of the opinion and decree as allows more than \$822.

No. 9678.

SUCCESSIONS OF ZENON AND ELISE LABAUVE.

AUSTIN HUNT ET AL. VS. C. A. BRUSLÉ ET ALS.

An appeal taken from an order refusing to dissolve an injunction on the face of the papers, is not maintainable.

The rule is in the nature of an exception of no cause of action. It is merely an interlocutory order requiring no execution, producing no effect. Its rendition can work no irreparable injury, the less so when the injunction simply arrests funds in the hands of the executive officer of the court.

A PPEAL from the Twenty-third District Court, Parish of Iberville.
Talbot, J.

A. Talbot and Jonas & Nixon for the Administrator, Appellant.

D. N. Barrow, A. Hebert and F. E. Grau, contra.

The opinion of the Court was delivered by

BERMÚDEZ, C. J. It is urged that, as the judgment appealed from is merely interlocutory and works no irreparable injury, the appeal must be dismissed.

The suit has for its object the removal of an administrator, at the instance of creditors, and the appointment of a successor to him when displaced.

The petition avers that there are certain funds in the sheriff's hands which should not be paid over to the administrator, for reasons stated.

State vs. Burdon.

On affidavit and bond, the court allowed an injunction to prevent the sheriff from paying those funds over to the succession representative, whose removal is sought.

A rule was taken to dissolve this injunction on the face of the papers, no sufficient cause having been shown to justify the issuing of it.

This rule, after hearing, was dismissed, and the judgment thus rendered is brought up for review.

This judgment is purely interlocutory and not such as can cause any irreparable injury.

It can be revised on appeal from the main judgment, should one be rendered against the defendant.

It merely retains in the hands of the executive officer of the court the proceeds of sales made by him and, for the payment of which to who may be entitled to receive them, he and his sureties are liable.

The rule is in the nature of an exception of no cause of action.

It has been held that a judgment dismissing a rule to dissolve an injunction on the face of the papers, or exceptions having the same purport, are interlocutory orders which can cause no irremediable wrong and which are not appealable anterior to a judgment on the merits. 7 Ann. 206; 14 Ann. 388; 3 R. 437.

Appeal dismissed.

Poché, J., takes no part in this case.

No. 9634.

THE STATE OF LOUISIANA VS. D. F. BURDON AND J. F. BURDON.

In criminal cases, all the essential facts must be found by a special verdict, in order to enable the court to give a judgment of law upon the matter in issue. Nothing is to be taken by the court by implication or intendment. What is not found is supposed not to exist.

Hence, in a trial under a statute which denounces the offense of "receiving or buying any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to have been so stolen or taken," a verdict of "Guilty of knowingly receiving stolen property" does not contain the legal requirement touching the intent with which the goods were received by the accused, and it cannot therefore be the basis of a legal sentence.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee:

1. In an indictment charging the defendant with receiving stolen property, under Sec. 832, R. S., a verdict finding the accused guilty of "knowingly receiving stolen property," is legal.

38	357
49	1011

38	357
50	374
50	466
50	596

38	357
120	118

State vs. Burdon.

2. Guilty knowledge is of the essence of the crime. Bishop Cr. Prac. Vol. II., § 906; Wharton Cr. L. §§ 983, 989; Wharton Cr. Ev. § 164; Dasty Cr. L. 147, a.
3. In such a verdict, the use of the adverb "knowingly" "modifies" the verb in a particular sense and makes it more correctly descriptive of the offense.
4. Such a verdict is not a special one, not being a statement of facts. It is a finding or conclusion of law deduced from a certain state of facts.

W. B. Whitaker and C. H. Luzenberg for Defendants and Appellants:

"A jury have a right in all criminal cases to find a special verdict. Such a verdict must state positively the facts themselves, and not merely the evidence adduced to prove them; and all the facts necessary to enable the court to give judgment must be found, *for the court cannot supply by any intendment or implication any defect in the statement.*" 1 Chitty Cr. L. 645; State vs. Ritchie, 3 Ann. 512; State vs. Foster, 7 Ann. 256; State vs. Davis, 20 Ann. 354; State vs. Foster and Davis, 36 Ann. 857; State vs. P. C. Peters, 37 Ann. 730.

"Guilty of knowingly receiving stolen property" finds the defendants guilty of no crime known to the law of this State.

Silence of the jury as to one count in an information containing two counts, is an acquittal as to that count. Proffat on Jury Trial, § 425; 2 Virg. Cas. 235.

The opinion of the Court was delivered by

POCHÉ, J. On trial of the defendants under two counts—for grand larceny and for receiving and having stolen goods, knowing the same to have been feloniously stolen—the jury returned the following verdict: "Guilty of knowingly receiving stolen property."

The defendants appeal from the judge's refusal to sustain their motion in arrest of judgment, which was based on the ground:

"That said verdict is a special verdict; that it is a finding solely as to facts; that it is complete in itself; that it finds no offense known to the law of this State, and that no judgment can be pronounced upon it."

Section 832 of the Revised Statutes, under which the charge was framed, reads:

"Whoever shall receive or buy any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to have been so taken or stolen," * * *

It is clear that the essence of the crime denounced by the statute is the act of receiving stolen property with the guilty knowledge that the same had been stolen, and with the guilty intent of thus receiving it with the design of appropriating the same, to the detriment and injury of the true owner.

To receive the stolen property, knowing the same to have been stolen, with the design of seeking out the true owner and to deliver the same to him, would certainly not constitute an offense under the meaning of the statute, no more than would be the act of a court officer who receives in custody stolen property, knowing the same to have

State vs. Burdon.

been stolen, for the purpose of producing the same in court at the trial of the accused.

The language used in the verdict may reasonably be construed to designate either or both of these manners of receiving stolen property, but unexplained and unaided by surrounding circumstances and by the possible meaning of the jury, it does not necessarily convey the idea that the jury had found that the accused had knowingly received stolen property with the guilty design of appropriating it and of thus depriving the true owner of the same.

In default of that essential declaration flowing clearly from the language used in the verdict, the finding of the jury does not present an offense known to the laws of Louisiana. Hence, the point made by defendants' counsel was well taken.

In construing the true import and meaning of doubtful verdicts, the rule is that "all the essential facts must be found by a special verdict, in order to enable the court to give a judgment of law upon the matter in issue. Nothing is to be taken by the court by implication or intendment. What is not found is supposed not to exist." Proffat on Jury Trial, § 436.

In keeping with that principle this Court has made the following rulings, which are unquestionable precedents for the conclusion which we have adopted in this case:

In *State vs. Ritchie*, 3 Ann. 512, a verdict on a charge of kidnapping a slave of another party, who was then and there deprived of the use and benefit of said slave, the verdict was set aside because the jury found the accused guilty "of carrying away and disposing of the negro 'A,' the property of 'B,'" without the statement that the owner had then and there been deprived of the use and benefit of his said slave.

In *Davis' case*, 20 Ann. 354, the verdict was found insufficient, because the jury found the defendant "guilty for keeping a banking-game or gambling house," under a statute which denounced the crime of "keeping a banking-game or gambling house, at which money or anything representing money, or any article of value, shall be bet or hazarded," * * *

The verdict of the jury in the case of *Davis and Foster*, 36 Ann. 857, was for similar reasons set aside. On a trial for murder the verdict read: "Both guilty of capital punishment." See also, *State vs. Peters*, 37 Ann. 730.

It is therefore ordered that the verdict of the jury and the sentence of the court be annulled, avoided and reversed, and that the cause be remanded to the lower court for a new trial according to law.

Citizens' Bank vs. Succession of Cuny and Clement.

No. 9627.

CITIZENS' BANK OF LOUISIANA VS. SUCCESSION OF MRS. C. CUNY AND
J.-B. CLEMENT.

When property, part of which is subject to a mortgage, is sold by the owner, and the purchaser, in part payment of the price, assumes payment of the mortgage debt, the latter, as part of the price, is secured by vendor's privilege on the whole property sold; but the mortgage remains confined to the part originally subject thereto.

When in proceeding by executory process to enforce the mortgage alone, without reference to the privilege, an order of seizure and sale issues against the whole property, it embraces property not covered by the mortgage, and is, therefore, error and the order must be set aside on appeal.

A PPEAL from the Twenty-second District Court, Parish of St. James. *Duffel, J.*

Henry C. Miller and Bérault & Legendre for Plaintiff and Appellee.

Robt. G. Dugué for Defendants and Appellants.

The opinion of the Court was delivered by

FENNER, J. Plaintiff had a mortgage upon a certain tract of land. A subsequent purchaser subject to the mortgage, sold the land so mortgaged, with other lands belonging to him and not included in the mortgage, to a third person, the act reciting:

"This sale is made for \$44,461 14, which the said purchaser has paid as follows:

"1st. By paying in cash \$4,188 14;

"2d. By assuming a mortgage in favor of the Citizens' Bank, resting upon part of the property herein sold, amounting to \$5,573;"

And as evidence of said assumption she furnished a note for that sum, paraphed to identify it with the *original* act of mortgage, which was delivered to and accepted by the bank.

For the remainder of the price she furnished nine promissory notes, which were secured by special mortgage and vendor's lien on the whole property sold.

The act contains not a word showing that the note furnished to the Citizens' Bank in evidence of the assumption was secured by any mortgage other than the original one assumed, which bore only on part of the land.

There can be no doubt that the debt to the Citizens' Bank, being assumed as part of the price of the whole property, became secured by a vendor's privilege on the whole. This is well settled. *Sciounean vs. Waguespack*, 32 Ann. 283; *DeL'Isle vs. Moss*, 33 Ann. 164.

But the privilege is very different from the mortgage. While the bank's mortgage primes all other claims on the part of the property

State vs. Williams.

subject thereto, her privilege on the remaining property is only concurrent with that of the holders of the notes for the balance of the price.

The bank, in this proceeding, obtained an order of seizure and sale in execution of her mortgage, which is represented as affecting the whole property, and the order directs the seizure and sale of the whole property for the satisfaction of the mortgage. The petition contains no allusion to the vendor's privilege.

From this order the defendants appeal, and inasmuch as the order in execution of the mortgage simply directs the seizure and sale of more property than is covered by the mortgage, the error is apparent and the order must be annulled and set aside.

It is, therefore, ordered, adjudged and decreed that the order of seizure and sale appealed from be annulled and set aside, in so far as it orders sale of property not covered by original mortgage, and otherwise affirmed; plaintiff and appellee to pay costs in both courts.

Poché, J., recuses on the ground of interest.

No. 9645.

THE STATE OF LOUISIANA vs. SOLOMON WILLIAMS.

The disqualification of a juryman for the reason that he is a convicted felon cannot be taken advantage of in a motion in arrest of judgment. It is assimilated to the disqualification of alienage and non-residence and objection must be made before conviction.

A new trial is not grantable because of newly-discovered evidence, the sole object of which is to impeach the veracity of the leading witness for the State, nor on the ground that a witness for the State has made statements since the trial at variance with his testimony upon it, especially when the lower judge holds that other testimony warranted the conviction, or does not believe the newly-discovered witnesses.

The greatest reliance is placed on the trial judges in refusing new trials in criminal causes, and it would be an unwise restriction to hold that they shall not take into account their belief that false-swearing has been resorted to in order to break a conviction and obtain a new trial.

A PPEAL from the Thirteenth District Court, Parish of St. Landry.
Hudspeth, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

W. C. Perrault for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. From a judgment upon a conviction of murder without capital punishment the defendant appeals.

38	361
45	499
45	501

38	361
50	537

38	361
107	621

38	361
118	660
118	663

The jury-panel having been exhausted, talesmen were summoned among whom was one Claviè who sat as a jurymen. After the verdict was rendered the prisoner moved "to annul and set it aside," or as the motion should have been termed, moved in arrest of judgment, on the ground that Claviè was a convicted felon, having been sentenced in 1883 to six months confinement in the parish jail upon conviction of a criminal offence.

Without discussing the question whether a sentence of imprisonment in a jail for the commission of a criminal offence entails the loss of a freeman's privilege, we think the objection to the jurymen should have been made before conviction. This disqualification or incompetency is assimilated to that arising from alienage or non-residence and must be pleaded in time. An accused is not permitted to wait until after conviction to make the objection that a petit jurymen is personally disqualified. *State vs. McGee*, 36 Ann. 206, where the subject is discussed at length.

The motion for a new trial is upon the ground of newly-discovered evidence in this;—that the prosecutor, a brother of the man who was killed, has voluntarily admitted to Moses Cain and George O'Neal that the prisoner and the deceased were good friends up to the moment of the homicide and that the death of his brother was caused by the accidental discharge of the pistol, etc.,—that this prosecutor while on the stand as a witness was questioned "in order to elicit answers in accordance with the above statements but the witness denied them and swore directly contrary to their admissions." In other words the newly-discovered evidence impeaches the credibility of one of the witnesses for the State.

A new trial is not grantable because of newly-discovered evidence, the sole object of which is to impeach the veracity of the leading witness for the State. *State v. Fahey*, 35 Ann. 9; *State v. Diskin*, *Idem*, 46.

Nor will a new trial be granted on the ground that a witness for the State has made unsworn statements since the trial at variance with his testimony on the trial, and especially when the lower judge holds that other testimony on the trial warranted the conviction, or does not believe the new witnesses. *State v. Johnson*, 30 Ann. 305.

The affidavit of the prisoner is supported by that of the two newly-discovered witnesses and one of the reasons assigned by the judge for overruling the motion is that he did not believe them. We have before said that applications for new trials such as this must be received with great caution and that the inducements to false swearing are very great. *State v. Washington*, 36 Ann. 341. The greatest reliance is placed on

State vs. Burns et als.

the trial-judges in refusing new trials in criminal causes, and it would not be a wise restriction to hold that they should not take into account their belief that false-swearing was resorted to in order to break a conviction and obtain a new trial.

The affidavit contains the allegation that with all possible diligence the defendant could not procure the evidence before the trial, and yet on the trial, as his motion recites, he sought to elicit from the witness admissions such as he now alleges he can prove were made. This shews the sole object of the new evidence is to discredit the State's witness, and as we have already said a new trial is properly refused when that is the case.

Judgment affirmed.

No. 9657.

THE STATE OF LOUISIANA VS. SAM BURNS ET ALS.

An appeal in a criminal proceeding, asked *after* the term during which the judgment complained of was rendered and made returnable on appellant's suggestion, on an improper day, must be dismissed as sought and returned too late.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

M. J. Cunningham, Attorney General, and *L. J. Beale*, District Attorney, for the State, Appellee.

Robertson & Russell and *G. & W. Buckner*, for Defendant and Appellant.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The sureties on the appearance bond furnished by one of the defendants, appeal from the judgment forfeiting their bond.

The State moves to dismiss the appeal, on the ground that it was taken too late.

It is settled that the proceeding to forfeit is criminal in character. 37 Ann. 200; 7 Ann. 276.

The judgment forfeiting the bond was signed on the 22d of November, 1884, and the appeal was sought and granted on June 8th following (1885).

In appealable criminal cases, the appeal must be asked during the term at which the judgment is rendered and not *after*, and it must be made returnable within ten days from the granting. Act 1878, No. 80, secs. 1, 3 and 4.

38	363
44	897
44	975
38	363
46	551
38	363
48	1015
48	1020
49	1509

 State vs. Offutt

The appeal was prayed for by petition and asked to be made returnable to this Court, at New Orleans, on the second Monday of February, 1886. The order was in accordance. For this error the appellant is responsible, as he suggested an improper return day.

As the appeal was not asked *during* but *after* the term at which the judgment complained of was rendered, and is besides made returnable, at appellants' suggestion, on an improper day, in violation of law, it cannot be maintained.

It is ordered that the appeal be dismissed.

38 364
46 1433

 No. 9598.

THE STATE OF LOUISIANA VS. EUGENE OFFUTT.

A motion for a new trial made in a criminal cause, after sentence, after the case has been finally closed and an appeal taken, comes too late.

Hence, the trial judge does not err if he refuses to direct his clerk to include such tardy and irrelevant proceedings in the transcript of appeal.

Therefore, the Supreme Court will not entertain any proceeding intended to coerce the district judge to order the introduction of such foreign matters in the transcript.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

M. J. Cunningham, Attorney General, and *L. D. Beale*, District Attorney, for the State, Appellee.

K. A. Cross for Defendant and Appellant.

 ON APPLICATION FOR CERTIORARI.

The opinion of the Court was delivered by **POCHÉ, J.** The accused complains of the refusal of the district judge to direct his clerk to include in the transcript, as part of the record, a supplemental motion for a new trial made by his counsel, and the affidavit of a witness made in support thereof, after the trial had been concluded.

His object is to present his said motion together with the supporting affidavit and the judge's refusal of the new trial to the action and revision of this Court.

His own petition shows that the motion in question was presented after a final disposition by the trial judge of a timely motion made by his counsel for a new trial, after sentence had been passed on him, and after the case had been finally closed and an appeal taken. Hence, the motion and the affidavit form no part of the proceedings held in his

State vs. Offutt.

trial. The appeal which he had taken from the sentence of the court, and from the verdict of the jury, before he presented the motion in question, can present for review only such things and matters as have occurred during, and form parts and elements of, his trial.

It follows that we would be powerless to consider or give legal effect to the proceedings which his counsel is now seeking to bring up to our notice, even if they had been included in the transcript.

On appeal from a criminal prosecution, this Court has no more concern with proceedings or other incidents connected with the accused or with the charge under which he has been convicted, which have occurred subsequently to the trial and sentence, than it would have with the mode of incarcerating the accused, or with the action of the Executive Department of the State in enforcing the judgment of the court, or in commuting or remitting such sentence.

It, therefore, appears to us that far from erring in the refusal complained of, the district judge would have committed a grievous error if he had followed the suggestion of defendant's counsel, and had thus ordered his clerk to inject in the transcript matters which were entirely foreign to the only issues which could have been tried on appeal.

The reliance of counsel on the decision in the case of *The State vs. Bess*, 31 Ann. 191, cannot avail him in the relief which he now seeks to obtain.

In that case the matters which were missing from the transcript formed essential and vital parts of the defendant's trial, and presented issues which the appellate tribunal had the undoubted right to consider and to dispose of.

It is, therefore, ordered, adjudged and decreed that the writ of certiorari herein applied for be denied.

ON THE MERITS.

It is not error for a judge to sustain a challenge for cause to a juror on the ground that he does not understand the ordinary use of the English language.

A bill of exceptions to the ruling of the judge in refusing a new trial, which simply states the fact of the overruling without any recitation of facts relied on or statement of grounds on which the judge acted, affords no basis for reviewing the ruling, because it affords no certification of the facts recited in the motion.

Newly discovered evidence, merely tending to impeach or discredit witnesses who have testified on the trial, does not necessarily afford ground for new trial, and we are not disposed to disturb rulings on such question.

FENNER, J. The case is before us on three bills of exception.

Bills Nos. 1 and 2 are so clearly meritless that they scarcely require

State vs. Offutt.

notice. After a juror had been examined on his *voir dire* and accepted by both parties, the district attorney, suggesting that perhaps the juror had not understood the questions propounded to him, desired to question him on that point. The court asked the juror if he had understood; he answered in the affirmative and remained on the jury. This is the subject of the first bill.

The second is hardly less frivolous, being taken to the ruling of the court in sustaining a challenge for cause of a juror, the court's reason being that he was "ignorant of the ordinary use of the English language." This was a proper exercise of the power expressly granted to the judge to the jury law. See Act No. 54 of 1880.

The third bill is to the overruling of a motion for new trial. It is in the following words: "Be it remembered that the court overruled the motion for a new trial filed by the accused for the grounds stated. Whereupon the accused excepted to the ruling of the court and tenders his bill for signature and approval."

Such a bill affords no basis for reviewing the action of the court in this case.

The motion for new trial was based on two grounds:

- 1st. That the verdict was contrary to the law and the evidence;
- 2d. Newly discovered evidence.

The latter was on points immaterial to the intrinsic merits of the case, and went merely to impeach the veracity of the prosecuting witnesses by contradicting certain statements which the motion alleges they had made.

But we have nothing but the allegations of accused that the witnesses had made the statements proposed to be contradicted, and, for aught we know, the judge may have denied the motion on the ground that no such statements had been made. At all events, the record affords no certification of the truth or pertinency of the matters alleged or of the grounds on which the judge based his ruling; and surely it would be utterly rash for us to pronounce his ruling erroneous.

Besides, newly discovered evidence merely tending to impeach or discredit a witness who has testified, is not necessarily good ground for a new trial, and we are not disposed to disturb the ruling of the trial court on such a question. *State vs. Young*, 34 Ann. 346; *State vs. Fahey*, 35 Ann. 10; 36 Ann. 11.

Judgment affirmed.

Saunders et al. vs. Burns.

No. 9654.

MARY L. SAUNDERS ET AL. VS. SALLIE E. BURNS.

38 367
125 702

A suit against a married woman should be brought against her and her husband.

It is only in case the husband is absent or refuses his authorization that the judge can validly authorize the wife to stand in judgment alone.

In this case, the husband was not sued and has not appeared. There being no allegation or pretense that he was absent or had refused, the judge's authorization was invalid.

The vice was not cured by going to trial without excepting on this ground. The objections to evidence on the ground that the wife was not legally authorized to stand in judgment should have been sustained.

Under Article 606, C. P., the judgment, however rendered, was subject to nullity.

A PPEAL from the Eleventh District Court, Parish of Natchitoches.
Pierson, J.

Watkins, Scarborough & Carver for Plaintiffs and Appellees:

1. The incapacity of the wife is removed by the authorization of the husband or the judge. R. C. C. 1786.

The objection is waived by previous *plea* and *answer*, in which the husband joined, and could not thereafter be urged by way of objection to the introduction of evidence. C. P. 107, 118; 14 Ann. 605; 10 Ann. 504; 9 Ann. 216; 5 Ann. 369.

2. The individual creditor may exercise the revocatory action after he has obtained a final judgment against his debtor, without making his debtor a party. R. C. C. 1972, 1975.

The defendant's objections were dilatory in their character, and should have been specially plead and previous to answering to the merits.

3. The defendant must be restricted to proving the price or consideration mentioned in the mortgage and *dation*. *Chaffe vs. Sheen*, 74 Ann. 689; R. C. C. 1900.

4. As there was, and is, in existence a matrimonial community, property purchased in the name of either of the spouses falls into it and forms part of it, unless the married woman asserting title makes full and conclusive proof as against husband's creditors. R. C. C. 2402; 29 Ann. 583; 15 Ann. 119; 26 Ann. 552; 20 Ann. 531, 206; 24 Ann. 295, 531; 32 Ann. 454, 611; 33 Ann. 806.

5. Recitals in the acts of sale are of themselves no proof of the amount of the consideration paid, nor by whom same was paid. 12 La. 302; *Demsley vs. Pollock*, 7 N. S. 460; *Bulsson vs. Thompson*; 33 Ann. 609, *Angele vs. Soulle*.

6. A wife's *dation* from her husband, in satisfaction of his indebtedness to her, without an adequate and legitimate consideration, is in violation of a prohibitory law and void. R. C. C. 2446; 4 Ann. 65; 1 Ann. 301; 2 Ann. 423; 7 Ann. 52; 11 Ann. 265; 21 Ann. 460; 4 La. 421; 30 Ann. 750; 5 Ann. 594; 23 Ann. 439.

7. The defendant had no right to demand or receive interest on the debt her husband owed her during the existence of the community. R. C. C. 2326, 2402; 19 La. 581; 3 Ann. 611.

Jack & Dismukes for Defendant and Appellant:

No valid judgment, annulling as simulated a *dation en paiement* made by the husband to the wife, can be pronounced against the wife *sui juris* and alone, in the absence of averments of his inability or refusal to act; and where the petition itself charges that the wife is not separate in estate from him, and that he is present in the parish and fails to pray that he be cited with her or be made a party in any way.

In such a case there is neither right nor cause of action disclosed, and the vice is so glaring and fundamental that it may be brought to the attention of the court by exception before or after issue joined, by objections to evidence, by plea or suggestion on appeal, and even after the right of appeal has lapsed by direct action of nullity brought by the wife,

Saunders et al. vs. Burns.

the husband or the heirs; moreover, the court may and should *ex-officio* notice and declare the nullity. C. P. art. 606; 3 N. S. 498; 2 Ann. 3, 806; 12 Ann. 350; 14 Ann. 165; 15 Ann. 628; 23 Ann. 323; 28 Ann. 840; 12 Ann. 239; 18 Ann. 735; 29 Ann. 600; C. P. arts. 604 and 609.

"When one intends to sue a married woman for a cause or action relative to her own separate interest, the suit must be brought both against her and her husband. Should the husband be absent, the plaintiff must demand that she be authorized by the judge before whom the suit is brought to defend it alone." C. P. art. 118.

The judge cannot authorize the wife to defend a suit if the husband be not absent or interdicted or does not refuse to authorize her. 11 Ann. 69; 24 Ann. 141; Manning's Unreported Cases, p. 65.

Where the husband is made a party and joins in the answer or suffers default to be confirmed against him, after being duly cited, his authorization of the wife is legally inferred, *aliter*, is not made a party and not cited. 23 Ann. 403; 29 Ann. 749; 34 Ann. 1048.

In a suit to annul or to revoke a sale of an immovable for simulation or fraud, the vendor is a necessary party. 31 Ann. 259, 196; 32 Ann. 91; 15 L. 503; 10 R. 387; 8 Ann. 386.

Actions to annul a *dation en paiement*, made by the husband to the wife for fraud and simulation, combine the elements both of the revocatory action and of the action *en declaration de simulation*, and where more than one year has elapsed between the execution and registry of the transfer and the date of service of citation in the suit, the features of the revocatory action, such as inadequacy of price, undue preference, and others peculiar to that proceeding, may be eliminated by the plea of prescription of one year, leaving the issue as one of simulation *vel non*. 2 Ann. 659; 3 Ann. 248; 4 Ann. 36; 6 Ann. 87, 439; 7 Ann. 298; 12 Ann. 889; 14 Ann. 106; 24 Ann. 124, 246; 30 Ann. 749, 966; 31 Ann. 594; 34 Ann. 347, 883.

The object and effect of the proceeding thus eliminated of the elements of the revocatory action, is to unmask the title in favor of all the creditors, indiscriminately, and this presupposes that the act never had anything more than a mere semblance of existence, and that it was wholly without just cause or consideration. 37 Ann. 308; 11 Ann. 168, 265.

When an actual consideration, no matter how inadequate, has been paid by the purchaser in an alleged sale, it is not a simulation, and should the consideration be different from that stated, it suffices, if it be a valid one. 32 Ann. 94; 1 Ann. 132; 2 Ann. 323, 913, 959; 4 Ann. 36; 8 Ann. 431; 12 Ann. 173; C. C. art. 1900.

The husband may make a *dation en paiement* to his wife for a legitimate cause, such as the replacing of her paraphernal effects, whether her claims are liquidated by judgment or secured by mortgage or not. C. C. art. 2446; 33 Ann. 518, 532; 30 Ann. 745; 8 Ann. 485.

"A succession is acquired by the legal heir immediately on the death of the person to whom he succeeds." C. C. 940.

"Property adjudicated to a married heir at a succession sale and paid for out of her heritable share, becomes her separate property, and does not fall into the community between her and her husband." 33 Ann. 425; 34 Ann. 1047; 2 Ann. 930; 14 Ann. 722; 5 Ann. 742; 6 Ann. 803; 20 Ann. 40.

Where it is shown that the husband actually received and appropriated the paraphernal funds of the wife, the creditors are not concerned as to how or why she received the property. 36 Ann. 217.

A judgment not attacked for fraud is *prima facie* good as to third parties. 20 Ann. 266; 5 Ann. 401; 4 Ann. 135; 17 L. 205; 15 L. 59.

"The wife has, during marriage, a right of action against her husband for the restitution of her paraphernal effects and the fruits of them." C. C. 2390, 2391, 2387; 35 Ann. 806.

The settled jurisprudence in regard to the wife's paraphernal property is, that the husband is presumed to exercise administration until the contrary be shown, and that in all cases the burden of proof is on those who have an interest to contest it. 16 Ann. 145; 33 Ann. 164.

When there is no evidence showing that the wife administered her paraphernal property separate and alone, it is the presumption that the husband used the funds as his own. 18 Ann. 588; Ibid, 105; C. C. 2362, 2363.

The rule announced in 33 Ann. 609, that declarations of the husband and wife, contained in notarial acts, are no legal evidence of the facts they state, applies to their declarations made *inter sese*, and does not mean that recitals contained in judgments and sheriffs' deeds must be proven *aliunde*.

The opinion of the Court was delivered by

FENNER, J. This action is brought by plaintiffs, who are judgment creditors of Geo. W. Thompson, against his wife, Sallie E. Burns, to annul, as fraudulent simulations, a special mortgage and subsequent *dation en paiement* made by Thompson to his said wife, in fraud of his creditors.

The action is brought against the wife alone. The husband is not cited or made a party and no relief is asked against him.

Serious objections are urged against the sufficiency of the authorization of the wife to enable her to stand in judgment.

Article 118, C. P., says: "When one sues a married woman for a cause of action relative to her own separate interest, the suit must be brought both against her and her husband. Should her husband be absent, the plaintiff must demand that she be authorized by the judge to defend it alone."

The suit was not brought against her and her husband. There was no demand for the judge's authorization. There was no allegation showing or pretense that the husband was absent or that he refused to authorize his wife.

The law is clear and this Court has distinctly held that the judge cannot authorize the wife, when the husband is not absent and has not refused to give his authorization. *Delacroix vs. Hart*, 24 Ann. 141. Hence the judge's authorization in this case was illegal and insufficient to enable the wife to stand in judgment.

It is claimed, however, that this defect was cured by the appearance of the husband conjointly with the wife in the filing of an exception of *lis pendens*. But we find no such appearance. It is inferred solely from the fact that the exception begins. "Now come the *defendants*, etc." No mention is made of the husband or of his authorizing the wife, and as he was not a defendant or a party in any mode, we see not how the mere use of a plural can be construed as including him.

The answer of the defendant wife, under which issue was joined and all further proceedings had, was filed exclusively in her own name, without reference, direct or indirect, to her husband. We think this defect invalidates the whole proceeding.

Barron vs. Jacobs et al.

Her failure to except on this ground cannot cure the vice. Even her unauthorized confession of judgment would be invalid. Art. 606, C. P., (see *Delacroix vs. Hart*, 24 Ann. 141), declares the nullity of a judgment, "if rendered, even contradictorily against a person disqualified by law from appearing in a suit, as a married woman without the authorization of her husband or of the court."

The defendant called attention to the fatal defect of the proceedings by objecting to all evidence, on the grounds that she was a married woman, that her husband had not been joined or cited, that he was not absent and that the judge's authorization was insufficient.

The objections were valid and should have been sustained.

Further objection was made on the ground that the husband was a necessary party in his own right. As we shall remand the case, we mention it for the purpose of saying that we consider it a serious one, and that the *dictum* of certain decisions that in an action to annul a contract for fraud or simulation, it is not necessary to make the original debtor a party when the debt is reduced to judgment, is not free from doubt as to its correctness and rests on authority slighter than is generally supposed.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, and that the case be remanded to the lower court, in order that the husband of defendant may be cited and for further proceedings according to law, plaintiff and appellee to pay costs in both courts thus far incurred.

No. 9674.

L. G. BARRON AND GEROME BARRON VS. J. W. JACOBS ET AL.

A suit in revendication of real estate must be dismissed, where it appears that prior to the institution thereof, the plaintiffs have sold all their interest to the land.

The dismissal of such suit carries with it that of an intervenor claiming the same property as plaintiff's vendee, the more so, where in terms the judgment so expressly declares.

A PPEAL from the Eleventh District Court, Parish of Natchitoches.
Pierson, J.

Watkins, Scarborough & Carver for Plaintiffs and Appellants.

W. G. McDonald and *E. E. Buckner* for Defendants and Appellees.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiffs sue to recover the undivided half of certain real estate, by inheritance from their deceased mother.

38	370
47	845
38	370
48	458
49	280
38	370
124	568

State vs. Williams.

The defendant denies the plaintiffs' pretensions, claims title and calls his vendors in warranty.

The warrantors excepted, charging that the writ was brought without the consent or knowledge of plaintiffs and is the result of a conspiracy to delay the collection of a mortgage claim, etc.

On the day preceding the trial of the exception, Mrs. Thompson intervened, claiming title to the land in controversy.

On the trial of the exception, it was proved without objection that, on the 10th of May, 1883, the plaintiffs, some sixteen months previous to the institution of this suit, which was brought on January 3, 1885, had sold and transferred to Mrs. Thompson their interest in the same property sued for.

After hearing evidence, the district court dismissed the suit and the intervention. The judgment thus rendered is now before us for review.

The court decided correctly:

The transfer by plaintiffs of their interest, whatever it was, stripped them of any right to sue for the same as though the transfer had not taken place.

The dismissal of the suit carried with it the intervention. It cannot be claimed that, by joining the plaintiffs, the intervenor became a plaintiff or substituted herself to the plaintiffs.

If she has any right to the land in question she will have to bring a proper proceeding to have the same recognized and enforced.

Judgment affirmed.

No. 9601.

THE STATE OF LOUISIANA VS. REUBEN S. WILLIAMS.

An information charging the accused with an assault with a dangerous weapon, to-wit: a certain pistol * * with intent then and there wilfully, feloniously and of his malice aforethought to kill and murder, etc., is a sufficient compliance with the requirements of Section 792 of the Revised Statutes, which denounces among others the crime of an assault with intent to commit murder.

In criminal cases the Supreme Court cannot review the verdict of the jury on questions of fact. The jury are the sole judges of the sufficiency of the evidence as to the guilt or innocence of the accused.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee:

1. It is not requisite to charge in the indictment anything more than is necessary to accurately and adequately express the offence. Whart. Cr. Pl. and Pr., Sec. 158. Therefore

38	371
49	273

State vs. Williams.

- when the crime is charged with certainty and precision, with a complete description of such facts as constitute it in the language of the statute, and the accused in hearing the indictment read, would clearly understand the charge he is called on to answer, and the court could feel no doubt as to the judgment to be pronounced on conviction, the indictment is good. 9 Ann. 106; Ib. 216; 13 Ann. 243; 34 Ann. 529; 23 Miss. 535; 8 Black. 212; 2 Iowa 102; 13 Miss. 13; 12 Miss. 268; 5 Black. 548; 3 Strob. 269; 6 Miss. 147; 1 Nott & McC., 91; 3 Penn. 142; 3 McCord, 442; 16 Mason, 448; 20 Pick. 356; 3 Gratt. 590; 6 Gratt. 684; 3 Blackf. 307; 1 Bally, 144.
2. Pursuant to this rule of construction it was held in Tennessee that, in an indictment for malicious shooting, it was sufficient to charge that the accused did "unlawfully and maliciously shoot" without describing the pistol or the circumstances attending the act. *State vs. Ladd*, 2 Swan, 226. And in Louisiana it was adjudged that an information for an assault by wilfully shooting under Sec. 792, R. S., need not allege that the shooting was done with a dangerous weapon. *State vs. Cognovitch*, 34 Ann. 529.
 3. In an indictment for assault with intent to murder, at common law, or where the statute does not specify the instrument, it is not necessary to state the instrument or means made use of by the assailant to effectuate the murderous intent. 1 Whar. Cr. Law. Secs. 644, 190; Whart. Cr. Pl. and Pr. Sec. 159.
 4. Where no irregularity is complained of in the proceedings at common law, the court trying the case is the sole tribunal by whom a new trial can be granted; and the refusal being a matter of discretion cannot be reviewed as error. Whar. Cr. Pl. and Pr. § 897.
 5. In Louisiana, the jurisdiction of the Supreme Court in criminal cases depends upon the Constitution alone. It cannot review the acts of the judge below resting in his discretion. To the exercise of that jurisdiction, confined exclusively to questions of law, an unmixed question of fact presents an insuperable objection. Const. Art. 81; 8 R. 540; 2 Ann. 921; 3 Ann. 497; 4 Ann. 505; 6 Ann. 311, 593, 631; 7 Ann. 47; 8 Ann. 114; 10 Ann. 501; 14 Ann. 79, 673, 735; 8 Ann. 312; 11 Ann. 81, 422, 479; 14 Ann. 40, 42; 12 Ann. 895; 22 Ann. 9; 23 Ann. 149; 30 Ann. 92.
 6. In most of the States, however, provision is made for obtaining revision by an appellate court, and for the presentation of the evidence to the appellate tribunal. Whar. Cr. Pl. and Pr., § 897. As, however, in criminal trials, the presumption is in favor of the verdict, unless the record affirmatively overthrows this presumption, even in such jurisdictions, the court will not disturb the evidence; and it must do this in such manner as to show that manifest injustice and wrong have been done in the premises. 4 Ark. 87; 2 Strobb. 60; 3 Strobb. 106; 16 Miss. 391; 5 Gratt. 703; 2 Nott & McC., 331.

Jas. O. Walker for Defendant and Appellant:

1. An information for assault with intent to murder (R. S. 792), will be set aside by motion in arrest of judgment as fatally defective, if it do not state the facts necessary to constitute the assault. 2 Arch., *Waterman's Notes*, p. 70; *Trexler vs. State*, 19 Ala. 21; *Beasley vs. State*, 18 Ala. 535; *Petit vs. People*, 3 Johns. 511.
2. The Supreme Court will review the ruling of the judge *a quo* refusing a new trial, if clearly erroneous, although it involves a question of fact, when such fact is made to appear by bill of exceptions. 32 Ann. 844, 1052; 33 Ann. 313; 30 Ann. 539.

The opinion of the Court was delivered by

POCHÉ, J. Having been convicted and sentenced to imprisonment at hard labor, under the charge of an "assault with a dangerous weapon, to-wit: a certain pistol * * with intent then and there wilfully, feloniously and of his malice aforethought to kill and mur-

der," etc., the defendant seeks relief by means of a motion in arrest of judgment and a motion for a new trial.

1. The complaint under the motion in arrest is that the information does not charge or describe the particular manner in which the assault was made; whether it was by shooting at or attempting to strike the intended victim of the defendant with the pistol, or otherwise.

There is no force in the contention, and the motion was properly overruled.

The information complies with all the requirements of the Statute under which it was framed, and that is legally sufficient. The Statute (Section 792, Revised Statutes) reads as follows:

"Whoever shall assault another by wilfully shooting at him, or with intent to commit murder, rape or robbery, shall, on conviction thereof, be imprisoned at hard labor not exceeding two years."

A slight comparison of the words of the information, with the language of the Statute, shows at once that the former contains even more than the necessary ingredients prescribed in the Statute. The gist of the offense therein denounced as applicable to the case in hand is an assault coupled with the intent to commit murder.

The law provides for several distinct crimes, one of which is the charge of an assault by wilfully shooting at another; another is an assault with intent to commit murder; a third, an assault with intent to commit rape, and finally an assault with intent to commit robbery, all four being disjunctively connected.

Under the charge as contained in the information, the accused therefore knew, and the court was sufficiently informed, that the defendant was to be tried for an assault with a dangerous weapon, to-wit: a pistol, not by wilfully shooting at another, but with intent to commit murder, and after trial, resulting in a verdict of "guilty," the court had all the required foundation on which to base a legal judgment within the provisions of the Statute.

We therefore conclude that the information fully covered and sufficiently described the offense denounced by the Statute. *State vs. Cognovitch*, 34 Ann. 529.

2. The substance of the motion for a new trial was that the evidence was not sufficient to justify a verdict of guilty of an assault with intent to commit murder, but that it could at most have warranted a verdict of an assault with a dangerous weapon.

Counsel annex to this bill the testimony of the party assailed by the accused, which had been taken down in writing by the committing magistrate, and which had been read to the jury at the trial. We will

State vs. Boyd.

not do the injury to the counsel of the defendant of supposing for one moment that they are serious in pressing us to consider that testimony with the object which they propose.

But candor compels us to say that we are simply amazed at their attempt, regardless of the motive which prompted it.

We had indulged the hope that the last of such errors had been committed in the case of Taylor, 37 Ann. 40. Hereafter we shall pass over such means of defense as absolutely trivial and unworthy of consideration.

Judgment affirmed.

No. 9651.

THE STATE OF LOUISIANA VS. DENNIS BOYD.

Opinion based on conversations is no ground for challenge of a juror when the juror states that he can try the case according to the law and the evidence, taking the law from the court and the evidence from the sworn witnesses, and do exact justice, regardless of such opinion.

Where the defendant has attempted to impeach the testimony of witnesses for the State, the latter may support the same by evidence character for veracity and integrity.

When the term of the district court has been fixed and begun two weeks before the session of the Circuit Court, and the accused has been tried and convicted before the beginning of the latter term, and when, having no business, the Circuit Court does not meet, the district court violates no law in continuing its term for the purpose of disposing of motions for new trial, etc., and passing sentence on the convicted defendant.

When a defendant has been once arraigned and has pleaded to an indictment on a former trial, re-arraignment is unnecessary, and if made, it is no objection that the case has been previously set for trial.

A PPEAL from the Second District Court, Parish of Bossier.
Drew, J.

M. J. Cunningham, Attorney General, *J. A. W. Lowery*, District Attorney, and *M. C. Elstner*, for the State, Appellee.

Defendant unrepresented.

The opinion of the Court was delivered by

FENNER, J. The defendant, under sentence of death for murder, is unrepresented by counsel in this Court. We have, therefore, given to the charges of error presented on the face of the record, that close and careful scrutiny which the gravity of his situation merits.

1. We find a bill of exceptions to the overruling by the judge of a challenge for cause of a juror on the ground of fixed opinion. After some statement as to an opinion formed by him from conversations with citizens living in the neighborhood of the occurrence, not profess-

38 374
44 108
38 374
45 908
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47 478
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38 374
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49 1523

State vs. Boyd.

ing to have been witnesses however, the juror stated emphatically "that he could go into the jury-box as a juror sworn to try this case according to the law and the evidence, taking the law from the court and the evidence from the witnesses under oath, and do exact justice between the State and defendant, *regardless* of any opinion on his mind at this time."

Unless the judge disbelieved this statement, which he did not, there was no ground for challenge. State vs. Ford, 37 Ann. 443; State vs. McGee, 36 Ann. 206; State vs. Foster, Id., 877; State vs. DeRance, 34 Ann. 187; State vs. Dugay, 35 Ann. 327; Proffatt on Jury Trial, § 186.

2. The exception to the ruling of the court in admitting testimony as to the character for truth and veracity of two of the State's witnesses, is not good under the circumstances of this case, where the judge states that on cross-examination of other witnesses, the counsel for defendant had attempted to impeach or invalidate their evidence. We think this brings the case within the rule laid down by Greenleaf and supported by the weight of authority: "Where evidence of contradictory statement by a witness or, of other particular facts is offered by way of impeaching his veracity, his general character for truth being thus in some sort put in issue, it has been deemed reasonable to admit general evidence that he is a man of strict integrity and scrupulous regard for truth." 1 Greenleaf Ev. § 469.

It would have been more satisfactory if the judge had stated, with greater peculiarity, the character of the previous attempt to impeach; but we must assume that it supported his ruling in absence of anything to show the contrary.

3. The objection to the legality of the term of court on the ground that it conflicted with the term of the Circuit Court was untimely and untenable. The term had been called and opened two weeks prior to the beginning of the term of Circuit Court and accused had been tried and convicted. At the time when the Circuit Court should have opened, nothing remained but to dispose of motions in arrest or for new trial and to pass sentence. It was only at this time that the objection was raised. But, whatever objection might exist to the continued session of the court during a term of the Circuit Court, is disposed of by the fact that the latter court had no business and held no session. No conflict, therefore, arose, and neither Art. 99 of the Constitution or Act 7 of 1880 were violated.

4. The objection that he had not been arraigned before fixing of the case for trial, is disposed of by the fact that it was urged only after trial. Besides, he had been arraigned and had pleaded to the indict-

Citizens' Bank vs Benachi.

ment on a former trial and re-arraignment was unnecessary. State vs. Johnson, 10 Ann. 456; see also State vs. Kane, 32 Ann. 999.

Other objections to the regularity of the proceedings in drawing the venire being urged for the first time on motion for new trial, are too late, and they have otherwise no merit.

After careful examination of all the points suggested by the record, we are satisfied that no aid of counsel could have benefited defendant and he must submit to his fate.

Judgment affirmed.

No. 9561.

CITIZENS' BANK OF LOUISIANA vs. N. M. BENACHI.

Defenses of want of consideration, extinguishment by remission, prematurity resulting from inexpiration of extension of time granted, against a mortgage note sued on, are inconsistent and inadmissible.

An injunction on those grounds, the evidence sustaining neither, is properly dissolved.

An appeal from the judgment dissolving is frivolous, and damages are allowable.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Henry C. Miller for Plaintiff and Appellee.

A. B. Philips for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant appeals from a judgment dissolving an injunction obtained by him, arresting executory process issued against real estate, mortgaged by him to secure the payment of the note sued on.

The grounds upon which the writ issued, as set forth in the original and supplemental petitions, are: *want of consideration; extinguishment by remission; prematurity resulting from inexpiration of extension of time.*

It suffices to say that not only are the defenses inconsistent, but that the record is barren of evidence in support of either.

The appellee has prayed for damages for a frivolous appeal, and is entitled to recover same.

The claim bears eight per cent interest, and the debtor is to pay five per cent attorney's fees. The claim is for \$3,298. We think one hundred dollars a reasonable allowance for such damages.

It is therefore ordered that the judgment appealed from be affirmed, and that appellee recover further one hundred dollars for a frivolous appeal and costs in both courts.

State ex rel. Wood & Bros vs. Judge.

No. 9698.

THE STATE EX REL. B. D. WOOD & BROS. VS. JUDGE OF FOURTH CITY
COURT OF NEW ORLEANS.

In the exercise of its supervisory jurisdiction the Supreme Court cannot entertain a complaint against an inferior court, which practically involves the correctness of a judgment rendered by said court, which had unquestioned jurisdiction *ratione materiae et personae* over the cause, or the correctness of any of its rulings in such a cause, when it appears that the rules of law and practice governing the trial of causes have been observed.

Such an attempt would be an unjustifiable assumption of jurisdiction and powers not granted by the Constitution, or sanctioned by law or jurisprudence.

APPPLICATION for Certiorari and Prohibition.

H. Renshaw and *W. S. Benedict* for the Relators.

T. M. Gill for the Respondent.

The opinion of the Court was delivered by

POCHÉ, J. The complaint of the relators is substantially that they are being harassed, through the instrumentality of the respondent judge by one James Sweeney who has of late sued them in said court on a series of illegal claims, which have been recognized and enforced by judgments in said court.

They allege that the said Sweeney, in order to avoid appeals from the judgments of the respondent judge, has maliciously and wickedly subdivided his illegal claim against them into fragments sufficiently small as to be unappealable, and for which he has brought a multiplicity of suits against them, which suits are swiftly decided by the respondent judge in favor of said Sweeney; and that, although requested thereto, the judge has arbitrarily refused to order that several of said suits then pending be consolidated, under which order, if made, they would have been enabled to bring said cases thus consolidated to some superior tribunal, where they could have obtained justice.

Hence they invoke relief under our supervisory jurisdiction.

They concede that the respondent's court had jurisdiction in each of the suits brought against them *ratione materiae et personae*, and the records of the suit in question, which have been sent up in obedience to our preliminary writ of *certiorari*, show that in each suit citation was duly issued and served on the defendants therein; that they joined issue by answer; that time was given for the preparation of their defense; that on the day fixed for trial they were heard by counsel; that their witnesses were also heard, and their testimony considered; that

38	377
45	535
38	377
48	293
48	790
48	1253
38	377
117	535

State ex rel. Wool & Bros. vs. Judge.

judgment was rendered only after a legal trial; that their motion for a new trial was heard, considered and in due course overruled; in a word, that all the forms and requirements of law were observed and followed, and that the proceedings were all regular under every possible test of the laws applicable in the premises.

The complaint is thus reduced to the charge that the judge has decided these cases against the law and the evidence, and that, under our supervisory powers, we must have the legal authority, and that, under our constitutional prerogatives, it is our duty by some process, which is not even suggested, to relieve these relators from the effect of such iniquitous proceedings. The facts in this case develop no exceptional circumstances.

Such an attempt would simply involve us in an extraordinary proceeding looking to the reversal of judgments which are avowedly unappealable in character, and emanating from a court over which we have no appellate jurisdiction.

It may be, as alleged by relators, that they have been unjustly condemned to pay sundry amounts which they do not legally owe, and that the respondent judge has erred in all his rulings against them, but, as he had jurisdiction in the premises, and as he has violated no rule of law in the manner of conducting the trials or in rendering his judgments, we would commit a still greater wrong if we attempted to interfere in the matter without legal or constitutional warrants.

It appears to us that the evils which relators' counsel so glowingly depict cannot be remedied by the judiciary department of the State government.

In the case of *Berthoud*, 34 Ann. 782, we said:

"It may very well be that this judgment is in flagrant violation of law, will work irreparable injury, and visit a great hardship on the corporation affected by it, but under our well defined jurisdiction we are powerless to relieve the relator, and have no more authority to revise that judgment than any other judgment in an unappealable case, falling, as this undoubtedly does, within the jurisdiction of the court which rendered the judgment."

The line of demarcation is thus sharply defined between the cases to which our supervisory jurisdiction can extend, and those in which the judgments cannot be disturbed by us, so that we have no option but to decline our interference in the present controversy. *State ex rel. Zuberbier and Behan vs. Judge*, 33 Ann. 16; *State ex rel. Valetton vs. Skinner*, judge, 33 Ann. 255; *State ex rel. Unbehagen vs. Nephler*, J. P., 35 Ann. 365; *Troegel vs. Judge*, 35 Ann. 1164.

It is therefore ordered that the preliminary writs herein issued be recalled and cancelled, and that the writs of *certiorari* and prohibition herein prayed for be refused at the cost of relators.

Bory vs. Knox.

No. 9377.

MRS. ADELE BORY vs. N. KING KNOX.

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e112 139

An action to annul a judgment must be brought within a year of its rendition where the suit is based upon alleged frauds or ill-practices or within a year of the discovery of the same.

Where a party is duly notified of such alleged frauds and ill practices orally or by writing as by means of a petition duly served on him, and refuses to believe the oral communication or to read the written notice, he will be bound, he will be held to be duly notified as if he had in fact taken thorough personal cognizance of the information imparted.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Sherburne, J.*

K. A. Cross for Plaintiff and Appellant:

1. A married woman cannot be authorized by the judge to stand in judgment, unless citation is served on the husband, or an attempt to cite him made. 24 Ann. 141; 9 Ann. 12; Duranton, Vol. 2, No. 446.
2. She can be authorized by the judge of her domicile alone. 12 L. 71; 31 Ann. 174.
3. Obligations, created by a married woman during the community, presumed to be for benefit of her husband or the community. 7 Ann. 568; 14 Ann. 712.
4. If she is a public merchant, it must be shown that they arise out of her business as such; 6 Ann. 56; especially when she is not separate in property.
5. She cannot waive protest without her husband's authorization. 10 L. 161.
6. Decree of judge authorizing her to mortgage her property, cannot give validity to past transactions. 24 Ann. 89; 29 Ann. 123.
7. A judgment absolutely null, for want of parties competent to stand in judgment, is not protected by prescription. 25 Ann. 98; 5 Ann. 218; 21 Ann. 663; 23 Ann. 336.

White & Saunders and *F. C. Zacharie* on the same side.

David N. Barrow and *Knox & Laycock* for Defendant and Appellee:

1. Where the evidence shows a defendant had full knowledge of all the facts of her transactions, on which a judgment is based, before rendition of the said judgment, and more than a year has elapsed, she cannot attack the judgment for fraud.
2. Where the evidence shows the defendant was in possession of all accounts, notes, etc., on which settlements had been made, on which a judgment had been obtained, and she was put on her inquiry by service on her of a petition of a creditor attacking said judgment for fraud, and she makes no investigation until a year after the judgment is rendered, the action to annul is prescribed. 18 Ann. 280; 18 Ann. 507; 8 La. 101; 2 La. 180; 15 Ann. 273.
3. Where a nominal sale is attacked as simulated, and the nominal vendee set up the sale was intended as a security for the payment of a just debt, the actual contract will be enforced. 32 Ann. 94; *Farmer vs. Mangham*, 31 Ann. 348.

The opinion of the Court was delivered by

TODD, J. This is a suit brought by Mrs. Adele Bory, the defendant in the case of *N. King Knox vs. Mrs. Adele Bory*, No. 383 on the docket of said court, to annul the judgment rendered in the case, being the same judgment attacked by *Paul Bertrand* in the suit just decided.

The grounds of nullity are identical in the two cases. They embrace

Bory vs. Knox.

alleged vices of form and proceedings, such as the want of legal authorization to defend said suit and the want of jurisdiction in the court which rendered the judgment; and alleged frauds and ill-practices in procuring the judgment, all of which were mentioned in the opinion delivered in the case of Bertrand vs. Knox et al. referred to.

Among other defenses to the suit, the plea of prescription of one year was interposed, which was sustained by the judge *a quo* and the suit dismissed.

The judgment sought to be annulled was rendered on the 18th of November, 1882. This suit to annul it was filed on the 1st of March, 1884, more than a year after its rendition.

The plea of prescription is not applicable to the alleged vices of form and proceeding set up in the petition, since such prescription is no bar to the action of nullity on such ground.

There is, however, no merit in the contention with respect to those alleged vices.

The husband of Mrs. Bory was absent in France when the suit was instituted. Mrs. Bory was a public merchant at the time, having a separate interest which she conducted alone.

The citation to her issued in suit 382 on the 2d of October, 1882, and the order of the judge authorizing her to defend the suit and stand in judgment bears the same date. This was sufficient in the absence of the husband. This order was indorsed on the petition and must be presumed to have been made before citation issued, and was doubtless copied with the petition that was served on Mrs. Bory. C. P. Art. 118, Brown, Syndic, vs. Ferguson, 4 La. 259.

Relative to the nullities resulting from alleged fraud and ill-practices charged, and to which the plea of prescription is specially applicable, we have seen that the suit of nullity was instituted more than a year after the rendition of the judgment assailed.

The requirement of the law is that such suit must be brought within the year from the rendition of the judgment or the discovery of the frauds or ill-practices alleged. Mrs. Bory asserts that the suit was filed within a year after such discovery.

It is proved that Mrs. Bory was informed by Bertrand of the alleged frauds on which her action is based before his (Bertrand's) revocatory action against the judgment was filed. She was also made a party to this suit of Bertrand vs. Knox, and in the petition all these alleged frauds and grounds of nullity are fully set forth, which she (Mrs. Bory) afterwards adapted as her own, and that this petition was personally served on her. This was certainly notice to her. It matters not that she did not believe Bertrand or did not read the petition.

State vs. Molisse.

If an opportunity is afforded to a party to know and to learn about a certain matter bearing on his interest and he fails or refuses to profit by it, if he closes his eyes to the notice spread before him and shuts his ears to oral information directly imparted to him, the law will hold him as bound by the same, and as fully notified as if he had taken thorough personal cognizance at the time of the information imparted and of the notice given. 6 Ann. 800; 18 Ann. 507; Story Eq. Jurisprudence, Sec. 887. We have given this point an attentive consideration, and we see no possible way or means by which Mrs. Bory can defeat this plea of prescription or avoid its effect.

This suit also embraced a demand in revendication to recover the property known as Last Chance in which she was successful, judgment in this regard being in her favor and properly so since the pretended transfer or sale to Knox was admitted to be a simulation.

It is to be noted that since this appeal has been pending, the defendant, Knox, has died and his legal representatives have been made parties.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be affirmed. Costs of the lower court to be paid by the defendant and of this Court by the plaintiff and appellant.

No. 9595.

THE STATE OF LOUISIANA VS. EDWARD MOLISSE.

Res gestæ are events speaking for themselves through the instinctive and spontaneous words and acts of participants, and not the words of the participants when narrating the events. The distinguishing characteristic of these declarations is that they must be necessary incidents of the criminal act or immediate concomitants of it, and that they are not due to calculated policy.

Time does not absolutely and alone determine whether a statement is a part or not of the *res gestæ*. No inflexible rule as to the length of the interval between the act of killing and the declaration of the victim can be formulated. The facts of each case must speak for themselves.

If the declarations are unconsciously associated with and related to the homicidal deed, even though separated from it by a short time, they are evidence of the character of the deed and are a part of the *res gestæ*.

Where the deceased, ten minutes after he had been fatally shot, said to a witness, "If he had not been so willing to fight he would not have been shot by the defendant," the statement is a part of the *res gestæ* and should have gone to the jury.

38	381
45	784
38	351
48	1408
38	381
f105	165
38	381
107	608
38	381
111	935
38	381
el13	55

State vs. Molina.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee.

D. C. Moise, A. A. Ker and *J. Duvigneaud* for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The defendant appeals from a sentence to five years' imprisonment at hard labour upon a conviction of manslaughter, and presents but one question for our review.

He offered one McGruder as a witness to prove that the deceased, ten minutes after he had been fatally shot, said to the witness "if he had not shewn himself so plucky and willing to fight he would never have been shot by the defendant." The judge excluded the testimony because "it was not under the circumstances part of the *res gestæ* and was not said by the deceased under the sense of impending dissolution."

"*Res gestæ*," says Wharton, "are events speaking for themselves through the instinctive words and acts of participants, not the words and acts of the participants when narrating the events but what is said or done by participants under the immediate spur of the transaction, because it is the transaction which then speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted. What they did or said is not hearsay; it is part of the transaction itself. And as long as the transaction continues, so long do acts and deeds emanating from it become a part of it, so that in describing it in a court of justice they can be detailed. The question is, is the evidence offered that of the event speaking through participants, or that of observers (or participants) speaking about the event. In the first case, what was said can be introduced without calling those who said it; in the second case, they must be called. Nor are there any limits of time within which the *res gestæ* can be arbitrarily confined. They vary in fact with each particular case. * * * As soon as we pass the line which distinguishes between the transaction talking of itself and talking as modifying the transaction, in other words, as soon as we pass the line between the time of the transaction and the time that follows it, we have no limits that can be imposed. If we are to receive declarations made ten minutes after a transaction, we must receive declarations made ten years afterwards." Whart. Cr. Ev., sec. 262.

This would exclude the testimony offered, but in the next section the author proceeds:

"The distinguishing feature of declarations of this class is that they should be the necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate concomitants or conditions of such act, and are not produced by the calculated policy of the actors. They need not be coincident as to time if they are generated by an excited feeling which extends without break or let-down from the moment of the event they illustrate. In other words, they must stand in immediate causal relations to the act and become part either of the action immediately producing it, or of action which it immediately produces. Incidents that are thus immediately and unconsciously associated with an act, whether such incidents are doings or declarations, become in this way evidence of the character of the act. Under the rule before us, evidence in homicide trials has been received of the exclamations of the defendant at the time of the attack; of the cries of the deceased and of others assaulted at the same time; of statements of the deceased, at the time or so soon afterwards as to preclude the hypothesis of concoction or premeditation, charging the defendant with the act." Sec. 263.

And, under that, the testimony is admissible.

The rule is that time does not determine absolutely whether a statement is part or not of the *res gestæ*, although it is a factor and an important factor in estimating whether it is, and therefore it is not correct to say that declarations made ten years after an event can as well be received as those made ten minutes after it. If the acts or declarations are unconsciously associated with and related to the homicidal deed, even though separated from it by a short time, they are evidence of the character of the deed and a part of the *res gestæ*. No inflexible rule as to the length of the interval between the act of killing and the act or declaration of the person killed can be formulated. In that matter the facts of each case stand alone and must speak for themselves. In each case the particular facts and incidents must be considered as an independent group, and the judge must determine whether they fall within or without the operation of the rule. And this is what Greenleaf means when he says the trial judge must determine the admissibility of the evidence, and a large discretion is allowed him. He even says the ruling of the trial judge thereon is conclusive. Cr. Ev. sec. 108.

That is not so—certainly not under our uniform practice. His ruling is reviewable by this Court, or we should not now be considering it.

There are several cases in the books that justify the contention of the defendant in this appeal.

In Massachusetts, the deceased wounded and bleeding ran from her room where the wound was inflicted to the room occupied by the witness in the same house but in the story above, and knocked at the door, crying murder. On being let in, the deceased asked the occupant of that room to go for a doctor and a priest, saying she was killed. This declaration was admitted, the court ruling that although there was such interval as to allow the deceased to go from her room up stairs to another, it was sufficiently soon after the occurrence to be a part of the *res gestæ*. *Com. v. McPike*, 3 Cush. 181.

The English courts have ruled in like manner under resembling circumstances. Thus, a prisoner was charged with manslaughter in killing the deceased by driving a cabriolet over him. A person, who saw the cabriolet drive by but did not see the collision, went up to the injured man immediately afterwards, attracted by a groan, when he made a statement to the witness of the manner in which he had been run over. It was held to be a part of the *res gestæ*. *Rex v. Foster*, 6 C. & P. 325. In the same line see *Thompson v. Trevanion*, Skin. 402.

A man was killed by a blow from a stick. A girl heard his cry and going to him asked what was the matter and he said he had been robbed by the man who had walked with him. This man was the party indicted for the murder, and the girl's evidence was admitted. *Reg. v. Lung*, 6 Cox C. C. 477.

The witness in this case should have been permitted to testify. The statement of the deceased to him was soon enough after the homicidal act and sufficiently connected with it to be an immediate concomitant of it and not a statement proceeding from or suggested by a calculated policy, and was therefore a part of the *res gestæ*.

But the State insists that even if it was admissible, it could not affect the verdict. The prosecution was for manslaughter and the conviction was of manslaughter. If the jury had heard the deceased's statement that he would not have been shot if he had not been so willing to fight, it could not have reduced the verdict of manslaughter to one for a less offence.

It may be that the jury would so have found, but it is not for us to find so for them. The evidence should have gone to them. They alone have the right to weigh it.

It is therefore ordered and decreed that the sentence upon the prisoner and the verdict of the jury are set aside, and the case is remanded to the lower court for a new trial.

Todd, J., dissents.

Mackesy vs. Shultz et al.

DISSENTING OPINION.

TODD, J. I do not consider the declaration referred to a part of the *res gestæ*, and even if it were, that it was of sufficient importance or significance as to have affected the conclusion reached by the jury.

I therefore dissent.

No. 9560.

WILLIAM MACKESY VS. THEODORE SHULTZ ET AL.

In a direct action to revoke a sale, containing the requisite averments and prayer for the revocatory action, and where the sale is alleged to be "simulated and fraudulent," the judge is authorized to grant the relief if the evidence establishes either simulation or fraud, or both. Affirming *Johnson vs. Mayer*, 30 Ann. 1203.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

R. DeGray and *W. B. Lancaster* for Plaintiff and Appellee.
Chas. S. Rice for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. This action is brought by plaintiff, a judgment creditor of defendant Shultz, to annul and revoke a sale made by said Shultz to his co-defendant, Annie Kraemer, and to subject the property in the act of sale described to the satisfaction of his judgment.

The substantial allegations are that the sale was "*simulated and fraudulent*;" that it was made with the purpose and intent of defrauding the creditors of Shultz, participated in by both parties with full knowledge of the total insolvency of Shultz; and the prayer is for judgment "annulling and revoking said *pretended and fraudulent* sale, and subjecting the property to petitioner's said judgment and for general relief."

Under the general issue voluminous testimony was received without objection, the result of which, according to the opinion of the judge *a quo*, was to establish that the sale, even if not simulated, was clearly in fraud of creditors and subject to revocation on that ground, and he gave judgment accordingly.

Appellant contends that the judgment should be reversed for error of law, on the ground that the petition presents exclusively an action "*en déclaration de simulation*," and that, under such issue, a judgment revoking the contract could not be rendered if, however, fraudulent, the contract was found to be real and not simulated.

We cannot sustain this position. We find in the petition every allegation essential to sustain the revocatory action proper and a prayer

38	385
110	1076
111	770

Mackee vs. Shultz et al.

exactly appropriate to the relief authorized in such an action. If every word charging simulation were stricken from the petition, it would still retain all the elements of a revocatory action.

With that vigorous common sense characteristic of him, Judge Spencer, as the organ of the court, in a case quite similar to this, brushed away the technical quibbling upon which defenses of this kind rest, in the following pertinent language:

"When sales are attacked by a *direct action*, there is no reason why the party may not demand relief from them by alleging simulation or fraud, or both. We are not disposed to hamper the remedies of creditors, who resort to direct actions by doubtful technicalities. In the class of cases now under consideration, the widest latitude should be given them, for they are necessarily to a great degree uninformed as to the precise relation existing between their debtor and his co-adjutors in wrong-doing—often they are compelled to strike in the dark. If the purchaser's title is an honest one, it is better for him that the double test be applied in one instead of two suits. The prayer of plaintiff's petition is broad enough to cover our decree, whether we hold the sale to be simulated or fraudulent." *Johnson vs. Mayer*, 30 Ann. 1203.

If the object of the law be, not to screen, but to uncover, fraud, these utterances are in full consonance with its spirit, and as they commend themselves to our sense of justice as well as to our reason, we adopt and reiterate them.

The case of *McAdam vs. Soria*, 31 Ann. 864, differs vitally from the foregoing in two particulars, viz: 1st. It was not a direct action, but a seizure under *fi. fa.*; 2d. The pleadings did not contain the averments requisite to the revocatory action.

As the opinion did not profess to overrule or even refer to the case of *Johnson vs. Mayer*, so recently decided by the same court, we cannot give such effect to the *dicta* contained therein which are in apparent conflict, but must consider their application as restrained to the case in hand.

Under the doctrine of *Johnson vs. Mayer*, we consider the judge was fully authorized to grant the relief on the ground of either "simulation or fraud, or both."

On the merits of the case, we rise from an attentive reading of the evidence with convictions entirely in harmony with those expressed by the judge *a quo*, and as we can add nothing to his masterly analysis, and no purpose would be accomplished by its reproduction, we shall content ourselves with affirming the judgment.

Judgment affirmed.

State vs. Scott.

No. 9599.

THE STATE OF LOUISIANA VS. ED. SCOTT.

A motion in arrest of judgment is well founded when it is levelled at an indictment which charges that the accused "feloniously did shoot with a dangerous weapon with intent to commit murder." Such indictment should have charged besides that the act had been done "wilfully and with malice aforethought."

38	887
48	1363
48	1341
38	387
51	1649
38	387
116	90

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

M. J. Cunningham, Attorney General, and *L. D. Beale*, District Attorney, for the State, Appellee:

The granting of a new trial, where the sole ground of the motion is that the verdict is contrary to the law and the evidence, is within the discretion of the lower court; and its action is not subject to review by this Court. Testimony that a prosecuting witness had told a different story out of court, from that sworn to by him on trial, could legally be offered for no other purpose except to impeach said witness, and in order to give such testimony to the jury, the legal foundation must be laid to impeach.

ON MOTION IN ARREST.

"Under an indictment for shooting with intent to commit murder, it is unnecessary to charge specifically that the accused did wilfully, feloniously and of his malice aforethought" shoot, etc. It is not defective where the words "feloniously and with intent to commit murder" are used.

Those words are amply sufficient under the Statute. 36 Ann. 336. "In an indictment for an assault with intent to commit an offense, the same particularity is not necessary as is required in indictments for the commission of the offense itself." Wharton's Criminal Law, § 644; 37 Ann. 467-8.

T. Jones Cross for Defendant and Appellant:

The qualification of the intent as *felonious* merely, without the addition of *wilfully* and of *malice aforethought*, "covers only the crime of manslaughter, and does not describe the intent essential to constitute murder." 36 Ann. 100.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant was indicted for shooting with intent to commit murder, found guilty and sentenced to two years at hard labor. He appeals.

The record contains a bill of exception to the refusal of the judge to grant a new trial and a motion in arrest of judgment.

In the motion for a new trial complaint is made that important testimony was not given to the jury by reason of an error of the attorney for the defense, who had misunderstood the ruling of the judge touching its admission.

We deem it unnecessary to pass upon this ground of complaint, as we rest our conclusion on the other.

 Canal and Navigation Company vs. Touché and Hollander.

The motion in arrest charges that the indictment is defective and illegal.

1. Because it does not contain the word "wilful."
2. Because neither the shooting nor the intent is charged with having been done with malice aforethought.

The accused is prosecuted under Sect. 791, R. S., and charged with intent to commit murder. The indictment expressly charges that the defendant "feloniously did shoot with a dangerous weapon with intent to commit murder"

The State claims that the case falls within the ruling in 36 Ann. 336, while counsel for the accused distinguishes between the cases to show that they do not clash.

Considering the rulings in 33 Ann. 922; 36 Ann. 100, and in 37 Ann. 776, and Sect. 1048 of the Revised Statutes, we regard that invoked by the State as merely constituting *res judicata*, and do not propose to repeat it.

We therefore conclude that the indictment is defective in not charging that the shooting was done also *wilfully* and *with malice aforethought*.

It is therefore ordered and decreed that the verdict and sentence be avoided, annulled and reversed, and that the indictment be quashed, the accused to remain in custody to await the further action of the District Court of the Parish of East Baton Rouge.

No. 9556.

CARONDELET CANAL AND NAVIGATION COMPANY AND BERTRAND
SALOY VS. OTTO TOUCHÉ AND FREDERICK HOLLANDER.

The dismissal of an injunction suit on an exception is equivalent in law to a judgment decreeing the injunction to have been wrongfully obtained.

An action in damages following such a judgment, by the defendants in the injunction suit, involves but one question, and that is the quantum of damages to be allowed.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

H. D. Ogden and Blanc & Butler for Plaintiffs and Appellees.

A. A. Ker and J. Duvalneaud for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. This is an action for damages alleged to have been caused by a writ of injunction sued out against plaintiffs by the defendant, Touché, and decided to have been wrongfully obtained.

The demand is for the sum of two hundred and fifty dollars, amount of the injunction bond, against Touché as principal and against Hollander as surety *in solido*, and against Touché alone in the additional sum of \$2,255 25 for actual costs and for exemplary damages.

Both defendants have appealed from a judgment against them *in solido* in the sum of two hundred and fifty dollars. Plaintiffs pray for an amendment so as to increase the judgment against Touché individually to the full amount of their demand against him.

Under the pleadings, no judgment in excess of \$250 could possibly have been or be now rendered against the defendant, Hollander, the surety on the injunction bond; therefore, we have no authority to examine or revise the judgment rendered against him, and hence we cannot consider his appeal.

As to the principal defendant, the record shows that on exception his suit against the canal company was dismissed, and that as to the other defendant, Saloy, he was ordered to amend his pleadings within a reasonable time, failing in which his action against Saloy was also dismissed.

Under this condition of things, the legal conclusion is that the writ of injunction had been wrongfully obtained, and in the present controversy the only question to be discussed is the amount of damages sustained by the original defendants in injunction, plaintiffs herein. *Barrimore vs. McFeely* 32 Ann. 1179.

The record shows that plaintiffs paid the sum of \$250 as counsel fees for their defense in the injunction proceedings; and this is the amount allowed as damages by the district judge.

We have searched in vain from the evidence any proof of additional damages caused to plaintiffs by the injunction; hence, we find no grounds or authority to justify the increased allowance prayed for by plaintiffs.

We do not feel disposed or even authorized to inflict exemplary damages on a party who conceived that he was legally entitled to the writ of injunction which he had applied for.

It is therefore ordered that the appeal of Frederick Hollander be dismissed at his cost, and that the judgment against Otto Touché be affirmed, with costs in both courts.

State vs. Madlar.

No. 9611.

THE STATE OF LOUISIANA VS. CHARLES MADLAR ALIAS PRUSSIAN
CHARLEY.

Motions for appeal in criminal cases tried in Orleans parish must be filed within ten days after sentence. The law regulating criminal appeals expressly prohibits granting them after ten days have elapsed from sentence.

Appeals in criminal cases from Orleans must be made returnable within ten days after granting them.

The law regulating appeals in criminal causes cannot be relaxed when its provisions are plain and its requirements absolute.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee.

J. G. MacMahon for Defendant and Appellant.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

MANNING, J. Sentence was pronounced on the defendant on August 26, 1885. He appealed by motion on November 30th following.

Motions for appeal in criminal causes tried in Orleans parish must be filed within ten days after sentence. Acts 1878, p. 56.

Objection was made by the district attorney to the filing of the motion on the ground that it came too late, which the court overruled. It should have been sustained. The 3d section of the Act of 1878 expressly prohibits granting an appeal after ten days have elapsed.

The appeal was granted November 30, 1885, returnable within ten days from that date. It was filed in this court December 14th. following.

Appeals in criminal causes must be made returnable within ten days after granting them. This requirement was complied with by the judge but the appeal was not lodged here until after that time had elapsed.

The law regulating appeals in criminal causes cannot be relaxed by construction when its provisions are plain and its requirements absolute. The public has an interest in the administration of the criminal law, and in its interest as well as those of individuals rules of practice must be adhered to. State vs. Jenkins, 36 Ann. 865.

The appeal is dismissed.

Belden vs. Slaughter-house Company.

No. 9550.

SIMEON BELDEN VS. THE BUTCHERS' UNION SLAUGHTER-HOUSE COMPANY.

Dismissal of a suit, on motion of defendant's counsel, because of failure of plaintiff to furnish bond for costs as required by an order of the court, does not constitute such voluntary abandonment by plaintiff as will defeat the operation of the suit to interrupt prescription.

The charge that plaintiff had made a partial assignment of his claim to a third person, is not satisfactorily proved; and, besides, the defendant having received no notice of such transfer from the party, and not having assented to such division of its debts, is fully protected and has no interest in the question.

The right of plaintiff to recover value of services rendered is recognized, and value fixed at \$1500.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Thos. J. Semmes for Plaintiff and Appellee:

1. No partial transfer by a creditor binds the debtor, unless he assents thereto, and until such assent the partial transferee cannot sue. 8 La. 536; 3 R. 432.
2. In such case the equitable interest of the partial transferee is like that of a dormant partner represented by the original creditor. 9 Ann. 74.
3. When one party wrongfully puts an end to the contract, the other can recover value of his services. 110 U. S. 345.

B. E. Forman for Defendant and Appellant:

1. Where six distinct and separate causes of action are cumulated in one suit, plaintiff should state when each cause of action arose, and how much he claims on each cause of action C. P. 172.
2. (a) A suit for attorney's fees is prescribed in three years. C. C. 3538. (b) A previous suit not involving the same identical cause of action cannot interrupt prescription; (c) nor does a previous suit interrupt prescription when either abandoned or discontinued. C. C. 3519; *Smith vs. Gibbon*, 6 Ann. 684; *Bell vs. Elliott*, 8 Ann. 453; *Denistoun vs. Rist*, 9 Ann. 464; *Elliott vs. Brown*, 13 Ann. 579. (d) A suit filed in 1881, and bond for cost promptly ordered, which was never given and never brought to issue, and dismissed in 1884, is abandoned.
3. A corporation can only contract with and employ counsel by its board of directors, acting by resolution. *Bright vs. Metairie Cemetery Association*, 33 Ann. 58.
4. All parties in interest must be made parties to the suit, and where a plaintiff has assigned his claims he can no longer prosecute in his own name without joining the assignee.
5. When the original paper (a private writing) is not in the possession of, nor under the control of, the party offering it, parol evidence of its contents (and a *fortiori* an examined and certified copy) was admissible. *Davidson vs. Davidson*, 10 B. Monroe (Ky.), 115; *Walter vs. Crabbs*, 8 B. Monroe (Ky.), 11; *Moody vs. Commonwealth*, 4 Metcalf (Ky.), 1; *Ralph vs. Brown*, 3 Watts & Sergeant (Pa.), 395; *Lindsay vs. Thomas*, 26 Ga. 537; *Shorter vs. Sheppard*, 33 Ala. 648; *Brown vs. Wood*, 19 Mo. 475; *Lynd vs. Judd*, 3 Day (Conn.), 499; *Flannigan vs. Lerbert*, *Bright* (Pa.), 611; 3 Allen (Mass.), 518; *Riggs vs. Taylor*, 9 Wheaton, 484; *Hyde vs. Hepp*, 11 R. 159; *Montgomery vs. Routh*, 10 Ann. 316.
6. Where litigation has been brought on by an attorney's bad advice, and his professional labors have been in no way beneficial, he is not entitled to recover.

Belden vs. Slaughter-house Company.

The opinion of the Court was delivered by

FENNER, J. The plaintiff, an attorney at law, claims, in this action, compensation for professional services rendered to the defendant corporation in 1880 and 1881.

From a judgment against it for \$3,000 the defendant appeals, and claims the reversal thereof on sundry grounds.

1st. It is urged that an exception to the vagueness and uncertainty of the petition was erroneously overruled. The plaintiff claimed a lump consideration for services in various distinct suits and proceedings.

Considering that he was employed as counsel of the company under a general retainer; that the object to be attained by the various services was the single one of maintaining defendant's right to conduct its business in the parish of Orleans; that this was the object and purpose of plaintiff's employment, and the services were all subsidiary thereto, we think the plaintiff was justified in treating the whole as substantially one service and claiming a lump consideration therefor.

2d. The prescription of three years is urged in bar of plaintiff's claim.

We consider the term of prescription to have begun at the date of plaintiff's discharge, under the facts of this case, where it is shown that payment for the services was to be postponed until the company had succeeded, which had not yet occurred.

The discharge took place on March 28, 1881, and this suit was brought only in January, 1885. But on the 29th of November, 1881, plaintiff brought a suit on the same cause of action and cited defendant therein, which suit continued pending until June, 1884, when it was dismissed on motion of defendant's counsel by reason of plaintiff's failure to comply with an order of the court requiring him to give bond for costs.

We cannot consider plaintiff's failure as such voluntary abandonment of the suit as is contemplated by C. C. 3519. The record shows that he obtained several extensions of the delay allowed him for furnishing the bond, the last as late as the 5th of June, 1884, and it is fair to presume he was unable to comply.

Prescription was suspended during the pendency of that suit, in so far at least as the causes of action now urged were embraced therein. The only one now presented, which was not then set up, is the service rendered in drafting defendant's act of incorporation; and as this is only one of several services, and as the judgment is for only one-half of the amount claimed, the latter may well stand, if otherwise sustained as to its amount.

3d. It is urged that plaintiff was never employed by defendant.

This plea is totally inconsistent with his frequent appearances in judicial proceedings, with the knowledge and co-operation of defendant's officers, and with the formal resolution adopted by the board of directors on March 28, 1881, reciting that "Mr. Simeon Belden has neglected the proper prosecution of the business entrusted to him by this company, and he is hereby discharged as our attorney and no longer has any authority to represent the company," etc.

We take occasion to say that the record does not disclose such neglect as would deprive plaintiff of his right to compensation, at least for past services.

4th. Another defense is that plaintiff, under his own agreement, was only to be paid after the company had succeeded in establishing its business.

We find that this agreement was contingent upon his being continued in the employment of the company; and the latter, having discharged him, cannot claim its benefit, but must respond for the value of services rendered.

5th. It is charged that, prior to the suit, plaintiff had assigned his claim for these fees to one Armstrong, and hence could not stand in judgment.

An attempt was made to prove an assignment to the extent of \$1000, but we think the evidence is entirely insufficient; but, at all events, the company having received no notice of such assignment, and having never consented to such a division of its debt, and having submitted the matter to the court, will be amply protected and has no concern in the question. See *Miller vs. Brigot*, 8 La. 536; *King vs. Hazard*, 5 N. S. 194; *Kelson vs. Beaman*, 6 La. 90.

6th. This leaves for our determination only the question of the *quantum meruit* of the services.

We have given attentive consideration to the nature and extent of the services as exposed by the record, and conclude that their value has been over-estimated by the judge *a quo*. It is true the questions involved were important, but the plaintiff's services did not extend to the point of having them determined in favor of defendant. The suits with the Board of Health were unquestionably the result of bad advice and occasioned no benefit to the client.

The remaining suits were properly brought or defended, and the issues were framed therein in shape to provoke a determination of the momentous questions involved; and, in the meantime, to frustrate the

 Buddig vs. Baldwin.

efforts of the Crescent City Slaughter-house Company to enjoin them from erecting their works and preparing to do business.

In May, 1881, about a month after plaintiff's discharge, this Court rendered its decisions removing every obstacle out of the way of defendant in the prosecution of its business. 33 Ann. 930, 934.

We have not omitted to notice that the last cited case does not figure as one of those for which the fees herein are claimed, but that does not affect our view of the case.

Although the Crescent City company afterwards obtained a new injunction in the Federal Court, that was dissolved by the Supreme Court of the United States, and defendant has recovered judgment for heavy damages on account of its wrongful issuance.

We consider that the services of defendant have contributed to the accomplishment of these results and that he is entitled to substantial compensation therefor.

Considering the importance of the questions, the number of the suits, the frequency and variety of the services, all of which must have occupied much of his time and study during the year and more, over which they extended, and yet with due regard to the drawbacks indicated, we have concluded to fix their value at fifteen hundred dollars, subject to the credit allowed thereon.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be amended by substituting fifteen hundred dollars for the three thousand dollars therein allowed, and that, as thus amended, the same be now affirmed; appellee to pay cost of this appeal.

 No. 9516.

HENRY BUDDIG VS. HENRY BALDWIN, SUPERINTENDENT.

The jurisdiction of this Court must be tested by the pecuniary amount in dispute, as shown by the pleadings, and as appearing from the nature of the action, and not by the jurisdictional allegations, or by the affidavit of the appellant.

The substantive allegations in the pleadings, not the alleged opinion of litigants, will be considered in all questions of jurisdiction.

No allegation and no affidavit can create an appealable amount of interest in a litigation which from its very nature and essence cannot involve a pecuniary amount in dispute equal to the lower limit of the jurisdiction of the Supreme Court.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Braughn, Buck, Dinkelspiel & Hart for Plaintiff and Appellant.
Farrar & Kruttschnitt for Defendant and Appellee.

38 394
108 656
38 394
116 718
38 394
123 352
123 353

Buddig vs. Baldwin.

The opinion of the Court was delivered by

POCHÉ, J. This is an injunction suit, the chief object of which is to restrain the defendant, as superintendent of the New Canal and Basin, from removing from the banks of said canal, and storing elsewhere, a large quantity of lumber, about two million feet, at the expense of plaintiff, the owner thereof.

The gist of the complaint is the alleged unconstitutionality of Section 8 of Act No. 127 of 1880, which, in terms, authorizes and directs the proposed removal of the lumber by the superintendent.

Plaintiff has taken this appeal from a judgment which dissolved his injunction on motion, setting forth the reason that his petition did not disclose a sufficient cause of action to justify an injunction.

In his brief, appellee suggests our want of jurisdiction *ratione materiae*, and we find nothing in the records on which to refute his proposition.

As already stated, the petition in this case contains no moneyed demand, hence the only pecuniary matter in dispute is the cost of removing and storing the lumber; and it is not even intimated in the pleadings that such costs could in any emergency amount to a sum exceeding two thousand dollars.

The pleadings contain no allegation of any possible damages as a result of the alleged unconstitutional attempt of the superintendent to remove plaintiff's pile of lumber.

Hence we are completely at a loss to conceive of the ground on which plaintiff can rest his allegation "that the forced removal of said lumber as threatened would cause him irreparable injury" (!) "and pecuniary loss in a sum exceeding one thousand dollars;" and the record affords no safer foundation for his affidavit, setting forth a pecuniary interest in this suit exceeding two thousand dollars. In the absence of any allegation on which to base any calculation of the pecuniary matter in dispute, we must say that plaintiff's swearing appears very reckless and rather hazardous.

We have on more than one occasion said: "The real amount in dispute, exclusive of interest, whenever the same can be legally ascertained from the pleadings and documents annexed, *and not the allegations of parties*, is to be the test of our jurisdiction and shall be our rule in determining all such questions." 32 Ann. 929, *Wilkins vs. Gannt*; 32 Ann. 1191, the case of *Crean*.

And when, later on, we were confronted by an affidavit intended to create a jurisdictional issue, but unsupported by substantive allegations disclosing an amount vesting this court with jurisdiction, we said:

Buddig vs. Baldwin.

"No allegation and no affidavit can create an appealable amount of interest in a litigation which, from its very nature and essence, presents an issue involving no pecuniary gain or loss to the parties in the suit." 34 Ann. 834, State ex rel. vs. Miscar.

The rule applies to cases like the present controversy, where it appears that, in a question of some legal importance, the only pecuniary amount possibly in dispute is a trifle when compared to the amount of the lower limit of our jurisdiction.

We are clearly without jurisdiction over the case; and it is plain that plaintiff has been mistaken in his choice of an appellate tribunal.

This appeal is therefore dismissed at appellant's cost.

ON REHEARING.

A second examination of the question of jurisdiction in this case has confirmed our views as stated in our previous opinion.

As the petition contained no allegations on which the court could base a reasonable or possible calculation of the probable cost of removing the lumber in question, appellant now seeks to remedy the deficiency of his pleadings by alleging in *his brief* that such a removal would cost at least one dollar per thousand, and that the cost of storage must be added thereto, all of which is held out as a sufficient jurisdictional allegation.

But we understand the rule to require us to consider the record only in deciding a question of jurisdiction, and that no circumstances not covered by the pleadings can be invoked as an argument on such a question.

And we also understand the rule to require the appellant to show jurisdiction affirmatively. City vs. Apken, 36 Ann. 419.

The rule has been construed as denying the right of establishing jurisdiction by means of an amended petition containing allegations tending to present an amount within the jurisdiction of this Court, when not apparent in the original petition. March vs. McNeely, 36 Ann. 287.

In this case a strange feat is attempted by the appellant.

In the lower court he went to trial under a showing which restricted his pecuniary interest in the litigation to a sum exceeding *one thousand dollars*. But on appeal he was bewildered in the choice of an appellate tribunal; hence he sought by an affidavit to enlarge his pleadings, and, like the rolling snow-ball, his possible loss of *one thousand dollars* was increased to a sum in excess of *two thousand dollars*.

We would have been justified, in reason as well as in law, to have entirely ignored that affidavit on the ground that it conflicted with the only jurisdictional allegation contained in the pleadings. But even that affidavit, when full effect is given to its meaning, was held and is insufficient to furnish any *data* on which our jurisdiction could be reasonably founded.

Hence, appellant has been driven by the necessities of his own case to resort to his brief as an attempted continuation of avowedly deficient pleadings, and we are now expected to consider the storage of the lumber as one of the elements which contribute to our jurisdiction of the cause.

But his jurisdictional allegation, which is transcribed in our original opinion, contains no reference to storage or the probable cost thereof. Hence the element of pecuniary interest cannot now be considered in determining the question of jurisdiction.

If the freedom and latitude which this appellant claims in the matter of jurisdictional allegations were allowed to all litigants whose desire may be to bring their appeals to this Court, it is difficult to conceive of a case in which, by an after treatment, the pleadings would not be strained in order to create a jurisdiction not originally contemplated, and manifestly not justified by the nature of the demand or the essence of the case.

This Court must be, as it has always been, solicitous to maintain and preserve the constitutional right of appeal; but it must be careful to restrict its powers as an appellate tribunal within constitutional limits.

We find no reason to justify a change of opinion in this case, which we had reopened with the sole view of giving an opportunity to appellant of arguing the question of jurisdiction, which had received no attention at his hands at the first hearing of the case.

It is therefore ordered that our previous decree remain undisturbed.

No. 9558.

ALPHONSE MARTIN VS. CITY OF NEW ORLEANS ET ALS.

Under Article 207 of the Constitution the capital, machinery and other property employed in the manufacture of articles of wood is exempt from taxation, although the same be used as well for purposes which would not entitle the owner to exemption, if he exclusively thus used it.

In such case, such property is partly taxable and partly not, in proportion of its relative value as employed or used in each business.

38	397
45	485
45	487
45	490
38	397
47	1316
38	397
49	397
38	397
119	641

Martin vs. New Orleans et als.

Principle applied to a saw mill and appurtenances employed to manufacture raw materials and articles of wood, but not extended to *vessels* used to convey timbers for saw mill purposes and which is sold in the market and dressed in the articles of wood.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

Chas. S. Rice for Plaintiff and Appellee.

W. H. Rogers, City Attorney, and *Blanc & Butler* for Defendants and Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The object of this proceeding is to annul the assessment made of property owned by the plaintiff, and which he alleges is employed in the manufacture of articles of wood.

The defense is a denial of the exemption claimed.

From a judgment reducing the assessment from \$42,675 to \$17,170, i. e., by forty per cent, the defendant appeals.

The facts do not appear to be disputed.

One witness only was sworn, the plaintiff, and it is admitted that, if another witness was heard, he would testify to the same purpose.

It is established by this testimony that, during the year 1884, plaintiff was engaged in the saw mill business, in which he had invested a capital represented by real estate, machinery, horses, vessels and active money.

It also shows that the vessels were employed in towing timber through rivers, lakes and bayous to this city, where it is sawed into planks and other raw lumber; part to be sold on the market and part to be converted by plaintiff into articles of wood, such as doors, sash and blinds, boxes, lathes, necessary for the construction of buildings and put in shape and style ready for immediate use. Some fifteen hands were employed in this last business.

The relative value of the property employed in the saw mill business proper is *sixty* per cent, while that used in the manufacture of articles of wood is *forty* per cent.

Article 207 of the Constitution, on which plaintiff relies, expressly exempts from taxation, during ten years from the adoption of the Constitution, "the capital, machinery, and other property employed in the manufacture of * * * furniture and other articles of wood * * * *provided*, that not less than five hands are employed in any one factory."

Martin vs. New Orleans et als.

In the case of *Jones vs. Rainés*, 35 Ann. 998, we had occasion to consider the meaning and purview of this article, an attempt being made to extend the immunity which it accords, so as to apply to *saw-mills*. We there held that, while it proposes to exempt *some* it did not *all* manufacturers; and that were to be considered as protected by its provision, only such as are specially enumerated in it. We accordingly decided that, as *saw-mills* did not enter into the contemplation of the framers of the organic law and had not been enumerated in the article, they could not be placed beyond the reach of the tax gatherer.

In the cases of *City vs. LeBlanc* and *vs. Beck*, 34 Ann. 596. we took pains to define who the manufacturers are, whom the previous article (206) exempts from *license*.

Applying the rulings in those cases to the present controversy, it is manifest that the property, of whatever nature, which is used in the saw mill business proper, that is, in the manufacture of raw materials, namely: of lumber, not ready for use, as are "furniture and other articles of wood," is not exempt from taxation.

The case is different, however, as to the property which is used for the manufacture of articles of wood, ready for use by the consumer.

The argument that the character of plaintiff's business must be determined by its principal and not by its incidental features, though apparently plausible (surely ingenious), is not entitled as a test to much weight, either to ascertain the nature of plaintiff's calling, avocation or pursuit; or to declare that of the property employed by him in his transactions.

It is clear that it was optional with the plaintiff to have used all the property in question exclusively, either in the manufacture of raw materials, or in that of articles of wood ready for use.

In the former case, the property representing a saw mill, preparing lumber to be dressed, would have been taxable in its entirety. In the latter, it would have been exempt from all taxation whatever.

It is, however, difficult to perceive, how and why, in the absence of any prohibitory clause in the Constitution, the plaintiff should not be recognized the right to employ that property to both uses.

Denying the plaintiff this important privilege would be to do violence to the Constitution by interpolating in it a restriction which, it does not appear, the framers of it intended to interpose.

The same article, in its first part, exempts from taxation "all places of religious worship or burial, all charitable institutions, all buildings and property used *exclusively* for colleges," etc.

The word *exclusively* is employed *ex industria*, to limit the exemption, to property exclusively used for church, charitable and school purposes.

It was not inserted in the further part of the article, attending to property employed in the manufacture of certain articles. Had the intention of the framers of the Constitution been to exempt *only* such property as would be *exclusively* employed in such manufacturing, they would have unequivocally expressed it; but they have remained perfectly reticent on that qualification. It does not, therefore, appertain to this Court to incorporate it in that provision; the less so, as in the case of *Jones vs. Rains*, it was formally announced that the object of the exemptions created by it was to encourage and foster the establishment of manufactures of the various articles daily needed by the people.

It does not, however, follow, that all the property assessed is entitled to the exemption recognized by the district court.

It is impossible to conceive how the vessels employed to procure the timber, can be justly entitled to the immunity. They are used to bring the timber necessary for the saw mill which manufactures primarily the raw materials to be dressed.

They are not used directly for the purposes of the manufacture of articles of wood, ready for immediate use by the consumer.

As well might the plaintiff claim, were he the owner of the lands from which the timber is felled, that such lands are likewise exempt, as they represent capital employed in the manufacture of articles of wood.

It is, therefore, ordered and decreed, that the judgment appealed from be amended by striking therefrom the words "upon vessels to the extent of twenty-two hundred dollars" and that thus amended the same be affirmed, plaintiff and appellee to pay costs of appeal.

No. 9559.

MRS. SERAPHINE MASPEREAU VS. CITY OF NEW ORLEANS ET ALS.

Property must be assessed in the name of the true owner. If assessed in any other name, the assessment is defective and cannot be the basis of a legal tax sale.

A woman divorced from her husband is in the same situation toward him as though no marriage had ever been contracted between them. She has the legal right to resume her original name, and property which she buys and which is recorded under that name cannot be legally assessed against her under another name, not even under her former name as a married woman.

APPEAL from the Civil District Court for the Parish of Orleans
Houston, J.

Farrar & Kruttschnitt for Plaintiff and Appellee.

W. H. Rogers, City Attorney, and *Blanc & Butler*, for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. The State tax collector and the city of New Orleans have taken this appeal from a judgment of the district court, annulling an adjudication at a tax sale of plaintiff's property in November, 1884, for taxes assessed against said property for the years 1882 and 1883, and ordering the cancellation of the assessment of said property for the years 1882, 1883 and 1884. The judgment also enjoined the tax collector from executing a deed to the property under the adjudication made by him as aforesaid to the State of Louisiana.

The grounds of plaintiff's complaint were that the property had not been assessed in her name, and that she had never been served with the notices required by law as necessary steps to a legal tax sale.

As the appeal taken by the city of New Orleans involves no other question but the legality or binding effect of the assessment, and as the amount of taxes which may thereunder be eventually due to the city, is far less than the lower limit of our jurisdiction, it follows that we have no jurisdiction over that branch of the case in which the city is interested, and that her appeal cannot be maintained.

The point presented by the State tax collector's appeal, involves the legality of his adjudication at a tax sale, of property which is shown to exceed in value the sum of two thousand dollars, and hence his appeal stands on a different basis.

The record shows that the property in suit was acquired by plaintiff by purchase on the 25th of July, 1881, and that her titles were put of record in the proper office on the same day.

It also appears that plaintiff, who had been the wife of Ernest D'Aquin for five years, was divorced from him in June, 1875, from which time she had resumed her original name as shown in the title of this suit, that for the year 1882, the property was assessed in the name of S. Keiffer, her vendor, and for the year 1883, in the name of Mrs. Ernest D'Aquin.

It requires no argument to show that the assessment of 1882 was an absolute nullity, and that it could not be the basis of a lawful tax sale. *Lague vs. Boagni*, 32 Ann. 912; *Guidry vs. Broussard*, 32 Ann. 924; *Marin vs. Sheriff*, 30 Ann. 293.

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On the second point, involving the alleged illegality of the assessment of 1883, appellant's counsel argue that plaintiff having, by marriage, become Mrs. Ernest D'Aquin, the assessment in that name was proper and legal, as that was and is her name until she legally acquires another.

But the Civil Code, Art. 152, says: "The effects of a divorce shall not only be the same as are determined in the case of a separation from bed and board, but it shall also dissolve forever the bonds of matrimony between the parties, and place them in the same situation with respect to each other as if no marriage had ever been contracted between them."

If no marriage had ever been contracted between Ernest D'Aquin and Seraphine Maspereau, the latter would never had been named or known as Mrs. Ernest D'Aquin, and hence it follows as one of the effects of the divorce that she then ceased to be Mrs. Ernest D'Aquin, and that she had as perfect a right to contract in her original name, as she had to contract at all, without the slightest reference to her former husband.

And his name had no more connection with her purchases or other contracts than he could in his own rights have interfered therewith or controlled the same.

By means of a reference to the public archives, which it was his duty to do, the assessor would have seen that, after the 25th of July, 1881, property stood in the maiden name of plaintiff, and that it was in that identical name that she had accepted the authentic sale made to her of that property. 30 Ann. 295, *Marin vs. Sheriff et al.*

An assessment made under such circumstances must be held as invalid. Hence we need not discuss the third ground of alleged nullity invoked by plaintiff, touching the want of notice required by law.

Having concluded that the assessment of 1882 was illegal because it was made in the name of S. Keiffer, and that of 1883 untenable, as it was erroneously in the name of Mrs. Ernest D'Aquin, we must hold that no legal adjudication was made on the 14th of November, 1884, and hence the judgment appealed from is correct.

It is, therefore, ordered, that the appeal of the city of New Orleans be dismissed at her costs, and that the judgment against the State tax collector be affirmed with costs.

Oteri vs. Oteri.

No. 9526.

JOSEPH OTERI VS. SALVADOR OTERI.

Held, that plaintiff was and remained one-fourth owner of ship "S. J. Oteri" until November 14, 1883, at which date his interest terminated by his voluntary acceptance of the return of the price which he had paid for said interest.

Held, that for the trips made by said ship prior to August 24, 1883, when the firm of S. Oteri & Bro., was dissolved and terminated, he is entitled to accounting of profits on same basis as had been always customary in previous transactions.

Held, that after the termination of the partnership, plaintiff's interest in the mercantile ventures of buying and selling fruit thereafter carried on by S. Oteri ceased; and that, as he could not be held for losses on such ventures, he cannot claim the profit. His interest thereafter was confined to his share of the earnings of the vessel *per se*. As these have not been kept in such manner as to enable us to ascertain their actual value, and as this is the fault of defendant, plaintiff is allowed his share of a liberal charter-price of the ship during that period.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

J. P. Horner and F. W. Baker for Plaintiff and Appellee.

W. S. Benedict and J. W. Gurley, Jr., for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Prior to August 24, 1883, Salvador and Joseph Oteri were equal commercial partners under the style of S. Oteri & Bro., engaged in the fruit importing and commission business.

That partnership terminated on the 24th of August, 1883, as has been judicially determined by this Court. *Oteri vs. Oteri*, 37 Ann. 74.

In connection with their business they used a certain steamship named "S. J. Oteri."

The vessel was purchased while in course of construction in England, was completed for account of the purchaser and brought to this port. The purchase price, together with all expenses connected therewith and with her voyage hither, was paid with funds of the firm of Oteri & Bro., and was charged, on its books, one-half to Salvador, one-quarter to Joseph Oteri, and one-quarter to Salvador Pizzatti, a brother-in-law of Salvador Oteri; but the vessel was registered in the name of Salvador Pizzatti, as sole owner.

After some profitless trips to Aspinwall and Jamaica, the vessel was transferred to the trade between this port and Spanish Honduras and the Bay Islands, and so continued to run up to the time of this suit. The business of the ship was not embraced in the partnership of Oteri & Bro., but stood on a different basis.

The vessel was not used exclusively or mainly as a common carrier, though taking such freight outward as offered and carrying passengers

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both ways. But the main business was the purchase of cargoes of fruit in the Honduran ports, bringing them to New Orleans and re-selling them here either on the spot or by railroad shipments to interior markets.

The firm advanced all the expenses of the ship; furnished the funds for the purchase of the cargoes; and attended to all the business of receiving and re-selling them, for all of which it received a commission of five *per cent*, which commission was shared equally between the partners, Salvador and Joseph Oteri.

After the net profits on each trip had been ascertained, including the profits on the purchase and sale of cargoes as well as the earnings of the ship proper, this net profit was passed to the credit of the parties on the books of the firm, in the proportion of one-half to Salvador Oteri, and one-quarter each to Joseph Oteri and S. Pizzatti.

Pizzatti, acted as master of the vessel, receiving a salary therefor, and also furnished his services in the purchasing of the cargo, for which his long experience in the trade gave him great advantages.

After the dissolution of the firm, Joseph Oteri ceased to have anything to do with the business. S. Oteri made all the advances for the purchase of cargoes and attended exclusively to their reception, handling and re-sale.

It appears that, while Salvador Oteri and Pizzatti were bosom friends Joseph Oteri was not on good terms with Pizzatti, and was not content with the arrangement under which the title to the whole vessel was left in the latter's name, and he insisted on having something to represent his interest in the vessel and to secure him against any wrongful use or disposition of the vessel by Pizzatti.

The method resorted to was the execution of a note by Pizzatti for the sum of \$34,250, the exact amount of the purchase price paid by Joseph, which note was dated October 7, 1882, and matured in one year, without interest, and was secured by mortgage on the vessel.

When this note matured in October, 1883, Salvador Oteri, as agent of Pizzatti, tendered payment thereof, which Joseph declined to accept, denying that the note represented any debt due to him, and claiming that he held it merely as security against any injury to his interest as owner in the vessel which still continued. He afterwards demanded an accounting of the earnings of the vessel, which being refused and his interest therein disputed, he subsequently concluded, under advice of counsel, to accept the sum offered in payment of the note, under fear, as he alleges, that he might lose everything. Accord-

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ingly, on November 14, 1883, he received \$34,250 and surrendered the note.

The object of the present suit is to recover :

1st. The sum of \$25,000, which he alleges his interest in the ship worth in excess of the sum received by him as above set forth, and so received under restraint and fear occasioned by defendant's unjust conduct.

2d. To recover his share of the profits and commissions on the various trips of the vessel made between June 13 and November 14, 1883.

I.

The claim to an additional value for his interest may be summarily disposed of. The evidence satisfies us that such additional value did not exist; and even if it did, he would be precluded from claiming it by his voluntary act in accepting the sum stipulated in the note, which he well knew was paid to him in full satisfaction of his interest in or upon the ship, whatever it might be, whether as creditor for the price or part owner. He so received it and the binding effect of his act is not destroyed by any circumstance sufficient to establish legal error, violence or fraud.

II.

We shall next dispose of several objections interposed by defendant in bar of plaintiff's right to claim an account of the earnings of the vessel.

1st. Defendant denies that plaintiff was ever a part-owner of the vessel and claims that Pizzatti was the sole owner, and that both S. & J. Oteri were mere creditors for the portions of the price respectively contributed by them.

The registry of the vessel and the act of mortgage in favor of plaintiff, considered by themselves and without explanation, would support this view; but we agree with the district judge that the evidence in the case makes it perfectly clear that the Oteris and Pizzatti were the real owners of the vessel; that the title was placed in Pizzatti's name from considerations of convenience merely; and that the mortgage was intended solely to secure Joseph's interest against any wrongful disposition or incumbrance of the vessel by the apparent owner.

It would be tedious and unprofitable to recount all the multitudinous facts and circumstances leading to this conclusion; but we may mention among them the mode in which the business of the vessel was conducted, both before and after the execution of the mortgage; the testimony of Stella, the confidential clerk of S. Oteri, who continually

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refers to the parties as joint owners; the testimony of Kelly showing that, when the vessel was brought out, he was consulted about having the title transferred to the names of the Oteris and Pizzatti, and then registering her in the name of Kelly as apparent owner; the petition filed in suit No. 7373, Civil District Court on December 26, 1882, (after the mortgage), wherein it is alleged that S. & J. Oteri and S. Pizzatti are "joint owners in certain proportions of the steamship S. J. Oteri"; and there are other facts equally conclusive. We, therefore, hold that Joseph Oteri was and remained a part owner of the vessel until the 14th of November, 1883, when he accepted payment for his interest.

2d. The pretended charter-party of August 13, 1883, whereby Pizzatti chartered the vessel to S. Oteri is too clumsy and transparent a sham and device to deserve further notice.

3d. Under our view above indicated of the nature and object of the act of mortgage, it is clear that the principles of admiralty law quoted by defendant have no application. Those principles are, that when one part-owner objects to some proposed employment of the vessel, he may require from his co-owners a stipulation equal to the value of his interest, for the safe return of the ship or for the payment of such value, and in such case the dissentient owner is not bound for expenses or entitled to share in the gains of the voyage. *Abbott on Ship*. p. 127.

But here, Joseph Oteri did not object to the employment of the vessel, but on the contrary sanctioned and participated therein, and the mortgage had reference to entirely different purposes already pointed out.

III.

Let us now consider the rights of plaintiff under the accounting herein made of the earnings of the ship from June 13 to November 14, 1883.

There is no dispute about the liability of defendant for plaintiff's share in the profits of trip No. 18, which ended July 27, said share being \$3,486.07. The only opposition of defendant to this allowance is a claim to offset against it a debt due by defendant for repairs of another vessel called the "E. B. Ward" owned by them jointly; but as this item is involved in a suit for settlement of accounts of that vessel, it need not figure in this case.

Trip No. 19 terminated on August 13, and stands on the same basis with the former. The only ground for claiming any difference between them is the contention of defendant that the partnership of S. Oteri & Bro., terminated on August 1; but as that contention has been judicially determined against him and the termination fixed of date August

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24, we consider the plaintiff entitled to settlement of this trip on the same basis with prior ones, and to recover his share of the profits \$1861.84, and his half of the commissions, \$398.57, in all \$2260.41.

Trip No. 20 began during the existence of the firm, but ended only two days after its termination, viz: on August 26. The venture is entitled to be considered as one of the firm, but the services in receiving and disposing of the cargo were rendered by S. Oteri alone. We think he will be sufficiently compensated for these extra services by allowing him the whole of the commissions and by awarding to plaintiff only his share of the profits, viz: \$2005.17.

The remaining trips of the vessel stand upon a different footing.

After the termination of the partnership, defendant's mandate to bind the plaintiff by mercantile transactions in the purchase and sale of fruit terminated. From that date this part of the business was conducted with the means and labor of defendant and at his exclusive risk, and as plaintiff could not have been held liable for losses incurred on such account, he is equally barred from claiming an interest in the profits. It is no answer to say that defendant had in his hands ample means of plaintiff. The compensation for the retention of these means is interest. He had no right to embark them in commercial ventures and if he had done so and losses had resulted, could have claimed no exemption from liability on that account.

Plaintiff's interest was confined to his proportion, as part owner, of the earnings of the ship *per se*, including proper freights for the cargoes belonging to defendant. But the accounts of the vessel have been so kept that it is impossible to distinguish and ascertain the earnings of the vessel. We have, therefore, no alternative but to allow to plaintiff a reasonable compensation for the use of his share of the vessel. As it is defendant's fault that the accounts were so kept as to entail the necessity of this method of settlement, we think plaintiff is entitled to a liberal allowance. After duly weighing the evidence on that point, we conclude that \$2500 a month would not have been an excessive charter-price for the steamer during this period, and we shall allow plaintiff his share of the sum for the period from August 26 until November 14, viz: two months and nineteen days, say one-fourth of \$6583.27, or \$1645.80.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be amended by reducing the amount allowed from \$14,975.54 to \$9,397.45, with legal interest on \$3,486.07 from July 27, 1883, and on \$2,260.41 from August 13, 1883, and on \$2,005.17 from August 26, 1883, and on \$1,645.80 (by average date of earnings) from October 5, 1883; and that, as thus amended, the said judgment be in all other respects affirmed, plaintiff and appellee to pay costs of appeal.

Oteri vs. Oteri.

No. 9557.

JOSEPH OTERI VS. SALVADOR OTERI, ET AL.

When a part-owner of a vessel, suing for a partition and account, has prayed for a sale of the ship, he cannot on appeal complain of a decree of sale made in conformity to the prayer of his own petition never changed or amended.

The principles upon which the decree herein is based are approved, and with correction of error, apparently clerical, in allowance for commissions, is affirmed.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

J. P. Hornor and F. W. Baker for Plaintiff and Appellant.

W. S. Benedict and J. W. Gurley, Jr. for Defendants and Appellees

The opinion of the Court was delivered by

FENNER, J. The plaintiff was one-fourth owner of the steamer E. B. Ward, the business of which was conducted by the firm of S. Oteri & Bro. up to the dissolution of that firm, and thereafter by S. Oteri, in much the same manner as was pursued with reference to the steamer S. J. Oteri, and detailed in the opinion just read in case No. 9526 of our docket.

Plaintiff brings the present suit against his co-owners, praying for a judicial sequestration of the vessel and for a decree ordering her to be sold, and for a partition of the proceeds, and also for an accounting to him for his share of the profits and earnings of the vessel from the 1st of August, 1883 to the date of the suit, July 3, 1884.

The order of judicial sequestration was granted by the court, and immediately afterwards, the defendants obtained an order of court authorizing them to release the sequestration on bond, which was executed.

The case was put at issue, and after the hearing of voluminous evidence, went to judgment in May, 1885.

The decree recognized the ownership of one-quarter of the vessel in Joseph Oteri and three-quarters thereof in Salvador Oteri; ordered the vessel to be sold; fixed the earnings of the vessel during the period involved at the sum of \$17,013 49; but, owing to loss of evidence, was unable to fix the deductions to which the managing owner was entitled; and referred the matter to a notary for a completion of the partition and settlement of accounts; with directions to divide the proceeds of sale in the proportions above indicated; to charge Salvador Oteri with the aforesaid earnings, to be accounted for to his co-owner, reserving his right, however, to establish the deductions to which he is entitled for disbursements for repairs and wages, and for

lost time; recognizing plaintiff's claim for his share of the commissions on sale of cargo of a certain trip No. 80; and finally reserving the rights of the parties to assert whatever claims they may have arising from the employment of the vessel during the pendency of the suit.

From this judgment the plaintiff has appealed.

He complains of the decree in the following particulars, viz:

1st. He objects to the order for the sale of the vessel, and claims that, in lieu thereof, the judge should have fixed the value of the vessel as it stood at the date of his suit, and should have allowed him one-fourth of that value.

It is difficult to conceive of a more unfounded claim, since the judgment in that respect conforms strictly to the prayer of plaintiff's own petition, which was never amended or changed.

If there is any liability on the part of defendant arising from deterioration in the value of the vessel during the pendency of legal proceedings or from her employment during that period, on which we intimate no opinion, such matters are not within the issues presented by the pleadings in this case, and were properly remitted to other proceedings under the reservation made in the decree.

2d. He complains of the method pursued by the judge in estimating the profits of the vessel.

The judge adopted the same principles which we have pursued in settling the accounts of the "S. J. Oteri" in the case No. 9526.

With reference to trip No. 80, which was made during the existence of the partnership, he allowed plaintiff his share of the whole profits, including those arising from the purchase and sale of the cargo; while, with regard to subsequent trips, he restricted him to a share in the earnings of the vessel itself ascertained by fixing a reasonable charter-value of the ship.

For the reasons given by us in the opinion just alluded to, and which are fully applicable, we approve his conclusions.

3d. He claims that we should fix the deductions to which defendant is entitled, and the settlement of which was remitted to the notary.

As the judge's opinion informs us that important evidence on these points was missing from the record, we do not see how he could have pursued a course different from that which he adopted, or how we can convict him of error therein.

4th. He complains that the decree allows him only one-fourth, instead of one-half of the commissions on the sale of cargo of trip No. 80; and this complaint seems to be well founded.

The judge, in his opinion, recognizes his right to one-half of said

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commissions, which were a perquisite of the firm in which he was an equal partner; but the judgment allows him on that account only \$104 65, while the trip-book produced by defendant himself shows the total commissions to have been \$418 60, of which plaintiff's one-half would be \$209 30. In this respect the judgment must be amended, and otherwise affirmed.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by increasing the allowance made to defendant as his share of commissions from \$104 65 to \$209 30, and that, as thus amended, it be now affirmed, defendants and appellees to pay costs of appeal.

 No. 9549.

SUCCESSION OF KATE TOWNSEND VS. TROISVILLE SYKES ET AL.

To entitle a party to a removal to the United States Circuit Court, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other.

To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit, as it has been begun.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Breaux & Hall for Plaintiff and Appellant.

A. J. Murphy for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff appeals from an order removing this cause to the United States Circuit Court for the Eastern District of Louisiana.

The action is brought to annul a conveyance of real estate by Troisville Sykes to his mother, Mrs. Reuben B. Sykes, and is instituted against both parties; the former a citizen of Mississippi, the latter a citizen of Louisiana.

The order of removal was obtained by Troisville Sykes.

There is but one controversy, the object of which is to determine the validity of the transfer of property to which the plaintiff succession

claims title and which has apparently, but illegally it is claimed, passed from transferrer to transferee.

The ground of action is that the property was fraudulently disposed of by Sykes; that it had been bequeathed to him by Kate Townsend, she appointing him executor and universal legatee; that he was living with her in open concubinage and that he murdered her; that he fraudulently accepted her succession, and without any authority attempted and pretended to transfer the property to his mother.

This suit had of necessity to be brought against the transferee, Mrs. Sykes, a citizen of this State, and had also to be levelled against Troisville Sykes, whose capacity to inherit and dispose of the property had been put at issue and who thus was an indispensable party, whom Mrs. Sykes otherwise would have been bound under the circumstances to call in warranty. C. P. 388.

Joining Troisville Sykes with Mrs. Sykes was not, therefore, an unnecessary proceeding.

The transfer attacked could not have been annulled and the transferee surely protected unless contradictorily with both parties, who thus became indispensable for a final determination of their differences in the present controversy.

The suit is one and indivisible. There exists in it no separate and distinct cause of action on which a separate and distinct suit might have properly been brought and complete relief afforded as to such cause of action, with all the parties on one side of the controversy citizens of different States from those on the other.

The case is not capable of separation into parts, so that in one of the parts a controversy be presented with citizens of one State on one side and citizens of another State on the other, which can be fully determined without the presence of the other party to the suit as it has been begun. *Fraser vs. Janison*, 106 U. S. 191; also, *Removal Cases*; 100 U. S. 457; 103 U. S. 336, 205; 104 U. S. 407; 110 U. S. 63; 112 U. S. 719.

The case presented by the record is not one over which the United States Circuit Court could validly entertain jurisdiction.

Under the above authorities, and those to which reference is made in 33 Ann. 520, 34 Ann. 292, 35 Ann. 36, and 36 Ann. 875, and under the rulings in those cases, the order of removal was erroneously granted.

It is therefore decreed that the order of removal appealed from be annulled and reversed, and that this cause be remanded to the lower court for further proceedings according to law.

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No. 9525.

THOMAS PICKLES VS. McLELLAN DRY DOCK COMPANY ET ALS.

Under its police power, the State has the right to recall and abrogate any powers previously conferred on any municipal corporation and to vest such powers in another and distinct State functionary.

Hence, the Legislature had the power to, as it did by the Act No. 7 of 1870, abrogate the Police Jury of the Parish of Orleans, right bank, and to vest powers of the same in the city of New Orleans, to which that territory including Algiers became henceforth attached.

Under that legislation, the city of New Orleans was clothed with the exclusive power and authority to regulate the use of the river banks on the right bank of the river in Algiers, and that power included the authority of allotting such space as in its discretion was necessary for a public ferry landing.

The legal exercise of that power is incompatible with the right of a riparian owner to encroach, for his personal use, on any portion of the space thus allotted for the use of a public ferry.

Such an attempt will be rebuked by the courts, and all obstructions of that nature must be removed.

The case of *Watson vs. Turnbull*, 34 Ann. 698, affirmed.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

Blanc & Butler for Plaintiff and Appellee:

1. The defendant is bound by the same rules in pleading and in making proof as plaintiff; and an answer which merely refers to a contract as invalid, must state specific defects, or, on exception at the trial, defendants will not be allowed to prove any defects.
2. Defendants cannot attack collaterally a contract between plaintiff and the city of New Orleans; nor have they any interest or right to question such a contract.
3. Section 23, Acts 1870, No. 7, p. 40, refers to contracts requiring disbursements by the city of New Orleans, engagements where the interest of the city is to give the least price, to adjudicate to the "lowest bidder," as mentioned in this act. It has no reference to the sale of rights where the highest price is required: to leases, contracts for farming out, power to collect wharfage, to run ferries and the like. These are powers given in other sections of the charter, Sec. 23 being expressly made to regulate all cases where the city is the payer and her coffers are to be opened.
4. No riparian owner, within or without the city limits, can claim the power to exclude the public from the landing or bank fronting his property on the Mississippi river; nor can he permanently place a dry dock before the bank on his property. 6 Ann. 450; C. C. 455.
5. Within the corporate limits the city has had full power delegated to it to regulate the river front, assign landings, establish ferries and fix or appoint moorings, and in carrying out these powers it has full right to determine the amount of river frontage or water space required for its ferries.
6. Private right must yield to public needs, and for a public purpose (the city being the sole judge of necessity) the corporation can establish its ferry landings wherever in its opinion it is best to be. The municipal control dominates private claims. *Dillon Mun. Corp.*, 3d ed., 107, 114; 5 Ann. 36; 6 Ann. 450; 8 R. 211; 18 La. 122; 5 Yerger, 189; 3 Ill. 53; 10 Wall. 502.
7. Even if plaintiff had no right to any ferry or landing, that would not entitle defendant to usurp the river front and monopolize the bank.
8. Aware of this, they pretend to a title from the Legislature by Acts 1840, p. 130, sec. 17, and its re-enactment in 1855. These acts give no such rights as defendants assert. They

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invest the police jury with the control to clear away buildings and remove things from off the land, and have no reference to the water front or mooring of vessels, etc. Furthermore, these acts are the charter of a police jury, and contain a limitation on its powers. The police jury, with its limited powers, no longer exists; the city now controls, and without those limitations, under laws which make no exceptions. The Act of 1840, and its repetition, has long ago passed away—was repealed by the charters of the city, and cannot avail defendants even had the extinct laws ever had any reference or application to the matters like those at issue here.

W. S. Benedict for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff, as lessee by transfer of the city of New Orleans, of a ferry known as the Third District Ferry, plying from the foot of Esplanade street to Olivier street, on the opposite bank, complains that the defendant Dry Dock Company has, by driving piles and locating a portion of their dock in front of his landing, illegally encroached on the space of one hundred and fifty feet allowed him under his contract for landing conveniences of his ferry-boat at the foot of Olivier street.

Hence, he brings this suit with a view to obtain redress through a judgment ordering the removal of the illegal obstructions interposed by the defendant company, and he cites the city to defend and protect him in the full enjoyment of his contract.

The city intervenes and joins plaintiff in his prayer for redress.

For answer the defendants plead the general issue, and specially urge their right to locate their dock and to drive piles in the bed of the river, as complained of, on the ground of the ownership by one of their incorporators of the riparian property in front of which they are operating, and on the authority of the Police Jury of the Parish of Orleans, right bank, under whose ordinances they had established their dry dock, which is a necessity of commerce and navigation, and that no part of the space occupied by them is necessary to the conveniences of the ferry.

They also allege that the piles, as driven by them, are beneficial and not injurious to the ferry landing, and that plaintiff has not complied with the contract which he has set up as the basis of his action.

They prosecute this appeal from a judgment in favor of plaintiff as prayed for.

The consideration of two bills of exceptions reserved by defendants involves the discussion, in a great measure, of all the law which governs the case.

The first bill grew out of defendants' objection to the introduction in evidence of the notarial contract of lease between the city and plaintiff, the objection being that the contract did not show on its face, and no

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evidence had been offered to show, that the contract had been awarded in compliance with the clause of the city charter which provides that "all contracts for public works, or for materials or supplies ordered by the council, shall be offered by the controller at public auction, and given to the lowest bidder who can furnish security satisfactory to the council, or the same shall, at the discretion of the council, be advertised for proposals." * * *

The district judge correctly ruled that the objection went to the effect and not to the admissibility of the evidence. How could the court decide whether or not the document contained proof of the manner in which the contract had been concluded, without admitting and considering it in all its parts?

But referring the objection to the alleged nullity of the contract for the reason contended for, we look in vain in defendants' answer for any averment of such illegality; hence, they were correctly ruled out of a position which had not been set up in their pleadings. The practical result of defendants' contention on this point would be a judgment annulling and setting aside a contract between the city and a lessee of an important franchise, useful and almost indispensable to the public, by means of a collateral attack, in a suit which merely involves the question of the power of the city of New Orleans, within her corporate limits, to regulate and control the use of the river banks, and to restrict private parties in their claim of unbridled license to enjoy the use of said river banks as their interests may suggest.

That mode of attack of a contract finds no sanction in law, and it cannot be tolerated in practice.

These considerations are sufficient in themselves to dispose of all the positions assumed by the defendants touching the alleged illegality and nullity of plaintiff's contract, and they preclude all discussion of the grounds of such nullity.

The other bill involves the alleged error of the trial judge's ruling in excluding proffered evidence to show a dedication to public use by the police jury of the space sought to be occupied by the defendants, as necessary to commerce and navigation, to show the occupation by them under the rights of a riparian proprietor, and to show further that the space thus occupied was not necessary, and had never been adapted, to the use or conveniences of a public ferry, and the use of the same by the defendants and their predecessors for over fifty years.

There is no merit in this contention.

Under a proper exercise of its police power, the State had the undisputed right to recall and to abrogate all the authority previously

granted by the legislature to the former police jury of the parish of Orleans, (right bank) and to vest the same power in another and distinct State functionary. That is precisely the meaning and the practical effect of Act No. 7, of 1870, which incorporated that portion of the parish of Orleans in the city of New Orleans.

Under that legislation all the powers conferred to the city of New Orleans under its charter could be legally exercised over every foot of the territory which had thereby become a part of that city. *Abascal et al. vs. Bouny*, 37 Ann. 538. And among those powers, one of the most important was the right to regulate the use of the river banks, to establish and control wharves and ferries, and to designate the places of mooring for ships and steamboats.

It follows, therefore, that from the moment that Algiers became a portion of the city of New Orleans, all the previous ordinances of the police jury of the parish of Orleans, right bank, purporting to confer landing or mooring privileges, and which had been granted under a power since abrogated, had to yield in force and effect to the regulations of the council of the city of New Orleans on the same subject-matter, and that the latter alone became the law binding on all alike.

Numerous decisions of this Court, in perfect harmony with general jurisprudence on similar questions, have settled beyond the domain of possible discussion the doctrine that a city vested with the powers enumerated in the charter of the city of New Orleans has the undoubted and necessary power to regulate the use of the banks of any water course on which it borders, and that in this State such authority is not restricted by Article 455 of our code, which declares that "the use of the banks of navigable streams or rivers is public," and "that according everyone has a right freely to bring his vessels to land there," etc. It is now well settled that this general right must be modified and controlled by municipal regulations when adopted in conformity with chartered authority.

In the case of *Watson et al. vs. Turnbull*. 34 Ann. 856, (which singularly is not referred to by either counsel in this suit), we had occasion to examine our jurisprudence on this question.

The contention in that case on the part of plaintiffs was that the city of New Orleans had no right to place "hitching posts" along the river bank in front of their property, on the ground that they had already placed, at their own expense, all the posts that were required, and that there was no necessity of commerce requiring the placing of

Pickle vs. Dry Dock Company.

such posts by the city, and that by such act the city would deprive the riparian owners of their free use of the banks of the river.

The Court held: "Within the corporate limits, the city of New Orleans, under her charter and under the general law, has the right to control, manage and administer the use of the river banks for the public convenience and utility, to establish wharves and landings." * * *

"Riparian proprietors have no right to appropriate to their exclusive use these banks, and they have no private property in the use thereof, which is public. The discretion of the city authorities in determining what are proper and needed facilities for commerce, and on what part of the river bank, within her limits, they should be established, is manifestly not a proper subject for judicial control or interference. Whatever incidental damage may result to proprietors from the exercise of these unquestionable corporate rights, is *damnum absque injuria*."

We have taken the pains of making this copious extract from that opinion for the reason that it covers almost all the points which we are now discussing, and because it formulates a rule of law of easy understanding, as a logical result of numerous adjudications which we had examined, and to which we refer in the opinion.

We have carefully considered the authorities relied on by defendants, but they do not refer to cases which involved the corporate powers of the city of New Orleans to regulate the use of the river banks within its limits.

They can draw no more strength from the case of *Ellerman vs. Morgan's R. R.*, 34 Ann. 698, as the point in contest herein was not involved in the issues therein discussed. We said there: "The case presently before this court is not one in which the city seeks to prevent the defendants from using their wharf in any manner, or to appropriate it and enjoy it for other purposes."

One of those questions is presented in the instant case, and that is the right of the city to prevent the defendant company from using its wharves and docks in a manner injurious to the public or in conflict with franchises or privileges emanating from her authority.

From the foregoing considerations it follows that under the law as it is now settled, it is immaterial to the real issue in this case, whether the defendants were or not riparian owners, whether they had obtained any franchises from the former police jury, and whether the space allotted to plaintiff was or not necessary to the ferry landing or to the conveniences of the public, and we may add that the defendants were without legal authority to raise the objection that plaintiff had not fulfilled his contract. *Werges vs. Railroad Co.*, 35 Ann. 648.

Villavaso et al. vs. Barthet et al.

Evidence on all these points was therefore manifestly irrelevant, and it was properly rejected.

Under these views we leave defendants without any law to support their contention, for, as stated in the first part of this opinion, all the principles of law applicable to their case were involved in their bills of exceptions.

Our examination of the testimony has satisfied us that plaintiff's complaint is well founded; that defendants have illegally encroached on a portion of the space allotted to him under his contract with the city, and we therefore conclude that the judgment appealed from is correct in all particulars.

Judgment affirmed.

No. 9543.

J. M. VILLAVASO ET AL. VS. LOUIS BARTHET ET AL.

On appeal from an order dissolving an injunction on bond, when a motion to dismiss the appeal on the ground that the interlocutory order appealed from could not work an irreparable injury, our decree denying the motion to dismiss and holding that the acts enjoined, if committed, would operate irreparable injury, necessarily involves the conclusion that the injunction should not have been dissolved on bond, and hence the dissolving order appealed from must be avoided and reversed.

38	417
49	584
38	417
50	973
50	274
88	417
110	988

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

White & Saunders for Plaintiffs and Appellants.

E. H. McCaleb and *B. R. Forman* for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. The plaintiffs obtained an injunction in the court *a qua*. It was dissolved on bond by that court. From the dissolving order, this appeal was taken. The defendant appellees moved to dismiss the appeal on the ground that the dissolving order was interlocutory in its nature, entailing no irreparable injury and, therefore, not appealable.

The motion to dismiss was denied for the reason that the acts enjoined, if committed, would operate irreparable injury.

Under this finding it follows the order dissolving the injunction was error, and must now be reversed.

It is, therefore, ordered, adjudged and decreed, that the order dissolving plaintiffs' injunction, herein appealed from, be annulled, avoided and reversed, appellees to pay costs of this appeal and of the proceeding to dissolve in the lower court.

McCoy vs. Weber and Fahey.

No. 9585.

JAMES A. MCCOY vs. JOSEPH H. WEBER AND JAMES FAHEY.

A notary will not be held individually responsible for paying the price of sale, deposited by the purchaser, to the ostensible owner and vendor in the absence of proper instructions given to him and accepted by him to pay it otherwise.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lasarus, J.

— — —
T. M. Gill for Plaintiff and Appellant.

W. B. Lancaster, H. Chiapella and Ohas. Louque for Defendants and Appellees.

— — —
The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff sues to annul a sale of real estate made by one Guérin to the defendant Weber, or to recover from the latter and Fahey, the notary who passed the act, the price of sale, \$2250.

He charges that the property belonged to him, although in Guérin's name; that it was understood with Guérin, Weber, Fahey and himself that the money would be paid to him, but that Weber paid it to Fahey, who gave it to Guérin.

He urges that, as the price was not paid to him, the sale should be annulled, but that the sale may be maintained, *provided* he recover the price from Weber and Fahey.

Guérin is not made a defendant, but Weber and Fahey are. Guérin, however, testified. They deny all averments to show any undertaking by them to retain the price for plaintiff's account, to fix any obligation on them in this regard.

From an adverse judgment plaintiff appeals.

It appears that the property was put for sale in the hands of Hoey, a real estate agent; that Guérin, in whose name the property stood, gave to McCoy, who handed it to Hoey, a paper, which was not produced, the tenor of which was a disclaimer of title; that this paper was, after a purchaser had been secured, delivered promiscuously with others to Fahey, without calling his attention to it; that Fahey never knew of the existence of such paper, and probably destroyed it; that the parties called at the notary's office two or three times; that Weber, the purchaser, paid the price into the notary's hands; that it was applied by that officer to the payment of the broker's bills, to the retirement of notes secured on the property, to the discharge of taxes due, and that the residue, \$575, was paid by Fahey to Guérin, who, on

McCoy vs. Weber and Fahey.

collecting the amount of the check given him therefor, paid it over to Mrs. McCoy, plaintiff's wife.

There is nothing to show that Fahey was ever instructed in writing or otherwise by Guérin to pay the price to McCoy, or that McCoy ever informed Fahey that the money was not to be paid to Guérin, but to him, McCoy, alone.

The evidence shows that Fahey once asked plaintiff who the money was to go to, and that plaintiff did not answer the question.

It also establishes that plaintiff requested Guérin to attend the signing of the act jointly with him, McCoy, who claimed the price, for otherwise he would not get it and that there was an understanding (to the reverse of plaintiff's allegation) that the money was to be paid to Guérin, who was recognized by McCoy as the person who was to receive the price.

There is not a scintilla of evidence that Fahey ever agreed to act as the agent of either McCoy or Guérin. It is apparent that his participation in the matter was purely official, except as regards the retirement of the notes, secured on the property, of which he was the bearer at the time of the transaction.

The only ground on which he could have been liable, would have been a disregard of his obligations as McCoy's agent and consequent injury.

Mandate is an act by which one person gives power to another to transact for him and in his name one or several affairs. R. C. C. 2985.

It is a contract which is completed only after the acceptance of the mandatory. R. C. C. 2988.

If the person said to have been instituted attorney in fact pleads that he has not accepted, it is incumbent on the principal to show he has. R. C. C. 2990.

One surely cannot be held liable for not having done that which he was under no obligation to do, for it is only from the assumption of the duty that responsibility attaches in case of breach.

A previous Court once properly held that, when the agent's instructions are so ambiguous as to leave it doubtful whether he should pay a fund entrusted to him, to one creditor or to another, and acting in good faith he pays it to the one not intended, the other has no action against him. 6 Ann. 466; Story on Agency, 74.

It follows from the circumstances of this case and the law by which they are ruled, that, as Fahey never was instructed and never *accepted* to pay the price to McCoy, and as he acted in good faith and officially

Gomez vs. Levy.

only throughout in the matter, he is not responsible for what he has done. His duty was to have paid, as he did, the money to the ostensible owner and vendor. In doing this, he carried out his mandate as a depository of the fund, under Weber's instructions.

There is no evidence to saddle any liability on Weber, the purchaser.

Judgment affirmed.

No. 9581.

F. GOMEZ, JR., vs. ISAAC LEVY.

A stipulation in a contract between a planter and his manager that the latter would receive as compensation for his services one-third of the net proceeds of the crops raised by him must be construed to mean the proceeds realized from the crops after deduction of all charges and outlay, such as costs of cultivating, of saving, of shipping and of selling the same.

In such a contract, a stipulation that the manager or employee is to share in the losses of the enterprise cannot be construed as including the loss of working animals by death from natural cause.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

Gibson, Hall & Montgomery and *T. M. Gill* for Plaintiff and Appellant.

Thos. J. Cooley for Defendant and Appellee.

The opinion of the Court was delivered by

POCHÉ, J. This litigation grows out of the following contract in writing, made between the parties, for the year 1881 and renewed by mutual consent for the year 1882 :

"State of Louisiana, parish of Pointe Coupee; agreement entered into this day between the undersigned, Isaac Levy and Francis Gomez, Jr. :

"Article 1. Isaac Levy agrees to give unto Francis Gomez, Jr., (†) one-third of all the net proceeds of all sugar, molasses and corn that he, as manager of said Isaac Levy, may make on the Unique plantation for the present year, 1881.

"Article 2. In consideration of the above agreement said Francis Gomez, Jr., agrees to share (†) one-third of all losses which may occur on the said Unique plantation for the present year, 1881, and furthermore agrees to devote his entire time and labor to the best of his

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ability to make a crop of cane and corn on said Unique plantation, as above stipulated.

Thus done and signed this 11th May, 1881.

Signed :

ISAAC LEVY.

F. GOMEZ, JR.

Plaintiff claims one-third of the net proceeds of the crop of 1882, which he alleges amounted to \$5770 10, it being one-third of the following items :

Net proceeds of sugar, molasses and cotton.....	\$13,061 55
2659 bbls. of corn, worth \$1 25 per bbl.....	3,323 75
185 loads of hay, at \$5 00 per load.....	925 00
Total.....	<u>\$17,310 30</u>

The defense is substantially a general denial, followed by a statement of the gross proceeds of the crop and of the expenses of making, saving, shipping and selling the same, under which defendant contends that plaintiff would be entitled to only \$276 21, against which he pleads in compensation and reconvention a store account due to him by plaintiff, two promissory notes subscribed by the latter, and damages in the sum of five thousand dollars for alleged mismanagement of his planting interests by plaintiff during the year 1882.

Judgment was rendered in favor of plaintiff for \$471 34, with costs of main action, and in favor of the defendant for the store account, \$114 10, and for the amount of the two promissory notes, \$513 14, and dismissing as in case of non-suit the demand in reconvention for damages. Although the contract made no reference to the cotton raised on the plantation, yet it appears from the record that in his account with plaintiff, the defendant gave him credit for the proceeds of the cotton, hence this matter is eliminated from the discussion.

The contract makes no mention of any intention to include the hay crop in the division of the crops, and defendant correctly resists the claim of plaintiff to participate in that element of the crop. It is not even shown that any hay was raised for the market, and the record shows that hay was made to be used and actually fed as forage for the working animals employed in the cultivation of the cane crop, which was the staple production of the plantation.

Hence, plaintiff can urge no legal claim to any portion of the hay thus made, either in kind or in estimated value.

The main contention in the case hinges upon the true meaning of what the parties contemplated as the net proceeds of the sugar, molasses and corn raised by the manager.

Plaintiff's counsel argue that the net proceeds of the sugar and molasses consist of the price obtained on the market for the same, after deducting costs of transportation and storage, and commission on sales.

Such a result would soon cause to dawn an era of prosperity to sugar planters which would far exceed their fondest hopes and their wildest dreams.

Such a construction excludes the unavoidable costs of raising the cane, of grinding the same, and of boiling the same into sugar and molasses, the very costs which too frequently prove so disastrous to that industry.

The net proceeds of any undertaking, either in agriculture or in commerce or other pursuits, must be understood in law, as well as in common sense, to be that which remains after the deduction of all charges or outlay.

This is not only the generally admitted meaning of the words, but it was the precise intention of the parties, as shown by the stipulation contained in the second clause of the contract, wherein it is agreed that Gomez, the manager, was to share one-third of the losses which might have occurred on the plantation during the year covered by the contract.

As the record stands, we are not clearly informed as to the meaning of what the parties contemplated by the net proceeds of the corn to be raised on the plantation.

It is conceded that no corn was intended for sale, and that none was raised in excess of the actual need of the plantation, hence flows the embarrassment of the construction.

But defendant concedes that plaintiff is entitled to the market value of one-third of the corn made on the place in the year 1882, which had not yet been used, and which remained on hand at the end of that year, when the contract of the parties expired.

This concession operates an equitable solution of the question in this case, for the record shows that when the corn raised during the previous year had given out, and it became necessary to buy feed for the stock, it was charged on the plantation account, one-third of which was then contributed by the manager.

The mode of supplying the plantation, both for the wages of the laborers and for other expenses, was by means of a store kept thereon for the account of defendant, through an agent of his. All the money and all supplies necessary to the proper cultivation of the crops were furnished from that store to the manager, and charged to the planta-

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tion, and the account thus kept was subject to the manager's inspection. It appears from the record that the account was inspected by Gomez, and by him found correct up to the month of September, and that at the end of the year, on a further examination of the account, he expressed his satisfaction with the same, save some items which will be hereinafter considered.

The principal items now contested by his counsel, are insurance of the sugar-house and taxes assessed on the plantation.

These items had been charged when he made his examination about the month of September, and his failure to object then now precludes him from contesting them.

But the charge of \$250, for oxen and a mule which had died, met with a serious objection on his part. We do not understand that the loss of working animals, by death from natural causes, can be included in the losses incurred by the cultivation of the crop. Hence, the manager's objection to that item, which was made in due time, is reasonable and legal, and it must therefore prevail. The balance of the account is supported by competent and satisfactory testimony.

The objection urged by plaintiff's counsel to the introduction of the account, on the ground that it was taken from defendant's books, which are not admissible in evidence in his favor, is not founded in law or in fact.

The account was introduced in connection with the testimony of defendant's agent who had controlled it, and of the book-keeper who had posted it, and that is good evidence.

There is no more merit in their contention to exclude all testimony intended to support defendant's reconventional demand. Their objection could at most apply to the effect of the proffered evidence.

The allegations of the answer were sufficient, although not very clear and explicit, to admit testimony on the various claims included in the reconventional demand. That evidence shows the correctness of the store account and of the two promissory notes which had been annexed as part of the reconventional demand. The account represented personal purchases of Gomez from the store in 1882, and the two notes represented similar indebtedness for the year 1881, and not as he now contends, his portion of the losses of the planting venture in 1881, from which he had been released by the defendant.

We have considered the evidence on defendant's claim for damages caused by plaintiff's mismanagement, neglect and want of skill during the year 1882, and we leave it with the clear conviction that it utterly fails to make out a case against him.

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The record shows to our entire satisfaction that Gomez was able, efficient, attentive and faithful in the performance of all his duties, and that the faults attributed to him were committed in obedience of defendant's special orders and directions.

Although the testimony is conflicting on the question of the market value of corn, and of the quantity thereof remaining on the place at the end of the year 1882, we conclude, after fully weighing the evidence, that corn was worth one dollar per barrel at that time and place, and that eighteen hundred barrels remained on hand at the end of the year, thus entitling Gomez to \$600 on that score.

We balance the accounts between the parties as follows:

Gross proceeds of the crop—sugar, molasses, cotton.....	\$14,522 13
Expenses of cultivation (deducting \$250 as above).....	13,443 09
Net proceeds.....	\$ 1,079 04
One-third to Gomez	\$359 68
His share in the corn.....	600 00
Total accruing to Gomez	\$959 68

That allowance in subject *pro tanto* to the aggregate amount of the store account and of the promissory notes, to wit: \$627 24.

It is therefore ordered that the judgment appealed from be amended by increasing the amount recovered by plaintiff from \$471 34 to \$959 56, and by rejecting absolutely defendant's reconventional demand for damages, which had been dismissed as in case of non-suit; and, as thus amended, said judgment be affirmed, at defendant's costs in both courts.

No. 9512.

J. M. SEIXAS, SYNDIC, VS. THE CITIZENS' BANK OF LOUISIANA.

In a revocatory action three things are requisite to maintain it—fraud on the part of the vendor, knowledge on the part of the vendee, and actual injury to the other creditors.

Knowledge may be express or constructive.

As a general rule the knowledge of the agent is the constructive knowledge of the principal.

Where an agent acts in double capacity, as in case a president of a bank contracts on the part of the bank with himself as an individual, or as the representative of a firm of which he is a member, if, in such transaction, the president of the bank is faithful to the interests of the bank, his principal, and his action is favorable to the bank, his knowledge of any material fact bearing on the validity of the contracts, such, for instance, as his own or his firm's insolvency, will be held to be the knowledge of the bank. If, on the contrary, the agent or bank president acts only for his own or his

38	494
46	462
46	867
38	494
46	1343
38	434
49	12
49	940
49	944
38	424
50	560
51	1396
51	1658
38	424
123	462

Seixas vs. Citizens' Bank.

firm's benefit, regardless of the interests of the bank, his knowledge will be not regarded as the knowledge of the bank.

Section 1808, R. S., strikes with nullity all contracts which an insolvent enters into with intent or purpose to give one creditor a preference over another, if made within three months next preceding his failure. The word "failure" in this statute means judicial failure, or a failure declared by a judgment or order in an insolvent proceeding.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Bayne & Denegre for Plaintiff and Appellee:

The exception by defendant of *his pendens* was properly overruled by the court. The *Tubal Cain*, 9 Federal Rep., 886; 7 Wallace, 619; 14 Ann., 383; 3 Sumner, 165; Godfrey vs. Hall, 4 La., 158; 17 La., 480; 6 Mart., N. S., 517; 13 Ann. Rep., p. 233.

The evidence shows that in March, 1884, Carrière & Sons were indebted to the defendant for "over-draft" by themselves and their friends for about \$506,380.32, for which they transferred securities exceeding \$300,000, and when said transfers were made, they were and had been for a long time hopelessly insolvent. These transfers are in fraud of the rights of their creditors, and will be set aside. *Blodget vs. Hogan*, 10 Ann., 19; 6 Ann. 532, *Pratt vs. Creditors*; 5 Robinson, 288; 37 Ann. 510; *Black*, syndie of *Pilabury*, vs. *Richardson*, 37 Ann., Rep.; 17 Wallace, 487; 2 Wood's Rep., 23.

The bank cannot claim the fruits resulting from an illegal or fraudulent act of their agent and repudiate the knowledge of his insolvency which he had at the time of making the transfers. 9 Federal Reporter, 273; 36 Conn. 100; *American Law Register*, vol. 10, N. S., p. 572; *Bump on Fraudulent Conveyances*, 234; 9 Bush, 609; 101 U. S. 328.

The word "failure" in Section 1808 of the Revised Statutes of Louisiana has the signification which is given to it among the definitions in Art. 3556, Sec. 11, of the Civil Code, and the transfers made within three months prior to the 4th or 10th of June are stricken with nullity; C. C. 3556; Sec. 11, Code Napoleon, 457; *Kennedy vs. Savings Institution*, 36 Ann. 8; 4 Martin, 30; 7 Martin 30; 2 Martin N. S. 64; 5 Martin N. S. 620; 6 Martin N. S. 66; 3 Martin N. S. 29; 26 Ann. Rep. 297; 2 La. 566; 2 Ann. 45; 1 La. 500; 2 La. 82; 23 Ann. 37; 7 Touillier, 381; *Mayer vs. Hellman*, 91; U. S. 500; 94 U. S. 557; 16 Wallace, 610; *Case Beaver vs. Citizens' Bank*, 2 Woods, 23; 3 Story, 544; 17 Federal Rep., 665.

The knowledge of the president or cashier of the bank of the insolvency of Carrière & Sons when the transfers were made is the knowledge of the bank. *Wade on Notice*, Secs. 32 and 33, 677, 681, 682 and 683; 36th Conn. Rep., 100, republished in *Am. Law Rep.* 10, N. S., p. 572, with notes of leading cases; 19 Vermont, 310; 33 Vermont; 10 Bush, 44; 13 La. 526; 14 Ann. 711; 2 Ann. 319; 1 Martin N. S. 367; 36 Conn. 395; 11 Wallace, 366; 38 Iowa, 261; 113 Mass. 391; 121 Mass. 400; 2 Missouri, 282-367; 2 Hill, 451; 96 U. S. 35; 7 Federal Reporter, 340; 101 U. S. 328; *Atlantic Reporter*, vol. 1, pp. 417-485; 34 Vermont, 262, 112; *English Common Law*, Rep. 466; *Dunlap Paley's Agency*, 265, 102, U. S. 263; 19 Wallace, 678, 114, U. S. 561. 96 U. S. 86. It makes no difference if the president or cashier is acting in a double capacity, for himself and the bank, if his acts benefit the bank, and the bank retains the advantages arising from his acts. This is true even where the motive of the debtor was not to give preference, but merely to court the favor of his creditor for future advantage to himself.

An insignificant or trifling legal consideration which might be sufficient to support a contract will not suffice to defeat a revocatory action.

The transactions disclosed in the record gave a preference to the bank by the insolvent firm of which the president of the bank was a member and the manager. In making these transactions he was not adverse to the bank, and they are not within any excep-

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tion which defeats the operation of the general rule that knowledge of the agent is knowledge of the principal.

Under the law of the State, No. 91 of 1877, it was the duty of the president and directors to know and publish "overdrafts," and under the law and the facts disclosed in this case, notice is imputed to them. 1 Johnson, Ch. 261; 2 Hill, 451. The law imputes notice to them of what it requires them to know and to do. Morne on Banks and Banking, p. 101; 1 John, 261, and authorities cited above.

Henry O. Miller for Defendant and Appellant:

The case presents, besides other issues, the question of fact, whether the defendant, the Citizens' Bank, gave the cash value for certain notes and assets, sued for by plaintiff. The proof shows the bank acquired these notes and assets for its cash loans and cash discounts, obtained by the firm in due course of their account, and on the notes and assets sued for, then pledged or discounted.

The mere fact that the firm of A. Carrière & Sons had an overdrawn account in the Citizens' Bank is no impediment to giving them fresh loans and discounts on collaterals; nor is there any warrant to say, that if such loans and discounts on collaterals are paid to the firm, that the credits for the fresh loans and discounts are to be imputed to the antecedent overdraft, and the bank is to have no title to the collaterals on which it pays out its cash.

When the bank lends money on collaterals, afterwards discounts the collaterals, crediting the debtor in account with the proceeds, and the debtor checks on the account thus credited to take up his notes given for the loan, the discount thus credited and checked upon by the debtor is, in effect, the consummation of the pledges to the bank, and the discount merely applies to the collaterals to the pledged debt. 14 La., p. 321; 9 Ann., p. 539.

The discounts by the bank of pledges acquired for cash paid affords no basis for the revocatory action, although, when the collateral is discounted, the account of the debtor is overdrawn and he is actually insolvent, unless the pledges are of greater value than the loans for which the pledges were acquired. 9 Ann., p. 539; 14 La., p. 321.

By the discount of the note pledged, the pledge is no longer held by the title of pledge, but the discount makes the bank the owner of the note. 3 La. 575; Bouvier Law Dictionary, verbo "Discount."

The knowledge of the agent will not be deemed the knowledge of the principal when it is the interest of the agent to withhold, and he does withhold, his knowledge from his principal. See the authorities cited in the brief.

The pledge for an antecedent debt is a valid pledge, unless the pledgor is insolvent to the knowledge of the pledgee, and the other conditions exist, to sustain the revocatory action. R. S. S. 1808, Acts 1817, p. 131; 11 La., p. 94; 4 Rob. 408; 6 Ann. 93.

The three months next preceding his failure, specified in the 1808th Section of the Revised Statutes, means the three months next preceding the filing of the debtor's petition, praying to be allowed to surrender his property to his creditors. 4 La., p. 256; 15 La., p. 123; Civil Code, Art. 2054; Code of Practice, Art. 165.

White & Saunders on the same side:

I—STATEMENT OF FACTS.

1. Emile Carrière was president of defendant bank until March 12, 1884. From that date till June 9, 1884, Mr. T. D. Miller was acting president. Mr. Carrière having withdrawn on account of illness, continued so in name but not in fact. Mr. E. Carrière was also sole managing partner of the firm of A. Carrière & Sons.

Seixas vs. Citizens' Bank.

2. The firm of A. Carrière & Sons suspended business and went to protest on June 10, 1884. It made a surrender under the insolvent laws of Louisiana, on July 18, 1884.
3. While Mr. Carrière was in fact, as well as in right, president of defendant bank, he permitted his firm to overdraw its account and to borrow the bank's funds to the amount of over \$200,000. He also permitted Emile DeSmet, owner of a saw-mill, and M. Escobal, owner of a tobacco factory, to overdraw their accounts and borrow to an amount of several hundred thousand dollars. All these overdrafts and borrowings were secured by pledges of collaterals belonging partly to A. Carrière & Sons, and partly to DeSmet and Escobal.
4. After Mr. Carrière ceased to act as president of the bank, he had several transactions with it, through its then acting president, either borrowing additional money or changing the form of the contracts entered into before March 12, while he still acted as president.
5. The firm of A. Carrière & Sons was enormously insolvent for several years before its suspension.
6. From time to time, A. Carrière & Sons were permitted to withdraw certain of the pledged securities under an agreement to substitute others. The substitutes were partially furnished in the course of a few weeks.
7. The questions of fact arising under the evidence are—
 - a. Had any officers of the bank, besides Emile Carrière, actual knowledge of the insolvency of A. Carrière & Sons?
 - b. Whose property, at the time of pledging, were the several collaterals held by the bank?
 - c. Were the transactions during the last year between the bank and A. Carrière & Sons intended by the parties, or by the firm, to be a securing of the existing debt of the firm to the bank, or did the firm simply intend and secure its own benefit?
 - d. Whether several of the transactions after March 12 were or were not in substance only reproductions without material alterations, save in form, of contracts entered into before that date, and giving the bank all the securities apparently held under the later contracts.
 - e. Whether, where the contract was in terms and as far as the evidence shows a loan on notes secured by pledge, the Court could consider this a covert securing of the existing overdraft—the evidence further showing that within the five days following the transaction the firm drew out much more than the amount of the loan, and their deposits were several thousand dollars less.

II—QUESTIONS OF LAW.

1. *Constructive Knowledge.* In contracts between a corporation and one of its officers, acting in his own interest, the corporation is not chargeable with knowledge of facts affecting the transaction known to such officer and not otherwise known to the corporation. *In re European Bank*, 5 Chan. Appeal, 353; *Winchester vs. Railroad Co.*, 4 Md. 231; *Barnes vs. Gas Co.*, 27 N. J. Eq. 33; *Wickersham vs. Zinc Co.*, 18 Kans. 481; *Lucas vs. Bank of Darien*, 2 Stew. (Ala.) 280; *Peckham vs. Hendren*, 76 Ind. 47; *In re Garity vs. Merchants' National Bank*, 139 Mass. 332.
2. *Meaning of "Failure,"* in § 1808 of *Revised Statutes of Louisiana*. The three months mentioned in § 1808, R. S., count back from the day of the filing of insolvency proceedings in court, and not from the time of actual insolvency, suspension of business, or going to protest.
 - a. *Bauduc vs. Creditors*, 4 La. 246; *Martin vs. Drum*, 12 Ann. 494; *Bank of Mobile vs. Harris*, 6 Ann. 711.
 - b. History of Insolvency Act in this State, and meaning in which term "failure" is incontestably used in other sections of these acts. Act 1808, pp. 50, 70, 72; Act 1817, pp. 126, 136, 138; Report of Jurists on Amendments to Civil Code, 1833, p. 392; Acts 1855, p. 432.

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- c. Use of word "failure" in this sense in Civil Code and Code of Practice. C. P. Arts. 165, 278, 279; C. C. Art. 3027.
- d. Analogy from other systems of bankruptcy laws. Rev. Stat. U. S. § 5128, *et seq.*; *Mayer vs. Hellman*, 91 U. S. 501.
- 3. *Contemporaneous consideration* required to support transaction within three months. Any legal consideration sufficient—money not the only consideration.
- 4. *As to renewed and reproduced contracts.* The bank having always held the securities to which the contracts relate, and not intending to diminish its security, can hold under the earlier if not under the later. *Seixas vs. Brugier*, 37 Ann. 509.
- 5. *As to exchanged securities.* Where the bank permitted pledged securities to be withdrawn, under an agreement that others should be substituted therefor, the substitutes when given are validly held as effectually under the pledge as had been those withdrawn. *Id.*
- 6. *Loans to an overdrawn depositor.* Where a bank lends, on pledge of securities, to an overdrawn depositor, it is bound to pay such depositor's checks to the amount of the loan, and cannot be permitted to compensate its debt on the loan with the depositor's overdraft. *Nolan vs. Shaw*, 6 Ann. 46; *Morgan vs. Lathrop*, 12 Ann. 257; *Breed vs. Purvis*, 7 Ann. 53; *Hancock vs. Citizens' Bank*, 32 Ann. 590.

The opinion of the Court was delivered by

TODD, J. This is a suit brought by the syndic of the insolvent firm of A. Carrière & Sons to recover of the Citizens' Bank a large number of securities which, it is alleged, were illegally acquired by the bank, and to have the transfers of the same declared null, as having been made in fraud of the creditors of the said insolvents.

Some of these transfers are sought to be annulled under the revocatory action proper, as provided by the Civil Code, and others are assailed as coming under the operation of Section 1808 R. S., relative to contracts made by insolvents within three months next preceding failure.

The answer is a general denial, a special denial that, at the date of the several transactions, the bank knew of the insolvency and a further averment in substance, that the transactions attacked were legal and valid, and for no cause subject to be annulled.

The judgment of the lower court was in favor of the plaintiff for the larger part of the securities and assets claimed in the suit, and also for \$83,063.50 for assets collected by the bank.

From this judgment the bank has appealed.

A. Carrière & Sons were private bankers in the city of New Orleans. They did an extensive business for many years, and enjoyed the very highest credit throughout this country and Europe, up to the time of their failure.

The firm went to protest on the 10th of June, 1884, and on the 18th of July following, made a cession of their property under the insolvent laws of the State.

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Emile Carrière, one of the members of the firm of Carrière & Sons, was, up to the 9th of March, 1884, and many years prior thereto, president of the Citizens' Bank, and it was during his presidency that several of the transactions between the bank and his said firm took place, which are attacked in this suit.

For a long time prior to the failure of A. Carrière & Sons, their account with the Citizens' Bank had been largely overdrawn, the overdraft amounting at times to several hundred thousand dollars; and it is charged that the transfers of the securities by that firm to the bank, against which this action is directed, were illegal preferences given by the firm to the bank, when in a condition of hopeless insolvency, and that insolvency at the time known to the bank, in the payment or reduction of that large overdraft or pre-existing indebtedness.

Some of these transfers were made more than three months before the failure and others within the three months next preceding that event. The nullity of the former is sought to be declared under the revocatory action and of the latter under the provisions of Sec. 1808 of the Revised Statutes.

I.

We will first direct our attention to the consideration of those transactions sought to be reached by the revocatory action.

This well known action is that given by Art. 1969 of the Civil Code for avoiding "all acts done by a debtor with the intent of depriving his creditors of the eventual rights they have on the property of such debtor."

It is requisite to maintain this action that three things be shown—fraud on the part of vendor; *knowledge* on the part of the vendee, and actual injury to the other creditors. C. C. 1984; 3 M. 605; 4 R. 408.

The evidence leaves no doubt that, at the dates of these several transfers, Carrière & Sons were insolvents; in fact, they were in a state of insolvency long prior thereto. It moreover appears, however, that they had so well succeeded in keeping their condition a secret, that their insolvency was known to no one, not even to those having the most intimate business relations with them until about the time their notes were protested, 10th of June, 1884, and as stated before, up to that time they enjoyed the very highest credit both at home and abroad.

There is nothing in the record to show that, at that date, the insolvency of the firm was known to or even suspected by any officers of the bank then exercising their functions in its control and administration. There was no express notice to the bank of the insolvency of the firm.

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At the dates, however, that the overdrafts of Carrière & Sons were made and some of the subsequent transactions took place, by which, it is alleged, these overdrafts or the antecedent indebtedness of the firm evidenced thereby, was affected or reduced, Emile Carrière, the leading member and manager of the business of Carrière & Sons, was president of the bank, and the insolvency of his firm was known to him; and it is urged that his knowledge of this fact was constructive notice to the bank, by which the bank was bound; and that such notice invalidated all the transactions by which the bank received the assets or securities embraced in these transactions entered into whilst Carrière was president of the bank and afterwards.

We do not, however, propose to discuss this question of knowledge or constructive knowledge here, but will reserve it for another part of this opinion.

As stated before, the bank expressly denies that any of the several transactions assailed were transfers, made to secure an antecedent indebtedness, but avers that they were all made in the usual course of their business and for a valid, present or contemporaneous consideration, and therefore do not come within the scope of the revocatory action or of Section 1808, Revised Statutes.

We prefer, therefore, to address ourselves first to the determination of the real character of the transactions assailed, and if we find one or all of them do not meet the conditions asserted by the bank for its protection and above set forth, the legal principles interposed by the bank for its further protection will then be considered.

On the 19th of March, 1883, A. Carrière & Sons borrowed from the bank \$60,000, and pledged certain collaterals as security for the loan, which was evidenced by a pledge note, on the back of which were enumerated the collaterals pledged.

At that time their account with the bank was overdrawn \$179,384.76. They at the same date made deposits to the amount of \$113,564.18; and immediately checked out \$91,158.79, the amount thus checked out exceeding their loan by \$22,400. Payments were made on the note amounting to \$10,000, and for the balance of \$50,000 they drew their check on the bank on the 24th of April, 1884, which amount was credited on their overdrawn account, and the collaterals pledged retained by the bank.

It is urged by plaintiff's counsel that this check discharged the debt for which these securities were pledged. No claim was made for the collaterals by the Carrières, and they have since remained in possession of the bank.

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The money paid out by the bank on the faith of these collaterals, was never, in fact, repaid to the bank. The check on the overdrawn account cannot be considered as a payment extinguishing the obligations, but should rather be viewed as merely changing the evidence of the debt for which the pledge note was given.

This was the view of the matter taken by the judge of the first instance, and his judgment rejecting the plaintiff's demand for these securities was correct; and the amendment asked by the plaintiff changing the judgment in this respect cannot be allowed.

II.

On the 15th of February, 1884, A. Carrière & Sons received \$50,000 more from the bank, for which they gave their two notes of \$25,000 each, secured by a pledge of collaterals. The pledge reads as follows:

"CITY OF NEW ORLEANS, February 15, 1885.

"Whereas, the Citizens' Bank of Louisiana has discounted certain promissory notes for the sum of twenty-five thousand dollars each, made by A. Carrière & Sons, to the order of the Citizens' Bank, dated on the 15th day of February, 1884, payable 75 and 90 days after date thereof;

"Now, in order to secure the full payment of said promissory notes at maturity, the undersigned, A. Carrière & Sons, do hereby pledge to said Citizens' Bank of Louisiana the following property, to-wit:

[Here follows a list and description of the securities pledged].

"And it is hereby agreed, that in the event of the non-payment of said note at its maturity, the president and cashier of said bank are hereby authorized, jointly or separately, as agents of the undersigned and of the bank, to cause said pledged property to be disposed of for cash, at public or private sale, at the option of said bank, without recourse to legal proceedings, and to this end to sign on the books of the corporations or companies, whose shares are hereby hypothecated as above, any and all transfers of said stock that may be necessary in the premises, in accordance with the rules and regulation of said corporate bodies or companies, and the proceeds of said sale shall be appropriated to the payment of the aforesaid notes, with interest accrued thereon, if any, and all commissions, costs and charges attending said sale.

(P. 418).

[Signed]

A. CARRIÈRE & SONS."

The collaterals pledged for this loan amounted to \$57,354.38, and on the same day the Carrières checked out \$57,012.54.

The lower court maintained the validity of this transaction, and no amendment is asked for by the plaintiff.

III.

On the 12th of March, there purports to be another loan by the bank to the Carrières of \$100,000. Notes were executed by A. Carrière & Sons for said amount, and collaterals pledged in the same manner and form as before to secure their payment. The notes were then discounted and the proceeds placed to their credit and checked out by the firm. It was, undoubtedly, a real loan.

There is nothing to distinguish this transaction from that of the 15th of February previous, except that in that case the amount placed to the credit of the Carrières, (proceeds of discount) was checked out by the Carrières on the same day, and in this instance several days elapsed before the amount was entirely drawn from the bank. This circumstance, in our opinion, makes no difference as to the legal effect of the transaction. It is contended that the amount derived from the discount was compensated by the prior indebtedness resulting from the overdraft. If such was the case, why did not the same principle or effect apply to the previous loan? If compensation did take place, it took place at the very instant the amount was placed to the credit of the Carrières, and it was not a question of a day or a week or even an hour. In fact, however, compensation does not result in such case.

Application for a loan was made by Carrière, which was granted; promissory notes for amount of same were executed by him and collaterals pledged to secure them; the notes were discounted and the proceeds placed to the credit of his firm, and when this was done, the amount so placed stood as a sum deposited by or for the firm.

Such a deposit cannot be compensated by a previous debt without the consent of the depositor, and here there was no consent. This principle is well settled. 6 Ann. 46; 7 Ann. 53; 12 Ann. 257; 32 Ann. 590.

The judge *a quo* thought, from the fact that the amount was not checked out for several days, and from the further supposed fact that the transactions took place after Emile Carrière's attention had been drawn to his overdraft by Mr. Miller, the acting president of the bank, that the loan was a simulation, and that the collaterals were turned over to the bank really on account of the antecedent debt.

In regard to the latter fact, the judge was mistaken, since the evidence shows that it was not till the last week in March, that Mr. Miller spoke to Carrière respecting the overdrafts, and this affair, as stated, occurred on the twelfth of that month, and at that time, and even when mention was made to Carrière of the overdraft, not the slightest suspicion was entertained by Mr. Miller of the entire solvency of the

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firm. It was evidently regarded and intended by both parties as a loan and the judge was in error in holding otherwise. What strengthens this conclusion is the fact that the money was borrowed by the bank in New York to raise the funds for the Carrières, and their notes indorsed by the bank, negotiated there for that purpose, and one of the notes at least was subsequently paid by the bank.

There is not a particle of evidence that any part of the money received under this loan was ever repaid the bank.

For the purpose of showing such repayment a number of checks drawn by the Carrières in favor of the bank were introduced in evidence. Three only of these checks were dated in March, and they are shown to have related to other and different matters, and were in no way connected with the affairs in question.

IV.

On the 16th of May, 1884, the Carrières borrowed from the bank \$20,000, and on the 19th of same month \$21,000, and on the 31st of same month \$15,500—all secured by pledges. The securities pledged for these loans were, at the respective dates of the several loans, already in possession of the bank. Some, under the prior pledges of the 19th of March, 1883, and the 15th of February, 1884. The securities belonging to the prior pledges and repledged for the loans of May, were insufficient to pay the preceding pledges. We have held that their prior transactions were valid, and that the bank could legally hold the securities acquired under them. So far then as relates to these securities, that is, to those received under the pledges of the dates mentioned, and repledged in the May loans referred to, it is unnecessary to determine whether the bank derived any right to them under these last loans, since her title to them was perfect under the previous pledges.

V.

Next we will consider the alleged pledge of securities in January, 1884.

The judge *a quo* held that there was no such pledge, and the bank was not therefore entitled to hold the securities claimed under it. We do not concur with the judge's conclusion in this respect. It is certain that Emile Carrière did deliver to the cashier of the bank certain securities, with instructions to retain them for the bank; that they were placed by the cashier in an envelope, to themselves, properly marked, and he, acting for the bank in his official capacity, kept possession of them for the bank. If this transaction was not attended with all the formalities observed in the other pledges above mentioned, still it was

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substantially a pledge, and fully authorized the bank to retain the securities unless invalidated for some other cause than the lack of form.

The confusion on this point doubtless arose from a statement made by Mr. Carrière about the same time when his attention was called to the overdraft of his firm by the cashier. It was to the effect that all he had in the bank was security for his overdraft, which, of course, would include the claims of the firm in the bank for collection, which were entirely at his (Carrière's) disposal, and to withdraw at his pleasure, and which could not therefore be the subject of a pledge.

But still, it is beyond question that Mr. Carrière did deliver to the cashier, as stated, certain designated securities with the positive instruction to retain them for the bank on account of or as security for the overdraft. It is contended by the counsel for the bank that the "overdraft" mentioned or alluded to in this transaction, and which the securities pledged were designed to secure, did not refer to the past or then existing overdraft, but to future overdrafts by the firm. And the fact that Carrière's overdrafts rapidly increased after this affair up to March following, until it even exceeded in amount the securities pledged, lends some color to the contention. But another consideration makes it a matter of no importance whether the pledge was for the one purpose or the other; and this brings us to the discussion of a legal principle which is, in itself, a potent factor in the decision of the case, viz: the question of knowledge on the part of the bank touching the insolvency or insolvent condition of the Carrières at that time.

This point has been elaborately argued by counsel on both sides, and they have brought a vast array of authorities to support their respective contentions.

It is plain that, if these collaterals were pledged to secure the past overdraft of A. Carrière & Sons, representing their antecedent indebtedness to the bank, and the bank knew at the time of the insolvency of the firm, the transaction could be reached and avoided by the revocatory action.

We have no doubt but, at that date and long prior thereto, the condition of the Carrières was one of complete insolvency.

We are equally as well satisfied that up to that time the bank, its officers, and we might say "all the world," was in entire ignorance of that fact. It is urged, however, that, as Emile Carrière was at the time of this transaction the president of the bank—and was of course thoroughly cognizant of the insolvency of his firm, of which he was the leading and managing member—his (Carrière's) knowledge was

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the knowledge of the bank and operated as constructive notice of the fact of insolvency of the firm.

We have weighed with care and deliberation the able argument of counsel on this point, and have studied diligently and exhaustively the numerous authorities cited by them, and our conclusion is this:

That, as a general rule, the knowledge of an agent is the knowledge of the principal. And even where an agent deals in a double capacity for his principal and himself at the same time, and where his acts are evidently designed and intended to benefit or favor the principal to his own prejudice or that of his creditors, even in such case his knowledge of his condition or other material fact will be regarded as the knowledge of the principal. But where such agent seeks his own personal interest or advantage in the affair, without benefit to his principal, then his knowledge cannot be held to be the knowledge of the principal.

Let us test these rules by the facts, circumstances and surroundings of this transaction and see how it results.

The evidence makes plain that the firm was at the time wholly insolvent, and had been so for several years; that this insolvency had been carefully and successfully concealed, and in consequence the vast credit the firm enjoyed at home and abroad remained unimpaired. The business of the firm mainly was dealing in exchange, domestic and foreign, and its large credit was the foundation upon which it acted. It was in truth the very life of the firm, without which it could scarcely exist for a day.

Under this state of things, Carrière's prime motive was to continue to conceal his unfortunate condition and maintain his credit. His only hope of succeeding in this rested on the Citizens' Bank. If he maintained his credit with that institution, he could still retain the presidency of it, and thereby avail himself of the opportunity that such a position afforded to draw on its resources and obtain its money to prop up the sinking condition of his firm and perhaps retrieve its desperate fortunes. It is not at all evident that at that time Carrière contemplated failure. He or his firm had so long subsisted on credit only, that he evidently believed that by the ingenious methods pursued in the past it could continue to do so, and with the help of the bank's means within his reach he might weather the storm and come out finally all right.

The necessity was upon him, therefore, to make some show to the bank to avert any suspicion of his real condition that might be deduced from his heavy overdrafts, not only with this bank but in nearly every

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other bank in the city and in several of the largest banking establishments of the old world.

In this great crisis, can we readily believe that Carrière placed those January securities with the bank to benefit the bank alone, by paying in part his existing debt to it, without ulterior purpose in view looking to his own advantage? We cannot reasonably so conclude. The heavy drafting that followed this transaction, and the salient fact that after this he succeeded in obtaining some \$200,000 from the bank, affords confirmation strong of the wholly selfish purpose that actuated him in this transaction. He was driving a bargain for himself alone.

Under these circumstances, we are forced to the conclusion that the bank should not be held to a constructive knowledge of the insolvent condition of A. Carrière & Sons at that time and in the affair in question, and that this want of knowledge protected the bank as relates to this transaction; and the same must be held valid and the bank entitled to keep the securities then received. *In re European Bank*, 5 Chancery Appeal Cases (Law Reports), p. 358; *Lucas vs. Bank of Darien*, 1 Stew. (Ala.) 280, 295; *Winchester vs. Railroad Co.*, 4 Md. 231; *Barnes vs. Trenton Gas-light Co.*, 27 N. J. Eq. 33; *Peckham vs. Hendren*, 76 Ind.

On the — day of January, 1884, the bank made a loan of \$6,600 to one H. Lange. Lange gave his note for the amount and pledged certain State bonds as security for the loan. Emile Carrière, without authority so far as the record discloses, withdrew these bonds from the bank and substituted for them two promissory notes called and described as the Benachi notes. Mr. Lange made no complaint of this substitution, so far as we can discover. The bank has never been paid this loan. The plaintiff seeks to recover the notes deposited in lieu of the State bonds. Lange got full value for the bonds, and the bank security was weakened or impaired by the substitution. We conclude from all the evidence touching this matter, that it was a *bona fide* loan and that the plaintiff could not legally have deprived the bank of the State bonds originally pledged and cannot reach the notes substituted therefor. The substitution or its validity is settled by the Brugier case, 37 Ann. 509.

VI—DESMET TRANSACTION.

On the 20th of January, 1884, the account of one Emile DeSmet with the Citizens' Bank was overdrawn to the amount of about one hundred thousand dollars. This overdraft was by the permission of Emile Carrière, then president of the bank, and who acknowledged himself responsible for the same.

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This indebtedness was evidenced by eight promissory notes of DeSmet, secured by a mortgage on certain saw-mills at Moss Point, Miss., and a pledge of a number of collaterals. These collaterals were held by the bank from the time of their delivery to the 12th of May following. On that day they were given up to DeSmet, in order that he might transfer the mills to Carrière & Sons with the understanding that they were to remortgage the property to the bank on receiving title thereto from DeSmet. This understanding was carried out on the 14th of the same month the transfer was made and the new mortgage executed. This arrangement was made at the request of Mr. Miller, the president *pro tem* of the bank, who preferred the obligation and mortgage of the Carrières to that of DeSmet.

Besides the mortgage on the mills given by DeSmet, the bank held DeSmet's note for \$41,111 due on the 28th of January, 1884. In part settlement of this note on the same day that it matured the bank acquired from DeSmet notes amounting to \$38,000, and for the difference between the discount of their notes, and note owing by DeSmet he gave his check in payment.

These notes or collaterals were handed by E. Carrière to the cashier of the bank, who received them as coming from and belonging to DeSmet, and there is no satisfactory proof that the Carrières had any interest in them.

On the 9th of April, 1884, the overdraft of DeSmet amounted to \$104,000, and on that day there was a partial settlement between the bank and DeSmet. The \$38,000 of notes which had been discounted for DeSmet were charged back to him. This made DeSmet's indebtedness, with interests, amount to \$145,000, for which sum he gave his notes, indorsed by A. Carrière & Sons, secured by pledge of the mortgage notes for \$100,000 already held by the bank and the \$38,000 notes discounted in the previous January as stated, and on that day recharged to DeSmet's account. To these notes was added a pledge of another note of \$10,000, making \$48,000 of notes held by the bank, these notes being known as logmen's notes. After the transfer of the mills from DeSmet to the Carrières on the 15th of May, already mentioned, a final settlement was made with DeSmet. His indebtedness then amounted to \$195,000.

The Carrières assumed the payment of this entire sum, and gave a new mortgage on the mills to secure the same in lieu of the one previously given by DeSmet.

There can be no question in our opinion that this mortgage was valid at least to the amount of \$100,000, the amount of the prior mort-

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gage given by DeSmet on the same property. Beyond that sum, it is useless to inquire since the property sold for only \$38,000. It is not pretended by the plaintiffs' counsel that this mill property was worth more than \$70,000.

The mortgage given by DeSmet on this property was not assailed. The transfer to the Carrières of the mills was, as stated, with the distinct understanding and agreement that they would assume the debt of DeSmet, and mortgage anew the property, so soon as they received title, as security for the debt assumed. The affair cannot well be viewed in any other light than the substitution of one debtor and one mortgage for another.

It is, however, urged in opposition to this view of the matter, that all the securities connected with this debt of DeSmet did not belong to DeSmet, but to the Carrières, and that the pledging of them to the bank was the act of the Carrières as guarantors of the debt and not the act of DeSmet.

DeSmet was the real debtor to the bank to the amount stated above, resulting from his overdraft, and notes of which he was the maker. The liability of the Carrières for the debt was secondary or contingent, that of guarantors or indorsers. The collaterals pledged as additional security were notes payable to DeSmet, and the evidence of a title to any of these securities in the Carrières is, by no means, satisfactory and it is incumbent on plaintiff to prove this. We think, therefore, that it is safe to conclude that the transaction touching this debt was the act of DeSmet, although made through and by Emile Carrière, who felt himself bound for its payment.

But, suppose that we are mistaken in regard to this, and that all these securities belonged to the Carrières, and that the debt for which they were pledged was their debt and in making the pledges of January and April, 1884, which embraced all these securities, the mortgage notes of DeSmet and the collaterals mentioned, Emile Carrière was acting for his firm and the pledge was made not for DeSmet's debt but for the debt of the firm, would such considerations annul the pledge and entitle the plaintiff to recover the property and securities?

At that time, (the 7th of April, 1884), Emile Carrière still remained as the managing partner of his firm, but he had ceased to be president of the bank. Mr. Miller became acting president of that institution on the 9th of March, 1884, and permanent president on the 7th of June following.

After the former date, Carrière had nothing whatever to do with the bank—he neither had unexercised any authority in its management or

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administration. Now, were this affair of the 7th of April an undistinguished pledge or transfer of securities for the overdraft or antecedent debt of Carrière & Sons to the bank, there would be no cause to annul the transaction if the bank at the time had no knowledge of the insolvency of the firm and this settlement or partial settlement was made more than three months prior to the failure of the firm. In fact, the securities in which this affair of the 7th of April was founded, had been placed with the bank in the preceding January, as shown above, and this transaction as well as the subsequent ones of May mentioned, of the transfer of the mills to Carrière & Sons and the remortgaging them to the bank, related to the transaction in January. All these several acts were but parts or details of one transaction having its beginning and foundation in January, 1884.

At the time of this settlement of the 7th of April, and its complete consummation in May, the situation in one very important respect had changed. Carrière was no longer president of the bank, and had nothing to do with its business or management. He was not acting in any double capacity in this affair, but represented himself or his firm alone. The bank acted through its then president, Mr. Miller. Apart from the question of the insolvency of the Carrières, the transaction relating to this DeSmet business was unassailable. As before stated, there was not then any suspicion of this insolvency on the part of the bank or its officers that we can discover from the evidence, but Carrière dealt and was dealt with as a solvent member of a solvent firm, and from the circumstance of being then in no manner connected with the bank, he stood in the attitude of a stranger to it.

VII.

This brings us to another important question as to whether the 7th of April was within the three months next preceding the failure, for if it was, the want of knowledge touching the condition of the firm, could not save it from the operation of Sec. 1808, R. S.; and this necessitates another and further inquiry, and that is, when did the failure of A. Carrière & Sons take place?

That question is, when did the failure of A. Carrière & Sons take place?

To determine this we must first refer to the law bearing on the disposition of property made by insolvents within three months preceding failure.

That law in the section above mentioned, 1808 R. S., reads thus:

“That any debtor, who shall be convicted of having, at any time within the three months next preceding *his failure*, sold, engaged or

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mortgaged any of his goods and effects, or of having otherwise disposed of the same, or confessed judgments in order to give an unjust preference to one or more of his creditors over the others, *shall be debarred from the benefit of this Act*, and the said deeds or acts shall be declared null and void; provided, however, that if the purchaser of such property shall prove that the said property was either sold or engaged to him for a true and just consideration, by him *bona fide* delivered at the time of such deed, then and in that case, the said sale and mortgages shall be declared valid."

Our first inquiry must be touching the meaning of the term or word "failure" as used in the section.

The history of the legislation connected with this section is well calculated to throw some light on this point and will assist us at arriving at a proper conclusion touching the true meaning of the term referred to.

As early as 1808, we find an act entitled: "An act for the Relief of Insolvent Debtors in Actual Custody, etc."

The 17th section of that act is identical with Sec. R. S. 1808, above quoted, except that, instead of the words "three months previous to his failure," in the latter section, we read "three months previous to his arrest and imprisonment" in the former.

In 1817, the legislature extended the benefit of voluntary surrender to debtors not imprisoned as well as to those who were, and passed a general insolvent law under the title of "an act relative to the voluntary surrender of property and to the mode of proceeding as well as for the disposal of the 'debtor's estates and for other purposes.'"

This act was reproduced with but slight changes in 1855, and the 25th section of it *ipaisimis verbis* constituted the Sec. 1808 R. S. referred to.

Thus it will be seen from the history of this legislation that, the provision of this section last named, (R. S. 1808) was originally, and all subsequent amendments and re-enactments, part of a statute the declared object of which was mainly to deal with the cession of property by insolvents, or judicial insolvency. This word "failure" is several times used in other sections of the act, and obviously with no other meaning than judicial failure or judicially declared insolvency.

It is also used in the same sense in the articles of our codes. C. P. 165; C. C. 3027.

All bankrupt laws contain a similar provision with our State insolvent laws prohibiting the giving of preferences by the debtor within a stated period to the actual bankruptcy, and this period dates back from the commencement of the proceedings in bankruptcy—that is the

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application of the insolvent debtor for the benefit of the bankrupt law.

And in speaking of the importance of thus fixing a definite and known limitation in the bankrupt law, the Supreme Court of the United States, in the case of *Mayer vs. Hellman*, 91 U. S. 501, uses this language:

"There is sound policy in prescribing a limitation of this kind. It would be in the highest degree injurious to the community to have the validity of business transactions with debtors, in which it is interested, subject to the contingency of being assailed by subsequent proceedings in bankruptcy."

Apart from any legal authorities or precedents, reason and a consideration of the purposes of the statute would teach that the word "failure" as there used, does not signify a condition of insolvency uncertain and undetermined, but refers to a fact authoritatively fixed, an event certain and determined. The statute otherwise would lead to the greatest confusion and embarrassment and often to the grossest injustice. It is what may be termed severe in its provisions, a harsh law, for it strikes with nullity all contracts giving a preference, although the creditor may have acted in the best of faith and in entire ignorance of the insolvency of his debtor. Such a provision should be rigidly construed, and the proscriptive term against the right to contract should be narrowed down to the shortest limit consistently with the language and plain intent of the law.

It is, however, urged that we must accept in this instance the meaning of the word as declared in Art. 3556, Sec. 11, C. C., and failure is there defined to be "the situation of a debtor who finds himself in the impossibility of paying his debts."

This definition, if it be one, evidently refers not to an established fact or known event, but to a mere condition. There is a serious obstacle in the way of taking this meaning of the term failure used in the statute, as illustrated by the facts of this very case. The evidence shows that the *Carrieres* were in a situation to find themselves "in the impossibility of paying their debts" for months and even years before their declared failure. To take such condition as the statutory meaning of failure, would necessarily imply that contracts made in the course of their business, years before their judicial or known insolvency, could be annulled so soon as this condition of insolvency and the commencement of it could be found out or disclosed. No such contention has ever been set up, and it is palpable that such a construction would do violence to the intent and meaning of the law.

Another consideration presents itself to our minds as leading to the

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same conclusion. This insolvent law, the section of which we are discussing, was a law of universal application, that is, it was applicable to all persons in the condition described, without regard to their callings or pursuits, and whether they belonged to the commercial or non-commercial class.

Some circumstances—such for instance as a protest of his note—might be sufficient to make known a failure with respect to a banker or a merchant, or others engaged in a commercial business. Whilst a like circumstance would be without such significance with regard to a planter or others engaged in similar callings.

An insolvency, judicially declared, would remove all doubt and uncertainty, and afford the very highest evidence of the fact of failure. It would place the initial point from which the prescribed term, the "*tiempo inhabil*," of three months, was to be traced back, beyond all controversy. Then the contracts which, under the rigid provisions of the statute, were to be stricken with nullity, would be so completely hedged in by fixed boundaries as to be of easy ascertainment.

We are not left alone to reason and conjecture on the rules of construction to guide our opinions on this point: the courts have not been altogether silent on the subject.

The first case in point is that of *Bauduc vs. His Creditors*, 4 La. 247. On the 17th of April, Bauduc gave a special mortgage to secure an antecedent debt. On July 30, three and a half months afterwards, he made a cession of his property. It was claimed by some of his creditors that this mortgage should be annulled, as having been given within three months of his actual and known insolvency, though more than three months before his cession or judicial insolvency. The decision of the lower court sustained the mortgage. On appeal it was tried before Chief Justice Martin and Associate Justices Matthews and Porter. In the opinion of Justice Matthews we find the following emphatic declaration on this point. He said:

"Whatever may be the doctrine established by the decisions of the tribunals in France, in relation to the time of failure, as recognized by the laws of that country, whether it be the period of the actual cession of property by an insolvent, or that of his inability to meet his engagements, as evidenced by the protest of his notes, etc., I consider it useless to inquire, believing, as I do, that the absolute nullity of contracts made by a debtor, as fraudulent towards his creditors, and such as our insolvent laws declare to be void, are those contracts alone which are made *within the three months preceding his actual failure and surrender of property.*" P. 256.

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It is, however, insisted by the counsel for plaintiff that this expression is the opinion of Judge Matthews alone, and should not be regarded as authority.

Judge Martin also read an opinion in the case, and whilst he does expressly announce his concurrence with Judge Matthews on this particular point, he must necessarily have concurred with him. Both judges agreed that the creditor did *not* know of the debtor's insolvency, and Judge Martin must also have believed that "failure" meant judicial failure as announced by Judge Matthews, since, if he had counted the three months as beginning at an earlier date—that of the actual (though not declared) insolvency of the debtor, he must have set the contract aside on the ground that it was entered into within the three months in contravention of the prohibition in the statute.

Judge Porter dissented on the ground that, though the transaction took place more than three months before the cession, and though dissenting, he nevertheless, in the course of his opinion, stated that it had always been his impression that "failure" meant judicial failure, and was to date from the cession as declared by Judge Matthews, though the argument then heard had somewhat shaken his belief on this point.

Since all three of the judges seemed to be in accord on this point, although it may not be held the strictest accord, we think the decision as relates to this point entitled to due weight.

The case of *Bank of Mobile vs. Harris*, 6 Ann. 711, has a significant bearing on this point. From the facts of that case the inference is plainly deducible that there was an entire acquiescence in the doctrine of the *Banduc* case. A party who was notoriously insolvent, but made no surrender of his property, executed a mortgage in favor of his brother to secure an existing debt after he had been protested. It was attacked on the ground that it gave a preference.

If the failure of the insolvent was to date from the protest of his draft—his actual insolvency—then the mortgage was a nullity because given within the three months next preceding actual insolvency and protest. The opposing creditor was represented by the most learned and distinguished counsel—Messrs. Benjamin & Micou—yet no suggestion by them, nor the slightest intimation from the court, that the contract was stricken with nullity, because made within the prohibited period. On the contrary, the discussion turned and the decision rested entirely on the knowledge and *bona fides* of the preferred creditor.

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Again in the case of *Martin vs. Drumm*, 12 An. 494, the Court said with respect to this matter:

"The presumption established by the Act of 1817, re-enacted in 1855, (R. S. p. 257, § 28), applies evidently *only to cases* in which proceedings are instituted against the insolvent to deprive him of the benefit of the insolvent laws, on the ground of his having given an unjust preference to one or more of his creditors over the others."

We think we have said enough to make it apparent that the conclusion is well nigh irresistible from these various considerations, that failure is not to be taken in the true sense of the statute as dating from actual insolvency, protest or other like circumstance, but from actual cession or insolvency judicially recognized and declared.

We have been referred to the recent case of *Black; Syndic, vs. Richardson Savings Bank and Kennedy*, and *Seixas, Syndic, vs. Brugier*, as opposed to the conclusion reached by us on this point. None of these cases have any direct bearing on this question, for in none of them was there any issue raised as to the true meaning of the term as found in this section of the Revised Statutes.

It is, however, urged that such a construction would be unfortunate, inasmuch as it would allow an insolvent debtor too much latitude in the disposition of his property and in fraudulent contracts against his creditors, and that it would place it in his power to defeat even the main object of the law by delaying to make a cession of his property or refusing to make one altogether.

This contention will lose its force when we consider that the creditors of an insolvent have the right, whenever a state of insolvency exists, to compel him to make a cession or surrender.

The insolvency of *A. Carrière & Sons* and their cession made on the 18th of July, 1884, and the conclusion reached on the point just discussed, would subject to the operation of the Statute just considered only those transactions between the *Carrières* and the *Citizens' Bank*, as occurred after the 18th of April, 1884, leaving those before that time subject only to the revocatory action.

The *DeSmet* transaction having preceded the date above mentioned is excluded from the operation of the Statute, and is governed by and subject to the revocatory action alone, and this includes the affairs connected with it of May, which, as we have shown, were but parts of the same transaction and but the carrying out of the previous understandings or agreements of the previous January and April.

VIII.

Manuel Escobal pledged to the *Citizens' Bank* certain collaterals and twenty-two bales of leaf tobacco to secure two notes given by him to

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the bank for \$8,000 and \$5,000 respectively. The lower court maintained the bank's title to the securities, and there has been no amendment of the judgment asked for in this respect, and we are therefore relieved of the further consideration of the transaction.

Escobal had overdrawn his account with the bank for several years, with the permission of Emile Carrière. On the 29th of March, 1884, the overdraft amounted to \$111,984, and for which Emile Carrière acknowledged himself responsible, and Carrière & Sons furnished their four notes to the bank to cover said amount; securities were pledged and discounted as before, and a check drawn by the Carrières in favor of the bank for the proceeds. Escobal's account was thus closed. The Carrières were to pay the debt and Escobal was released.

The release of Escobal by the bank was a good and sufficient consideration for this transaction with the Carrières. It does not require a moneyed consideration to protect the contract from the operation of Section 1808, R. S., or the reach of the revocatory action. Any legal consideration will suffice. Their assumption of Escobal's debt, whereby the bank released him from liability, was a good and sufficient consideration for the contract, and we see no reason to question its validity or the title of the bank to the securities received under it.

Even, however, if the consideration was not sufficient and contemporaneous, but was nothing more nor less than a transfer or pledge for an antecedent debt, it cannot be annulled for reasons given with respect to the DeSmet affair. The same principles and reasons apply to all transactions between the parties occurring in the interval preceding the 18th of April, 1884, and the 9th of March of the same year, the date when Mr. E. Carrière retired from the presidency of the bank, which includes the pledges of the 12th of March, as well as those of the 29th of March and 7th of April, specially mentioned above.

IX.

There is some mention made in the opinion of the judge *a quo* in the record, of a pledge of the 7th of June, 1884. It does not seem to be an object of much contention, since it is not mentioned in the brief of plaintiff's counsel, and briefly referred to by one of defendant's counsel. It consisted of the discounting of a number of collaterals received by the bank under its several pledges, and putting the proceeds to the credit of Carrière & Sons. This was done by direction of Mr. Miller, the president, as explained in his testimony after the death of Mr. A. Carrière, so as to close the account. It has no significance or bearing whatever that we can see upon the issues in the case.

X.

On the 23d of April, 1884, Mr. E. Carrière, by permission, withdrew some of the securities acquired by the previous pledges and substituted other paper in lieu of them. These substitutes are claimed by the syndic. We think the substitutes took the same status of the notes withdrawn, and the bank held them by a right equal to that entitled to hold the original. The substitution is covered by the Brugier case, 37 Ann. 509.

This completes the review of all matters and issues presented in the case, the examination of which has consumed much time and involved great labor.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed in the following particulars, to wit:

1. In so far as it maintains the validity of the pledges executed by A. Carrière & Sons to the Citizens' Bank of March 19, 1883, and February 15, 1884, and recognizes the title of bank to the securities received under them.

2. In so far as it maintains the right of the bank to hold and retain the other securities mentioned, designated and described in the opinion and judgment, whether embraced or included in said last mentioned pledges or not.

3. In so far as it rejects the demand of plaintiff to the bonds of the St. Louis, Atlantic, Canal and Transportation Company, and the disposition made in the decree respecting them.

That in all other respects it is further ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and the plaintiff's demand be rejected with costs of both courts.

Bermudez, C. J. concurs in the decree.

CONCURRING OPINION.

POCHÉ, J. While I concur in the decree rendered in this case, I am not in accord with all the reasons contained in the opinion as adopted by the majority of my associates, and I therefore rest my concurrence on the following considerations:

The essence of success in all actions intended to abrogate contracts entered into by insolvent debtors, at the instance of one or more of their creditors, is the intention of the debtor to injure some of the creditors and to benefit others.

In the revocatory action, the intention must be proved against both the preferred creditor and debtor, together with knowledge of the creditor touching the state of insolvency of his debtor.

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In the action under Section 1808 of the Revised Statutes of 1870, it is sufficient to prove the intention of the insolvent debtor in the contract assailed, to give an unjust preference to one or more of his creditors over the others, without any proof of either knowledge or intention on the part of the preferred creditor.

A careful consideration of all the facts connected with the numerous transactions assailed in this case, has forced on my mind the clear conviction that, in all the contracts between the Citizens' Bank and the firm of A. Carrière & Sons, through the instrumentality of Emile Carrière, either when he was acting in his dual capacity or when he was dealing as the manager of his firm with his successor as president of the bank, Emile Carrière never was animated with the least intention of benefiting the bank.

The record shows, beyond any reasonable doubt, that for several years previous the firm of A. Carrière & Sons was alarmingly insolvent to the full and almost exclusive knowledge of Emile Carrière, who found in the bank and its funds the only means of sustaining the waning credit of his firm both at home and abroad, but principally with their foreign correspondents.

Now, in order to quiet the alarm, and to lull the lurking suspicion of the directors of the bank, which were gradually arising from the unreasonable overdrafts, and from his suretyship on account of the ravenous demands of dangerous customers, such as DeSmet and Escobal, he quickly heeded the warnings of the cashier, and reduced his overdrafts by sundry contracts of pledge; but it is clear to my mind that he was not actuated with any motive to enhance the condition of the bank as a creditor, but that his simple and very apparent purpose was to pave his way to other overdrafts and to a constant bleeding of the bank of its resources.

By those means, his true intention was concealed, a false sense of security was created in the minds of the managers of the bank, and his double dealing game was successfully played until the occurrence of the fatal catastrophe; the death of his father, opened the eyes of all, and burst his ingenious bubble.

The result was that, at the date of their failure, while the indebtedness of the firm to the bank, had assumed a different form, it had not been practically affected to the advantage of the bank, but that, on the contrary, that corporation was one of the heaviest sufferers in the disaster.

The record shows that, on the wake of each of the pledges made to the bank, the firm of A. Carrière & Sons invariably drew repeated

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and immense amounts of cash, which had the effect of swelling the amount of their indebtedness to the bank, on that score, to an extent exceeding the amount of their original overdrafts.

I therefore conclude that through and by means of the multifarious transactions included in plaintiff's attack, there was no intention of benefitting the bank on the part of Carrière, and that practically no such effect can be attributed or traced to any of the contracts which have been subjected to judicial test in this controversy.

Entertaining these views, I find no necessity for the discussion of the vexed questions of the knowledge of the agent as an equivalent to the knowledge of the principal, and of the date from which the three months contemplated by Section 1808 should be computed. Hence I take no part in the discussion of either of these questions, and I am not committed to the views of the majority therein.

No. 9704.

THE STATE OF LOUISIANA VS. LOUIS CRITTENDEN.

Although the court may have refused to permit the prosecuting officer to introduce other evidence after the case has been closed, yet when the jury requests to be permitted to have the prosecuting witness brought before them for the purpose of examining the nature and locality of his wounds and of questioning him in relation thereto, it lies in the discretion of the judge to grant the request and such permission is not error.

When the defense offers to question the State's witness with a view to ascertain whether or not he has been a penitentiary convict, for the purpose of establishing his incompetency, and the question is ruled out on the ground that the record is the best evidence, and when no objection is made at any time to his competency, and the record, though claimed to be in the trial court, has never been produced on the trial or on motion for new trial, we must presume that there was no foundation for such objection, and that even if the court committed error, it was immaterial and no ground for reversal.

Where the counsel on either side puts to his own witness a question grossly leading and seeking to elicit evidence in itself inadmissible, the judge has the right to interfere and prevent such proceeding, even in absence of objection by opposing counsel; and such action furnishes no ground for reversal, if the ruling was otherwise correct.

A witness in a criminal case has the privilege of declining to answer a question which tends to criminate himself; and when he claims this privilege the judge is right in declining to compel him to answer.

In an indictment for shooting with a dangerous weapon with intent to murder, under Sec. 791, R. S., although it is not necessary expressly to charge an assault, yet as an assault is necessarily implied in the charge, the setting of it out is innocent surplusage, and the larger crime being otherwise properly charged, a conviction thereof will be sustained.

The indictment containing in its caption and commencement a full description of the State, parish and judicial district, the charge that the crime was committed in the "State, parish and district aforesaid," is a sufficient laying of the place.

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APPEAL from the First District Court, Parish of Caddo.
Hicks, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

J. B. Slattery for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The errors charged are presented on four bills of exception and a motion in arrest of judgment.

1. The first bill was taken to the ruling of the court in permitting the jury, at their own request, to have the prosecuting witness recalled after the evidence was closed, and to strip and exhibit the location and nature of his wound, and to be questioned by the jury concerning the same.

The objection was based on the ground that the judge had previously refused permission to the State to introduce the same evidence, after closing its case, and that the jury could not thereafter call for it. The judge states that his ruling against the State was on the technical ground that the evidence was not in rebuttal, and that such technical rule did not apply to the request of the jury, who were entitled to information on points which they considered essential to the understanding of the facts of the case. Irrespective of the correctness of the first ruling of the judge, he committed no error in the ruling complained of. This Court has heretofore held that "it was a matter to be left to the sound discretion of the judge, whether he would, after the State announced that it had closed, and before argument began, allow further evidence." *State vs. Colbert*, 29 Ann. 715.

Mr. Bishop affirms the same principle thus: "It is the general rule that, after the prosecuting officer has announced the evidence closed on his side, other evidence, not rebutting, cannot be introduced against the defendant; but, in various circumstances, the court, in its discretion, will allow a departure from this rule." *Bish. on Cr. Proc.* § 966.

The evidence being intrinsically proper, there could not be a better ground for the exercise of this discretion than the request of the jury. See also, *Wharton Cr. Pl. and Prac.* § 707.

There was no necessity for re-swearing the witness, who remained under the oath originally taken.

2. The next bill recites that "the prosecuting witness, Collins, after testifying that he had been in the penitentiary and had been sent from Caddo parish, was asked by the defense, to enable them to find the judgment of conviction, as there was no index to the criminal docket,

'how long it was since he had left the penitentiary,' to which question the district attorney objected, and the objection was sustained."

The judge states that the witness had said "he had been in the penitentiary right here—not convicted and sentenced to the penitentiary.' Considering that the object of the question, as stated in the bill, was simply to lay foundation for objection to the competency of the witness; that no objection was ever made to his competency; that the record of his conviction was not thereafter produced either during the trial or even on motion for new trial, it is fair to presume that there was no foundation for such objection, and that the ruling of the court, even if erroneous, worked no injury.

3. The next bill was taken to the action of the judge in interrupting a witness of the defense and preventing him from answering a question propounded by defendant's counsel and not objected to by the prosecuting attorney.

The question was as follows: "From your knowledge of the character of both parties and the action of the prosecuting witness during the difficulty, did you think the life of the defendant was in danger, and was the defendant justified in believing his life was in danger?"

The judge states that he considered the question as objectionable, both because it was clearly leading and because it elicited a mere opinion of the witness; that the witness was unscrupulous and showed a desire to exculpate the defendant regardless of truth; and that, notwithstanding the neglect of the district attorney, he felt it his duty to interfere in the prevention of such leading questions and the exclusion of such illegal testimony. He further intimates that it was not the first instance of the kind, saying that "the trial was becoming a farce," and that "his object was to call to the mind of counsel that the court was not the place to act farces in."

The question was grossly leading, to which the affirmative answer would respond as a mere echo of the words and ideas embodied in the question.

Moreover, the testimony itself sought to be elicited was improper, as not stating actual facts from which the jury might form its own opinions, but expressing merely the opinion of the witness based on facts not disclosed. *State vs. Parce*, 37 Ann. 268; *State vs. Coleman*, 27 Ann. 691; *Wharton Cr. Ev.* § 457; *State vs. Rhoads*, 29 Ohio St. 171; *Haynie vs. Baylor*, 18 Tex. 498.

The *gravamen* of the complaint, however, seems to be that, in absence of objection by the district attorney, it was improper for the judge to interfere. We dissent entirely from this view. A trial is not a mere

lutte between counsel, in which the judge sits merely as an umpire to decide disputes which may arise between them. It is his duty to see that the trial is conducted lawfully and fairly, to contribute to the eliciting of the truth and, as we recently said, "to take care that neither party shall suffer unlawfully." *State vs. Green*, 36 Ann. 186; *State vs. McGee*, Id. 206.

Thus, he may supplement the deficiencies of counsel on either side, by putting questions to witnesses which they have omitted, and, it is said, by recalling witnesses, who have been dismissed, for further question, and, in England at least, even by calling and examining a witness whom neither side has called. *Wharton Cr. Ev.* § 452.

We think, therefore, he has equal right, of his own motion, to require counsel on either side to put their questions in legal form, and to prevent the introduction of improper evidence, whether objected to by opposing counsel or not.

A trial is not intended as a mere test of the capacity of counsel, but has the higher objects of eliciting truth and securing justice. The rules of evidence have been framed with the view of advancing these objects, and, when they are violated, it is the privilege and duty of the judge to enforce them.

4. The next bill was to the refusal of the judge to compel a witness to answer the question: "From whom did the defendant obtain the pistol with which he did the shooting?"

A former witness had testified that the pistol was obtained from this witness, and the question was objected to as tending to criminate him. The judge having explained his privilege to the witness, the latter declined to answer the question on the ground that the answer would criminate him. The objection of the district attorney was perhaps in itself untenable, as the witness might have waived his privilege; but as he claimed the privilege, the judge did not err in refusing to compel him to answer. *State vs. Cook*, 20 Ann. 145; *Greenleaf Ev.* § 451; *Constitution 1879*, art. 6.

5. The motion in arrest is based on two grounds: 1st. That the indictment does not charge any crime greater than an assault, while he was convicted of shooting with intent to murder; 2d. It does not allege the time and place where the shooting took place.

Both grounds are untenable. The indictment charges that accused "did make an assault with a dangerous weapon commonly called a pistol, and did shoot said Collins with intent then and there, him, the said Collins, wilfully, feloniously and of his own malice aforethought, to kill and murder."

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The charge contains all the elements of shooting with intent to murder, as described in Section 791, Revised Statutes; and, though it was unnecessary expressly to charge the assault, yet as an assault was necessarily implied in such a charge, the setting of it out was innocent surplusage.

As to the time, it is very clearly laid as on the second day of January, 1886; and as to place, the indictment, containing in its caption and commencement the words, "State of Louisiana, Parish of Caddo, First Judicial District," charged the crime to have been committed "in the State, parish and district *aforesaid*." This is sufficient.

Judgment affirmed.

Todd, J. takes no part.

No. 9735.

THE STATE EX REL. F. L. GATES VS. TAYLOR BEATTIE, JUDGE.

1. It is the duty of a judge recusing himself upon grounds other than *personal* interest in the suit, to appoint a lawyer, having the qualifications of a judge, of the district in which the recused case is pending; and if no lawyer can be obtained at the term of the court at which the recusation is declared, the judge shall immediately appoint some judge of an adjoining district to try the case.
2. In the event the recused cause shall not have been tried within nine months from the date of the recusation, it shall be the duty of the district judge to order the transfer of the case to the district court of the nearest parish in the adjoining district, the judge of which is competent to try the case.
3. In case of such transfer of the suit, the judge of the court to which the transfer is made has as full and complete authority and jurisdiction over the same as if it had originated in that jurisdiction.

A

PPPLICATION for Prohibition.

D. Caffrey, Foster & Southon and *A. C. Allen* for the Relator.

Breaux & Hall and *E. Simon* for the Respondent.

The opinion of the Court was delivered by

WATKINS, J. This is an application for a writ of prohibition to restrain the respondent judge from any further proceeding with the trial of the suit of Theodore Fontelieu vs. F. L. Gates, the relator, which is a suit contesting defendant's right to the office of judge of the Twenty-first Judicial District.

Relator avers that plaintiff Fontelieu entered his recusation in that suit—he being at that time judge of that district—on the ground of

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personal interest, and referred the case to the judge of the Twenty-fifth Judicial District; that he in turn transferred said suit to Nineteenth Judicial District, in which Judge F. S. Goode presided; that the Governor appointed B. F. Winchester to fill the vacancy occasioned by the death of Judge Goode, and he recused himself on the ground that he had been consulted as counsel, and appointed the respondent Judge of the Twentieth Judicial District to try the case, and he has undertaken the trial thereof.

Relator avers "that Judge Taylor Beattie is *entirely without authority* to try said cause, and that Judge B. F. Winchester was *entirely without authority to appoint* him to try it.

"Your petitioner says that when the said Judge Winchester ordered the appointment of Judge Beattie to try said cause, he, through counsel, excepted to the order on the ground of want of authority of Judge Beattie, and the further ground of there being in the district four lawyers having the necessary qualifications to act as judge *pro hoc*," and that respondent judge is incompetent to try the cause, and that the recused Judge Winchester should have selected and appointed one of the attorneys of the Nineteenth Judicial District, having the necessary qualifications to try the same.

Respondent judge for answer returns "that in his opinion the recusation of Judge Winchester and the appointment of your respondent were in strict accordance with law," and he proceeded thereunder.

The defendant's bill of exceptions taken in the case of Fontelieu vs. Gates shows that, after recusing himself, Judge Winchester tendered the appointment of judge *pro hac vice* "to A. C. Allen, Esq., an attorney-at-law having the necessary qualifications of a judge of the district court, for the parish, to try the case, and that said A. C. Allen thereupon declined to accept the appointment;" and the judge tendered the appointment "to P. H. Mentz, Esq., an attorney having the necessary qualifications, who likewise declined; whereupon his honor entered an order appointing Judge Taylor Beattie of the Twentieth Judicial District Court to try the case."

This order was excepted to by the relator, as defendant in the suit of Fontelieu vs. Gates, "on the ground that, in the Nineteenth Judicial District four lawyers having the necessary qualifications to try the case, to-wit: Geo. B. Shepherd, Septime Lanaux, Lucius Southon, Tobias Gusham, and Emile Burgh, could be called, or one out of their number could be appointed to try the case; and on the further ground that the Statute requires and orders the judge to appoint a lawyer, whenever he is recused, except for causes of interest," and that the

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judge recused had no discretion in the matter. The recused judge assigns as his reason for appointing the respondent that "the court appointed every *qualified lawyer at the bar of St. Mary*, except Mr. S. Lanaux, who resided in Morgan City, and who was *not present*, before appointing Judge Beattie of the adjoining district." This bill of exceptions is annexed to and filed with the respondent's answer.

To us, the recusation of Judge B. F. Winchester and his selection and appointment of respondent were in strict conformity with the provisions of Sec. 2 of Act 40 of 1880, which reads as follows, viz: "That in cases in which a district judge shall be recused, except for cause of interest, he shall, for the trial thereof, appoint a lawyer having the qualifications of a judge of the district court, in which the recused case is pending, and if *no lawyer* having the necessary qualifications *can be obtained at the term of court at which the recusation is declared*, the judge (recused) shall *immediately* appoint some district judge of an adjoining district to try the case, who shall be notified of his appointment, etc.;" and he shall, as early as practicable, go to the court at which the recused case, for the trial of which he shall have been appointed, is so pending and there try and determine the cause.

The relator's counsel, with great earnestness and ingenuity, argue Judge Winchester's "entire want of authority to appoint" Judge Taylor Beattie, and the latter's want of authority to act under said appointment and try said cause, for the reason that, Judge Winchester was himself a judge *ad hoc*, and the legislature had not given him such power; and that this case presents a *casus omissus*, not provided for by Act 40 of 1880, or any other law of this State; and insists "that the judge *ad hoc* appointed under section 5 of that act has not the same power as the judge appointed under sections 2 and 3; nor does he proceed to try the case in the same manner." He further contends that, when Judge Goode died and his successor, Judge Winchester, recused himself, there was an end of the legislative grant of jurisdiction, and the case is at a standstill, until the legislature affords relief.

Counsel for the relator places strong reliance upon *Jarnau vs. Chopin*, 6 La. 130, in which he claims, Judge Martin, as the court's organ, announced a similar principle as controlling a similar case.

In that case the sole question presented for solution was, whether the court below erred in refusing an order of reference of the cause to the judge of an adjoining district, it appearing that both the district judge before whom the case was pending, and the judge of the parish in which the court was sitting, had been employed and consulted in the case. The motion was grounded on the first section of an act

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passed in 1822, but which the court held to have been repealed by a statute enacted in 1824, which ordered reference of such cases to the parish judge.

The court ruled that the judge before whom the cause originated, and that one whom the law calls in his stead, being both incapacitated from acting, the appellant is precisely in the same situation, in which he would have been, under the act of 1822, if the judge of his own and of the two neighboring districts had been incapacitated. His, then, would be a *casus omissus* in the law, and remediable by the legislature only.

The act of March 23, 1880, is much more ample than was that of 1822. Section 5 of the former statute does not, in our opinion, provide for the selection or appointment of a judge *ad hoc* as relator's counsel contend. It is in these words:

"That when any recused case, for the trial of which a district judge has been appointed, as provided in sections 2 and 3 of this act, has not been tried in nine months from the date of the recusation, it shall be the duty of the district judge to make transfer of such cause to the district court of the nearest parish of an adjoining district, the judge of which was competent to try the case, etc."

An examination of State ex rel. Fontelieu and others vs. Conrad DeBaillon, Judge, 37 Ann. 393, will show that the defendant judge, to whom the cause had been originally transferred, failed to try the same during the prescribed period of nine months and said cause was thereafter transferred to the Nineteenth Judicial District Court for the parish of St. Mary, and where it now resides.

The suit having been regularly transferred to the Nineteenth Judicial District Court for the parish of St. Mary, under the provisions of the Act of 1880, it is quite as much under the control and jurisdiction of that court as any suit originally instituted within that territorial jurisdiction.

Judge Goode having died, Judge Winchester was appointed and took his place and stood in his place, and was and is fully vested with all the jurisdiction and authority that his predecessor, Judge Goode, possessed.

Having a recusable interest in the case of Fontelieu vs. Gates, as an employed attorney-at-law, he made and entered an order of recusation and appointed the respondent judge to *come into his court* and try the cause. In this we think he was correct.

On the other branch of the case we deem it sufficient to add that sec. 2 of act of 1880, makes it the duty of district judges who are thus

Tague vs. Insurance Company et al.

recused "to appoint a lawyer having the qualifications of a judge of the district court in which the recused case is pending, and if no lawyer, having the necessary qualifications can be obtained at the term of the court at which the recusation is declared, the judge (recused) shall immediately appoint some district judge, etc."

The statute does not say a lawyer of the judicial district, but a lawyer having the necessary qualifications of a judge of the district court in which the recused case is pending. In case such a lawyer cannot be "obtained at the term of the court at which the recusation is declared the judge (recused) shall immediately appoint some judge.

This statute was intended to facilitate and speed the trial of causes in which the trial judge may have a recusable interest. It certainly does not contemplate the recused judge delaying the trial until he had first tendered the appointment to every competent lawyer of the judicial district, before he should appoint a judge of an adjoining district.

It is, therefore, ordered and decreed, that the restraining order granted be rescinded and set aside, and that a perpetual prohibition be refused.

No. 9571.

BRIDGET TAGUE VS. ROYAL INSURANCE COMPANY OF LIVERPOOL
AND LONDON ET AL.

No appeal lies to this Court in a case in which plaintiff claims less than \$2,000, on distinct contracts, from each of several defendants, not bound jointly or severally, though five in number, and the claim against each nears \$1,000, aggregating together some \$5,000. Consent cannot confer jurisdiction *ratione materiae*.

APPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

J. Timony for Plaintiff and Appellant.

Breaux & Hall for Defendants and Appellees.

The opinion of the Court was delivered by
BERMUDEZ, C. J. We have no jurisdiction *ratione materiae* over this controversy.

The plaintiff sues on five different insurance policies, to recover from each of the five defendant companies a sum less than one thousand dollars.

The companies, if bound, are liable neither jointly nor severally for the same amount.

38	456
104	780
88	456
105	334
38	456
109	458
38	456
117	925

State vs. Samuels.

The insurance was effected separately on property valued at \$5,000, one-fifth in each company.

It has been held, in similar cases, that jurisdiction did not attach. 4 R. 319; 5 N. S. 87.

In the earlier case, the Court said: "The attempt made by this mode of proceeding to obtain a review of these judgments and to have their nullity established, is an attempt to have that done indirectly which the law will not permit to be done directly."

In the last case, the Court said: "The appellants contend that, as the plaintiff has joined them in the same suit, he has himself made a case, which authorizes them to appeal. We are of a different opinion. If a separate suit had been instituted against each appellant, * * * it is very clear no one of them would have been entitled to an appeal, and we do not see that the joining of them in one suit makes any difference as to their rights. If they thought their rights endangered by being all joined in the same suit, the appellants ought to have objected in the lower court and not have reserved their objections for this tribunal."

This doctrine has since been uniformly recognized and applied. 5 R. 120; 10 Ann. 78; 28 Ann. 172; 30 Ann. 609; 33 Ann. 806.

It is a principle too firmly settled to be questioned, that, however formal or disguised, consent cannot confer jurisdiction *ratione materie*.

In the instant controversy, the plaintiff does not ask a judgment for a sum "*exceeding two thousand dollars;*" but for \$970 only, against each company named.

This Court can therefore in no possible aspect render a judgment exceeding the lower limit of its jurisdiction against either or all the companies, between whom there exists no privity and who are bound, if liable, neither jointly nor severally. Const. Art. 81.

It is therefore ordered and decreed that the appeal to this Court be dismissed with costs.

No. 9708.

THE STATE OF LOUISIANA VS. WILLIE SAMUELS.

An information under Section 792 of the Revised Statutes, which charges that the accused wilfully, feloniously and of his malice aforethought * * shot into and among a crowd with intent to kill and murder some person or persons, is not bad for duplicity.

The description of the *animus* of the shooting is sufficient to qualify the intent to commit murder.

The information is not deficient for using the words *into* and *among* instead of the word *at* used in the Statute. It is not deficient because it does not in terms charge an *assault*, when it appears that other words used contain the necessary ingredients of an *assault*.

38	457
48	582

38	457
120	344

38	457
1122	520

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

E. H. Randolph and *J. W. Jones* for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Defendant seeks relief from a conviction under charge that "with force and arms, into a crowd of persons assembled together at a circus * * * with a certain dangerous weapon commonly called a pistol, wilfully, feloniously and of his malice aforethought, (he) did shoot among and into, with intent to kill and murder some person or persons unknown. * * *

The first point submitted is a motion to quash the information on the ground that it charges no crime under the laws of this State, and further, if there is such offence, it is bad for duplicity.

A complaint that no offence is charged, and that two offences are charged in the same information, is manifestly more hypercritical than definite or consistent. Hence on appeal a more logical course has been adopted by counsel, and the first ground of the motion is abandoned.

On the alleged defect of duplicity, we find that the information is brought under section 792, Revised Statutes, which provides that, "whoever shall assault another by wilfully shooting at him, or with intent to commit murder, rape or robbery, shall be," etc.

It is plain that the Statute contemplates several distinct offences, which are disjunctively enumerated, and our jurisprudence has long since and uniformly sanctioned pleadings under which one or more of the offences denounced by that very Statute can be cumulated in the same count of the indictment or information, when it appears that they are connected with the same transaction and constitute but one act, as shown by the information in this case. *State vs. Faut*, 2 Ann. 637; *State vs. Markham*, 15 Ann. 498; *State vs. Richards*, 33 Ann. 1294, and authorities cited in the last case.

The motion to quash is therefore devoid of all merit.

In a motion in arrest, the defendant urges three other objections to the information under which he was convicted.

1. That the information fails to specifically allege an assault, and that under section 792 an assault is of the essence of the crime therein denounced.

It is true that the information does not contain the word *assault*, but it is equally true that the language used in the information contains

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the necessary ingredients of an assault, and no rule of law requires that criminal pleadings should contain the identical words of the Statute, provided the true meaning thereof be unequivocally found in the bill or information.

2. He next contends that the information contains no averment of a felonious intent to murder.

The manner of the shooting, which is the substantial charge in the information, is described to be *felonious, wilful* and of *his malice aforethought*, and that description covers and sufficiently qualifies the alleged intent to commit murder. *State vs. Bradford*, 33 Ann. 921; *State vs. Murphy*, 35 Ann. 622.

3. He also complains that the charge is of shooting *into* and *among* a crowd, instead of following the language of the Statute, which uses the words shooting *at*.

We can hardly conceive the purport of this objection, for it appears to us that shooting *among* and *into* a crowd, conveys the idea of a more dangerous or offensive shooting than would be conveyed by the words shooting *at*. There is no force in the contention.

If for no other purpose but to avoid idle discussion, a more vigorous compliance with the terms of the statute, by prosecuting officers, would be advisable, and would doubtless enhance a speedy administration of justice.

Although the author of the information in this case managed to convey with sufficient legal precision the idea of the charge which he intended to prefer, yet the style of the instrument is so loose and clumsy that it suggested some reasonable doubts of its real meaning, and it has necessitated labor which might have been easily avoided.

Other means of defense have been resorted to in the district court, but they are not insisted on before this Court; counsel having restricted their efforts to sustain their motions to quash and in arrest.

Judgment affirmed.

No. 9610.

THE STATE OF LOUISIANA VS. GABRIEL GONSOULIN.

In order to set aside the venire, accused must point out and establish some material illegality in the drawing and show some material injury to himself.

A man living near the line between two parishes is a lawful juror in that parish in which he is a registered voter and claims his residence, when the line has not been legally and definitely settled, and it is not positive which side it would place him on when so established.

38	459
44	505
38	459
45	9
45	844
45	1043
45	1102
38	459
46	1349
38	459
50	153
50	263
50	1349
38	459
104	585
38	459
108	457
107	200
107	330
38	459
111	478
38	459
115	943
38	

State vs. Gonsoulin.

The jury is presumed to be legally composed, and he who asserts the contrary assumes the burden of proof.

Applications for a change of venue are largely within the discretion of the trial judge. His action may be reviewed by this Court, but his conclusion relating thereto will not be disturbed unless it clearly appears that he has misapplied the law or the facts.

To entitle accused to a change of venue, the prejudice against him must be so general throughout the parish as to render it impracticable for him to get a fair and impartial trial.

The fact that a justice of the peace hears rumors of an offense in the neighborhood does not show that such offense was "made known" to him, so that prescription will begin to run in favor of the offender. To have that effect it must be made known by affidavit before him. R. S. 986, 2058.

After the evidence is closed on the trial of a motion in which the evidence is taken down, the trial judge may allow a witness to correct his statement as taken down, without re-opening the evidence so as to be compelled to hear other and further evidence.

The declarations of accused made, not at the time of the commission of the offense, but subsequently in reply to the charge against him, are not part of the *res gestæ*: they are self-serving and inadmissible.

The fact that unexpected evidence was adduced furnishes no legal ground for a new trial. Wh. Cr. Pl. and Pr. § 884.

Accused is not entitled to a new trial because he or his counsel made a mistake in not adducing his entire evidence at the proper time. Wh. Cr. Pl. and Pr. §§ 876, 877.

Courts have always the right to correct their minutes so as to conform to the facts, especially when such facts are within the personal knowledge and recollection of the court.

It is not essential that accused should be present at the filing and trial of motions and pleas not involving the question of guilt or innocence on the merits. It is sufficient if the minutes show his presence at the arraignment, trial, verdict and sentence. 32 Ann 560; 34 Ann. 121; 35 Ann. 9.

A PPEAL from the Twenty-first District Court, Parish of Iberia.
Gates, J.

M. J. Cunningham, Attorney General, and *C. H. Mouton*, District Attorney, for the State, Appellee.

Breaux & Renoudet and *A. Fontelieu* for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant having been convicted of larceny was sentenced to eighteen months imprisonment at hard labor, and appeals.

To support his appeal, he cites numerous alleged erroneous rulings of the trial judge, as set forth in several bills of exception.

1st. The first is to the overruling a motion to quash the venire, on account of alleged irregularities in the manner of drawing the same.

We have closely examined the irregularities pointed out, but we do not find them of sufficient gravity to vitiate the proceeding. Above all, we do not find that any of the acts complained of were perpetrated in fraud of the rights of the accused and calculated to work an irreparable wrong upon him, and unless they are of such character the

State vs. Gonsoulin.

court is without authority to set them aside and annul the subsequent proceedings of the prosecution. We are not compelled to accept as conclusive the oath of the accused that the irregularities charged were either fraudulent or intended or calculated to inflict an irreparable injury.

The motion was therefore properly overruled. Section 10 of Act 44 of 1877; 33 Ann. 1362-1415.

2d. The next complaint, seasonably made in the lower court, was that the grand jury that found the bill was illegally constituted, because one of the members thereof was not a resident of the parish in which the prosecution was instituted.

The member in question lived near the dividing line between the parishes of Iberia and St. Martin, that is near where such line should run, for in point of fact no such line had ever been established or surveyed. The evidence left it in doubt in which parish the party had his residence. He was a registered voter in the parish of Iberia, where he sat as a grand juror. To have registered he must have taken the registration oath and sworn that he was a resident of that parish, and the judge was therefore justified in his ruling. There was no error on this point. It was incumbent on the defendant to make good his complaint and he failed to do so by conclusive evidence.

3. There was a motion for a change of venue, which was denied. It was largely addressed to the discretion of the judge, and we are satisfied that his discretion was soundly exercised in this instance, since a review of the testimony fails to satisfy us that the accused could not have obtained a fair and impartial trial in the parish where the prosecution was pending.

4. The indictment was found more than one year after the alleged offense purports to have been committed, and prescription was pleaded in bar of the prosecution under it. It was alleged in the indictment that the offense had never been made known at any time before the finding of the bill to any officer having the power to prosecute the offense.

The accused in rebuttal averred that it had been made known to an officer that could have inaugurated the prosecution—that is, it was known to one or more justices of the peace of the parish where the offense purports to have been committed.

Admitting that a justice of the peace was one of the officers embraced in the proviso of the statutes, it certainly cannot be held that the offense had come to the knowledge of such officer, within the intent of the statute, unless by affidavit justifying him to issue his warrant for

the arrest of the accused. It was not enough that the justice had heard of the offense committed as a rumor and have had any possible effect, the information must have come to him in his official capacity and in the method prescribed by law—by affidavit. The judge properly overruled the plea.

5. The accused complains that a witness, after he had testified on the trial of a motion and the evidence closed, was granted leave to return and correct a part of his testimony which had been taken down, and that he, the accused, was not permitted to reopen the evidence upon the subject of inquiry.

A witness, who has testified, may be permitted to correct his testimony. This right could not be denied him, but such correction could not be considered as reopening the evidence, and the defendant was not authorized thereby to offer further evidence upon the matter then in hand: his claim to do so was properly denied.

6. After the testimony in chief for the State and the defense had been taken and a witness for the State had testified in rebuttal, the defendant offered witnesses in rebuttal, and they were not allowed to testify on objection of the State's counsel. The court refused to permit them to testify for the reason stated that the evidence was closed. This was so, and the defendant had no legal right to offer witnesses to rebut the testimony given in rebuttal by the State: unless in an exceptional case rarely to occur. It was a matter lying in the discretion of the judge. It was a mere privilege asked, not a legal right, and the court could legitimately refuse to grant it.

7. The defendant had produced a witness, who swore that he, defendant, had bought the animal charged to have been stolen, from a person named. This person was called in rebuttal and was asked if he had sold the animal to the accused. The counsel for the defense objected to the question as leading, and complains of the judge's ruling permitting it to be answered. There was no force in the objection and it was a manner of questioning that was unobjectionable addressed to a witness offered in rebuttal. Wh. Cr. Ev., sec. 454.

8. Statements of the accused touching his ownership of the animal, the subject of the larceny, were offered and rejected.

The statements in question were not made at the time of the alleged taking, nor when the animal was found in possession of the accused, they formed, therefore, no part of the *res gestæ*, and were evidently to be regarded as self-serving declarations and were clearly inadmissible.

9. The defendant complains that, in his absence from the courtroom, the judge allowed a correction of the minutes to be made sup-

State vs. Gonsoulin.

plying an omission in the record, as it then stood, touching the presentation of the bill in open court by the grand jury. The motion for correction was made by the district attorney, the defendant's counsel being present, and the correction need not have been made in the presence of the accused. The judge can, of his motion, make any necessary correction in the minutes, especially, as in this case, the facts relating to the omission supplied and correction made were within his personal knowledge. It was the right and duty of the judge to make the correction.

In the assignment of errors filed, in which all the above matters appear, it is also charged that the record does not show that the accused was arraigned or had pleaded, nor his presence in court at all stages of the prosecution.

The arraignment and plea is shown by the record. The part of the record in which it appears, was supplied through a *certiorari*. He was present at the trial and when sentence was passed. It is only necessary that he be present at the important stages of the trial, and is not required at the trial of motions not directly bearing on the question of his guilt or innocence—the only issue to be determined by the jury.

10. We find another bill taken to the refusal of the judge to give certain special charges relating to circumstantial evidence.

The reason of the refusal as stated by the judge was, that all the instructions on this subject demanded by the facts of the case or in any way applicable thereto, were embodied in his charge. It was a matter that came within the discretion of the judge, and we are bound to give weight to the reasons assigned by him for his refusal to so charge and his action in the premises is not properly subject to review by this Court. We cannot conclude from the lights furnished by the record that the judge's refusal in the premises could have had any effect on the verdict.

11. After the case was closed and the jury had retired, a request was made by them for permission to ask further questions of one of the witnesses who had testified on the trial. The request was refused. The trial had closed, the request was irregular and the refusal deprived the defendant of no legal right.

This completes the review of the proceedings, and we find no ground upon which the accused can be relieved.

Judgment affirmed.

 State vs Francis.

No. 9706.

THE STATE OF LOUISIANA VS. JOSEPH FRANCIS.

An appeal taken in a criminal case and made returnable within ten days after the order of appeal is granted, will be dismissed if the transcript of appeal is not filed on the return day, or within three judicial days thereafter. Sec. 4, act 30 of 1878; *State vs. Butler*, 35 Ann. 392.

A PPEAL from the Twenty-first District Court, Parish of Iberia.
Gates, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

A. Fontelieu, L. O. Hacker and C. O. Delahoussaye for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. Upon information the accused was charged with an assault by wilfully shooting at one Robert Lee; and from a verdict of "guilty," rendered on the 22d of January, 1886, he prosecutes this appeal.

 ON MOTION TO DISMISS.

In this Court a motion is made to dismiss the appeal upon the ground that same was granted on the 30th day of January, 1886, returnable in ten days, and the transcript was not filed until the 26th of February, 1886.

It is required by the terms of section 4 of act 30 of 1878, that appeals in criminal cases *shall* be made returnable to this Court *within* ten days after granting the order of appeal, wherever the same may be in session.

The indorsement of the clerk of this Court shows the transcript of appeal was only filed February 26, 1886; and, therefore, not within the delay provided by law.

In *State vs. Butler*, 35 Ann. 392, this Court said: "By not filing the transcript on the return day, or within three judicial days following it, and by not seasonably applying for an extension within which to file it, and not filing it in time, the defendant must be considered *juris et de jure* as having abandoned it."

The minutes of the court appertaining to the appeal are as follows: viz: "Motion filed and granted, for a suspensive appeal from the above sentence, and judgment made returnable before the Supreme Court holding sessions in New Orleans, within ten days, according to law."

 State vs. Insurance Company.

The fault is imputable to the appellant. His case does not come within the provisions of act 531 of 1839, now section 36 of Revised Statutes.

It is, therefore, ordered, adjudged and decreed, that the appeal herein taken be dismissed.

 No. 9603.

THE STATE OF LOUISIANA VS. THE HIBERNIA INSURANCE COMPANY.

Under Act No. 4 of 1882, the license is imposed on the business pursued by an insurance company in the State of Louisiana, and not on business done through branches or agencies established in other States, subject to their laws and to the taxation imposed thereby.

Section 7 of the act applies the same rule of graduation to home companies and to foreign companies transacting business here through branches or agencies; and it might, with equal force, be contended that foreign companies were to be taxed according to their premiums earned at home as well as here, as that home companies should be taxed according to their premiums earned through like agencies in other States.

"Rebates" being a deduction from stipulated premiums allowed in pursuance of antecedent contract, the difference constitutes the only premium actually earned by the company, and in estimating the gross amount of premiums the rebates are properly deducted. Inasmuch as the basis of graduation is restricted to premiums received for business done in the State, it is self-evident that the deductions allowed should suffer the same restriction, i. e. the only return and unearned premiums and rebates deducted should be those arising from and connected with the business done in the State.

It seems probable that, in this respect, the defendant has not complied with the law, but as the evidence is not sufficient to fix the license according to this view, non-suit must be given.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lasarus, J.

John McEnery and W. B. Somerville for Plaintiff and Appellee:

- 1 "Gross premium," in the license act, includes all premiums, from whatever source.
2. Exemptions from taxation are to be strictly construed, and as "rebates" are not mentioned among the items to be deducted from the "gross premium," they cannot be allowed. Act No. 4, 2d Ex. Sess. 1881, p. 70.
3. A license is a personal privilege to pursue a certain vocation, and the amount fixed, to be paid by the license payer, cannot be construed as a tax on income or otherwise, and made subject to the laws governing property taxes.
4. A State may levy a tax on gross earnings of a corporation, regardless of whether they are earned within or outside of its boundaries. 15 Wall. 284; 14 Otto, 595; 18 Wall. 206.

J. C. Gilmore for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. This case involves the construction and constitutionality of the sections of Act No. 4 of 1882, regulating the license taxation of insurance companies.

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The pertinent provisions are the following:

Section 1 of the License Act, page 52, provides: "That there is hereby levied an annual license tax for the year 1882, and for each subsequent year, upon each * * * corporation pursuing any * * * business in the State of Louisiana, etc.

"Sec. 2. That on the 2d day of January, 1882, and each subsequent year, each tax collector throughout the State shall begin to collect, and shall collect as fast as possible from each of the * * * corporations pursuing within his district or parish any * * * business a license tax as hereinafter graduated."

"Sec. 7, p. 68. That for every business conducted by an insurance company * * * or firm doing an insurance business of any kind * * * in this State, whether located here or operating through a branch department * * * the license shall be based on the gross annual amount of premium, etc.

"Provided, that the gross amount of annual premiums shall not include unearned and return premiums and reinsurances." Act No. 4, 2d Ex. Sess. 1881, pp. 68 and 70.

The defendant company not only transacts business in this State, but has also established offices in various other States where it conducts the business of insurance on property located in such States, in accordance with their laws and subject to such license taxes as are there imposed.

In formulating the published statements required by Section 1784 of the Revised Statutes, the company set forth the entire amount of premiums received by it on all insurance, whether in this State or elsewhere; but in estimating the annual amount of premiums according to which its license tax was to be graduated, it deducted those received on account of its business done in other States, and it also deducted as "unearned and return premiums and reinsurances" the rebate allowed to insurers.

Upon the amount thus fixed the company has paid the proper tax to the tax collector.

The State now claims, in this suit, that said deductions were improper and unlawful, and demands the additional tax which would be due if said deductions had not been made.

The defendant resists on the double grounds, viz:

1st. That it has paid all that is due under a proper construction of the law.

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2d. That if the law could be construed as taxing its business done in other States, it would be violative of the Constitution of the State and of the United States.

We find no necessity for considering the constitutional questions presented. The terms of the law would have to be very clear and unambiguous, to command our assent to a construction of it, which would sanction a legislative intent to impose a license tax upon business pursued by the corporation in a different State, or even to refer to the receipts of such business as a basis for the graduation of a license tax.

Far from being unambiguous in the expression of such intent, the terms of the statute convey very clearly to our minds the contrary purpose.

The license is upon the business. It is levied on corporations "pursuing business in the *State of Louisiana*." Sec. 1.

Section 2 directs the tax collectors to collect from "corporations pursuing, *within his district or parish*, any business," etc.

Section 7 applies to all insurance companies doing business "in this State, whether located here or operating through a branch department," etc., and fixes as the basis for graduation "the gross annual amount of premiums." This basis applies equally to home companies and to foreign companies transacting business here. It might as well be contended that foreign companies were to be taxed according to the amount of their premiums earned at home as well as in this State, as that home companies should be taxed according to their premiums earned on business transacted through branches in other States as well as on business transacted in this State.

The statute applies precisely the same rule to home and foreign companies, and we consider it perfectly clear that the premiums referred to are premiums derived from business transacted in this State.

It only remains to be considered whether the "rebates" are to be deducted in estimating the "gross annual amount of premiums." The law authorizes the deduction of "unearned and return premiums," and hence it is contended that it excludes deduction of "rebates." But we think it very clear that in using the term "gross amount of premiums," the law refers to premiums actually received or earned; and as, by the terms of their contracts, the companies allowing such rebates only receive the difference between the premium stipulated and the rebate, it seems clear that such difference, only, constitutes the gross premiums earned. The contracts are made with the full knowledge and understanding that such rebates are to be allowed, and it is a mistake for the State to say that they are mere voluntary returns by the company.

 State vs. Hanks et als.

Having thus expressed our views as to the construction of the law, we would add that as the basis of graduation is restricted to the business done in the State, the deduction allowed should suffer a like restriction—that is to say, the only return premiums, unearned premiums and rebates which should be deducted are those arising from and connected with the business done in this State. This is self-evident. The record is barren of evidence necessary to determine the amount of license on this basis, and as the State is the actor in the proceeding, we shall dismiss the rule as in case of non-suit.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed; and it is now ordered and decreed, that the rule taken by the State be dismissed as in non-suit, the State paying costs in both courts.

 No. 9722.

THE STATE OF LOUISIANA VS. HILAIRE HANKS ET ALS.

1. State vs. Alexander Balize affirmed.
2. Proof administered of the previous prosecution of *another person* "accused of *same offense*," is not proof of knowledge by the prosecuting officer that the accused had committed the offense, and he cannot thereby sustain his plea of prescription.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette.
DeBaillon, J.

M. J. Cunningham, Attorney General, and *Robt. C. Smedes*, District Attorney, for the State, Appellee.

Chas. D. Caffery for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. The accused were charged, upon information of the District Attorney, with stealing a horse, the property of Seigné Duhon, on or about the 15th of May, 1881, and the information recites that said "offense has not been made known to the officer having authority to direct the investigation thereof within the time necessary to take the same out of the saving clause of the Statute of Limitation."

To this information, two exceptions are urged, viz:

- 1st. Prescription of one year.
- 2d. The property stolen, is insufficiently described to put the defendants on their guard.

38	468
48	805
48	1362
49	1160
38	468
51	1648
38	468
123	438

 State vs. Hanks et al.

From a judgment of the court *a qua* sustaining the plea of prescription, the *State* has appealed.

 MOTION TO DISMISS.

In this Court the counsel for the accused seeks to dismiss the appeal, on the ground that the record contains no bill of exception, nor assignment of error; and supports his motion by reference to various authorities.

In *State vs. Alexander Balize*, recently decided, and not yet reported, we held: "When the *record* enables the court to decide on the merits, either party may, at any time, refer the court to any error apparent on its face, without making a formal assignment thereof;" and, upon examination of the authorities *cited* for accused, we find in accord therewith the following, viz: 20 Ann. 389, *State vs. Behan*; 20 Ann. 402, *State vs. Morel*; 20 Ann. 402, *State vs. Krepple*.

The only mode of bringing the *facts* of a criminal case before this Court is by a bill of exceptions. 32 Ann. 819, *State vs. Green Red*; 25 Ann. 417, *State vs. Socha*; 32 Ann. 842, *State vs. Nelson*; 35 Ann. 543, *State vs. Sherard*; 36 Ann. 158, *State vs. Miller*; 36 Ann. 185, *State vs. Wm. Green*.

Motion to dismiss overruled.

 ON THE MERITS.

The proof adduced, to traverse the averment of the information, found in the record, consists of a similar information of date October, 1884, charging one *Thomas Smith* with the commission of same offense; and that he was arraigned, and a jury empaneled to try the cause; but same was withdrawn and a *nolle prosequi* entered after the testimony had been adduced and the accused discharged.

It is also admitted that the "offense had been examined by the grand jury, at one time, the date of which is not given, except as last year, I think."

Revised Statutes of 1870, section 986, provides: "No *person* shall be prosecuted or punished for any offense, wilful murder * * * * excepted, unless the indictment or presentment for the same shall be found or exhibited within one year next after the offense shall have been made known to a public officer, having the power to direct the investigation or prosecution."

Stripped of unnecessary verbiage and we have: No person shall be prosecuted for an offense unless indicted within a year after it was denounced to a public officer.

 Pasley vs. McConnell et al.

It is clear that the indictment of Thomas Smith previously, did not exonerate defendants, who are indicted for the same offense now.

There is neither mutuality or identity of parties. Even in a civil suit the previous citation of A, would not interrupt prescription as to B, and the converse is equally true.

We decline to accept such an interpretation of the Statute of Limitation of prosecutions.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be avoided, annulled and reversed; and, it is further ordered, adjudged and decreed, that this cause be remanded to the court *a qua* and the information reinstated, in order that such further proceedings be taken as justice may require; and that the accused parties pay cost of both courts.

 No. 9568.

JOHN PASLEY VS. ANN MCCONNELL ET AL.

Appellants have a right to join in one motion and in one bond, when the suit is a unit and one judgment only is rendered in it.

A bond conditioned for an amount ample enough to cover costs, and which is that fixed by the court in the order granting the appeal, is sufficient to support a suspensive appeal taken from a judgment in a petitory action, where the property in dispute is under sequestration in the custody of the sheriff, and no money claim is allowed by the court.

A bond of appeal need not be signed by appellants, or by any one for them.

In an action by a judgment debtor to annul a sheriff's sale of his property seized under a judgment against him, the addjudicatee cannot question his original title, because that would destroy the sole foundation of his own.

When property has been sold in execution of a judgment during the pendency of a devolutive appeal, the subsequent reduction of the amount of the judgment by the appellate court has no effect upon the validity of the title acquired at the sale, even if the purchaser be the judgment creditor. The latter is only bound to restore the excess of the price which may have been applied to her original judgment.

The non-payment of accrued taxes does not destroy the validity of the adjudication.

The rule of Art. 684, C. P. prohibiting sale unless the price bid exceed prior mortgages and privileges, applies exclusively to special or conventional mortgages.

The mortgage certificate in this case showed no conventional mortgages or privileges exceeding the bid.

The registry of seizure of immovable property in New Orleans, under Act 189 of 1837, operates merely as a substitute for actual seizure and possession by the sheriff, and has nothing to do with the establishment or notice of a privilege. The privilege resulting from such seizure arises not from its registry, but from its actual continuance as a subsisting seizure.

When a prior special mortgage has been cancelled and erased from the records prior to the sale, in pursuance of a final judgment to that effect by a court of competent jurisdiction, and does not appear on the mortgage certificate read at the sale, the judgment debtor cannot, long afterwards, claim the nullity of the sale on the ground that the price bid did not exceed the amount of such cancelled mortgage.

38	470
46	422
38	470
48	62
38	470
110	141

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

W. S. Benedict for Plaintiff and Appellee.

J. Magioni and J. Timony for Defendants and Appellants :

I.

Where appellants were not condemned to pay any sum of money, or deliver any property, the bond need only be to cover costs. 30 Ann. 801.

Where an appeal is taken from a judgment, and the property is in the hands of the officer of the court, under an order issued on the petition of plaintiff and appellee, a bond fixed by the judge for an amount to cover costs is suspensive. 7 N. S. 352; 10 Ann. 345; 27 Ann. 231, 685.

But where the appellant has complied with the judge's order and given bond in the sum fixed, if the bond is insufficient for a suspensive appeal, still it is good for a devolutive appeal. 15 Ann. 333.

Where the certificate of the clerk is in the usual and proper form, and the appellee finds that the evidence, which is necessary to him, is not in the record, he should have suggested a diminution of the record and called for a *certiorari*. 27 Ann. 444.

Where the ground is that the appeal bond is not conditioned as law directs, without setting forth the particular defects contemplated by appellee, that is not sufficient. 17 Ann. 78.

II.

A judicial declaration made by a party, that certain property did not belong to him, will be estopped from claiming it, when it is afterwards decreed that the property did belong to him, and that he was only screening it from his creditors by means of simulated sales. 32 Ann. 979.

Where a party shows a judgment, execution and deed of sale, or proces verbal of sale, it is *prima facie* evidence of a valid alienation, and the party attacking the sale must show the forms of law have not been fulfilled. 19 L. 307.

When a party appoints an appraiser at a sheriff's sale, he cannot afterwards be heard to controvert the proceeding to which he had given his assent. 3 Ann. 453; 27 Ann. 314.

Where a party has directed the sheriff to sell the property in block, that is more than the appointment of an appraiser; it gives to the execution sale the force and effect of a voluntary sale. 6 L.

A sale of property under execution, on a judgment from which no suspensive appeal has been taken, will divest the title of the owner, though the judgment be afterwards reversed. 5 N. S. 214; 1 R. 94; 2 Ann. 221; 15 Ann. 99; 25 Ann. 515.

The validity of a sheriff's sale is not affected by the fact that the accrued taxes on the property conveyed by the deed had not been paid. 29 Ann. 211.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The appellee claims that the appeal should be dismissed, because :

1. The defendants have joined in one motion and given one bond only;
2. The bond is not properly conditioned;
3. The bond is insufficient in amount;
4. The bond is not signed by the appellants, or either of them, or by attorney.

Pasley vs. McConnell et al.

I.

The suit is for the recovery of certain real estate and the revenue thereof.

The property in dispute was sequestered and is still in the sheriff's custody.

The recovery is asked contradictorily with the several defendants against whom, without any discrimination, judgment was rendered in plaintiff's favor. without passing on his money demand, which was reserved.

There is but one petition and one prayer, one substantial defense although there be several answers, one judgment only was rendered.

It is not perceived why all the defendants, who are alike dissatisfied with the finding against them, should not, by one and the same motion, appeal from it and, in pursuance of the order of court allowing the appeal, furnish but one bond, for the amount prescribed.

The law does not provide that this shall not be done and the court is impotent to establish prohibitions where none has been imposed.

The bond is in terms sufficient to recover in case of affirmance of the judgment appealed from as well against the appellants as against their surety. Succession of Clark, 30 Ann. 801.

II AND III.

It cannot be required that the bond be given under the provisions of art. 577, C. P., although the judgment appealed from decree the delivery of real estate. The reason is obvious: that the property is not in the possession of the defendants, but in the custody of the law. The sheriff holds it and collects its revenues for account of the party or parties who may be ultimately adjudged entitled thereto.

In such instances, it has been repeatedly held, that a bond for costs is sufficient. This is the more so, where the order allowing the appeal fixes the amount of the bond, the law being silent as to it, and the bond is furnished exactly in accordance with the terms of the order. 30 Ann. 801.

IV.

It is unnecessary that an appeal bond be signed by the appellant. The bond in this case was, however, signed for the appellants, whose names are written at foot thereof, by one of their counsel, who so attests expressly.

The motion to dismiss is overruled.

ON THE MERITS.

FENNER, J. Mrs. McConnell, in May, 1882, recovered a judgment against Pasley in the Civil District Court for \$14,660.59, from which Pasley took a devolutive appeal.

Pasley vs. McConnell et al.

During the pendency of said appeal, Mrs. McConnell caused a *fi. fa.* to issue on her judgment, under which various pieces of real estate belonging to Pasley were seized and advertised for sale.

Pasley made no opposition to the proceeding, but, on the contrary, appointed an appraiser and gave his consent that the property should be sold in block.

The property was appraised at \$13,900, and was adjudicated to Mrs. McConnell at the price of \$9,500 cash.

There being unpaid taxes due on the property the sheriff withheld his deed, but, these taxes having been subsequently paid, the sheriff gave to Mrs. McConnell the *procès verbal* of the adjudication, which was duly registered in the conveyance office in January, 1883. No sheriff's deed has ever been passed, for what reason the record does not advise us.

It is shown that the price has never been paid in money, and it does not appear how it was imputed—whether as a credit upon the writ or retained by the purchaser for satisfaction of anterior mortgages; but the purchaser received delivery of the property in January, 1883, after payment of the taxes.

On November 17, 1883, she made a *dation en paiement* of the property to her three sons, John, William and Robert Ermon.

In January, 1884, upon the devolutive appeal of Pasley, this Court rendered its decree reducing the judgment of Mrs. McConnell from \$14,660.59 to \$2,980.

Thereafter, on January 28, 1884, Pasley brought the present action against Mrs. McConnell and the Ermons, her transferrees, in which he alleges the nullity of their titles on various grounds, and prays to be decreed the owner of the property, to recover possession thereof and to have an accounting of the revenues.

I.

The pleas of estoppel filed by defendant, based on certain judicial allegations of Pasley denying ownership of the property made in other suits in support of transfers made by himself which were set aside as fraudulent simulations, have no merit.

Defendants have no title to this property, except the title of Pasley, and they cannot dispute his ownership of the property at the date of sale without thereby destroying their own title.

II.

The reduction of the judgment of Mrs. McConnell by this Court has no effect upon her title as purchaser at the judicial sale pending the devolutive appeal.

Pasley vs. McConnell et al.

She had the right, under the law, to execute her judgment and to become the purchaser at the sale. *Baillio vs. Williams*, 5 N. S. 214; *Williams vs. Gallien*, 1 Rob. 94; *Farrar vs. Stacy*, 2 Ann. 210; *Graham vs. Eagan*, 15 Ann. 99; *Waters vs. Smith*, 25 Ann. 515.

We are not called upon to discuss what would have been plaintiff's rights, had Mrs. McConnell's judgment been entirely reversed.

In *Graham vs. Eagan*, above quoted, it was held that, in such case, where plaintiff in execution is purchaser of property sold in execution of a judgment subsequently reversed on a devolutive appeal, he is obliged to restore the property itself and place defendant in the same condition he would have occupied if no such judgment had been obtained against him. But this decision is in direct conflict with that in *Farrar vs. Stacy*, 2 Ann. 210, which is not referred to; and, moreover, the Court expressly held that, where the judgment was only partially reversed, leaving a just ground for the sale, the obligation of the purchaser would only be to restore the excess of the price.

Under all the authorities above quoted, and especially the strikingly similar case of *Waters vs. Smith*, 25 Ann. 515, such is the extent of Mrs. McConnell's obligation, if the adjudication to her was otherwise valid.

III.

The lack of the sheriff's deed has no significance whatever.

The Code of Practice explicitly provides that the adjudication "of itself alone," consummates the sale and passes the title and, at least unless its effect is destroyed by the failure of the purchaser to comply with the terms of his bid, it is all-sufficient and the sheriff's deed merely supplies additional evidence of the title. C. P. 690; H. D. Execution V (d) 12) 2.

IV.

The grounds of nullity of the sale urged are two, viz:

1st. The non-payment of the taxes due on the property.

The record shows that the taxes have been paid. Besides, Section 69 of Act 96 of 1882, relied on by plaintiff, is only a repetition of former laws on the subject, under which it has been held by this Court that the validity of the adjudication is not affected by non-payment of the accrued taxes. *Jouett vs. Mortimer*, 29 Ann. 206.

2d. That the price of adjudication did not exceed the amount of privileges and mortgages recorded against the property.

Nothing is better settled than that the rule of Art. 684, C. P., that there can be no sale unless the price exceed the prior privileges and mortgage, applies exclusively to special or conventional mortgages and

Pasley vs. McConnell et al.

not to judicial or general mortgages. 1 Ann. 32. 426; 2 Ann. 617; 5 Ann. 574, 736; 7 Ann. 614.

Referring to the certificate of the recorder of mortgages, of even date with the sale and then read, we find it exhibits no special mortgage except one in favor of F. Lacroix for \$262 50, and no privilege anterior to that of Mrs. McConnell except such as may result from registry, a writ issued in execution of a judgment of Mrs. LeBlanc, which was recorded in June, 1875.

Under the Act of 1857, No. 189, the only purport and effect of such a registry was to operate as a substitute for actual seizure and possession by the sheriff and to dispense with the appointment of a keeper, and it had nothing to do with the establishment or notice of a privilege. If the writ was still in force and in the sheriff's hands, his duties under the law were plain, but considering the length of time which had elapsed and the absence of all reference to it in the sheriff's proceedings, we are bound to assume that it had lapsed. Its operation as a privilege arises not from the registry, but from its actual continuance as a subsisting seizure, which is not established.

Plaintiff, however, claims that there existed another special mortgage for \$10,000, of superior rank to Mrs. McConnell, which had been duly recorded.

This mortgage had been decreed null and void and erased from the records, in pursuance of a final judgment to that effect rendered by the civil district court in a direct action brought by Mrs. McConnell against the mortgagee named in the act, to wit, one Cousins. He was a non-resident and was brought into court by the appointment of a curator *ad hoc*. Considering the object of the action, viz: the removal of an apparent incumbrance from immovable property situated in this State, which stood in the way of another incumbrance thereon, we think the action partook of the nature of a proceeding *in rem* to an extent sufficient to take it out of the rule of *Pennoyer vs. Neff*, 95 U. S., p. 714, and *Ice Co. vs. Laughlin*, 35 Ann. 1184, and that the service on the curator *ad hoc* was sufficient "process of law" as against Cousins.

To the argument that the mortgage notes were negotiable and may, therefore, be in the hands of third persons, it is sufficient answer to say that the claims of such third persons will be considered when they are presented by them.

The evidence in this case shows that at least \$8000 of the notes were in possession of Pasley long after the mortgage and up to the last tidings of them, and there is no evidence that they have been parted with.

State vs. Mason et al.

At all events, the sheriff was bound to respect the decree of the Civil District Court and to adjudicate the property, without reference to the mortgage so cancelled and erased.

V.

So far as the non-payment of the price is concerned, under the condition of affairs existing at the date of adjudication there was no payment to be made. Mrs. McConnell's writ alone called for a larger sum than the amount bid, if it was applicable thereto; and so far as the prior general mortgages were concerned, their remedy was against the proceeds by third opposition or against the property by the hypothecary action. *Alford vs. Montejo*, 28 Ann. 593.

In conclusion, we would say that Mrs. McConnell is bound to pay the price of adjudication to whosoever is entitled to it. Upon removing the apparent anterior encumbrances, plaintiff will be entitled to recover the excess of the price over the amount of her final judgment. As this action presents no feature of a claim for the price or of the resolatory action for its non-payment, but seeks solely the nullity of the adjudication, we have no occasion to discuss such questions now or the rights of Mrs. McConnell's transferrees.

We simply determine that the present action cannot be maintained.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and that there be now judgment in favor of defendants, dismissing plaintiff's suit at his cost in both courts.

No. 9701.

THE STATE OF LOUISIANA VS. NATHAN MASON AND WILLIAM
RICHARDSON.

1. An objection urged, after verdict, that the accused was not served with the list of the jury, comes too late. 23 Ann. 620, 621.
2. An accomplice joined in the same indictment with the prisoner to be tried, may testify, provided he be not put on trial at the same time. 23 Ann. 78; 25 Ann. 522; 7 Ann. 379.
3. While the jury may convict on the testimony of an accomplice alone, the judge should caution them, in prudence, not to return a verdict of guilty unless such evidence is corroborated—but this Court will not control him as to the language he shall employ in giving them such instructions.

A PPEAL from the Seventh District Court, Parish of Franklin.
Ellis, J.

M. J. Cunningham, Attorney General, and *L. A. Thompson*, District Attorney, for the State, Appellee:

The action of the trial judge in overruling a motion in arrest will not be reviewed on appeal unless a bill of exception is taken thereto.

36 476
47 476
47 484
38 476
52 486
52 1929
52 1930

Compelling accused to go to trial without a copy of the *venire*, furnishes no legal ground for a motion in arrest. Such complaint must be presented by bill of exceptions to thus being forced into trial prematurely, over his objections made at the proper time, as shown by the minutes, and to the ruling objected to a bill of exceptions must be taken: otherwise, it cannot be reviewed.

The circumstance that a witness may be an accomplice, can only affect his credibility, of which the jury is the exclusive judge; and a conviction based upon his uncorroborated evidence is legal. 25 Ann. 522; 35 Ann. 135.

J. W. Willis for Defendants and Appellants:

The testimony of an accomplice is insufficient to secure a conviction, unless he is corroborated by other evidence connecting the accused with the offense committed, and such corroboration is not sufficient if it merely shows the commission of the offense. Bish. on Cr. Procedure, 1 vol. 1169, 1150 and 1170; Whar. Cr. Ev. § 441; Whar. Cr. Law, § 789; Greenleaf on Ev. 1 vol. § 380; Phillips on Ev. 1 vol. pp. 37 and 41; Hales P. C. 1 vol. § 305; 23 Ann. 79; 68 Mo. 52; 64 Mo. 394; 58 Ga. 57; Hawley's American Cr. Reports, 1 vol. p. 194; 3 vol. p. 396; 55 Miss. 455; 34 Iowa, 453; 50 Cal. 490; 39 Cal. 403; 1 Tex. 301; 43 Tex. 170; 34 Tex. 133; U. S. vs. Troax, 3 McLean, 224; U. S. vs. Harris, 2 Bond, 317.

The opinion of the Court was delivered by

WATKINS, J. William Richardson, one of the accused, charged with entering in the night-time a certain store-house of one T. A. Scott, and that same he did wilfully, feloniously and burglariously, break and enter, with the intent to steal, take and carry away certain goods, money, etc., was duly convicted, and sentenced to three years imprisonment in the penitentiary, and from the verdict of guilty, and the judgment of the court, he prosecutes this appeal.

His counsel rests his case on two grounds, viz:

1st. The refusal of the trial judge to charge the jury as he had requested.

2d. The accused having been ordered to trial without being previously served with a copy of the *venire*.

I.

To the former objection, it is sufficient answer to say that the indorsement of the sheriff on the information shows that the accused was served on the 8th of February, 1886, and the minutes of the court show that the trial occurred on the 12th of same month—hence, “two entire days” intervened between the day of service and the day of trial; and the law was fully complied with. R. S. sec. 992.

Besides, the objection being made, *after verdict*, that the accused was not served with a correct list of the jury comes too late. 23 Ann. 620, State vs. Vester; 23 Ann. 621, State vs. Axiom.

II.

The refusal of the trial judge to give the jury a requested charge is made the subject of a zealous and earnest argument by the counsel for the accused.

State vs. Mason et al.

It is *ipsisimis verbis*: "Gentlemen of the Jury: If you believe from the evidence that the witness, Tom Smith, was present and aided and assisted, and encouraged the burglary charged to have been committed with a criminal intent, you must acquit the accused, Wm. Richardson, unless you find that the testimony of the said witness, Tom Smith, is corroborated by other evidence connecting the accused, Wm. Richardson, with the offense charged to have been committed; and the corroboration is insufficient if it *merely* shows the commission of the offense."

It has been held by this Court's predecessors that an accomplice, joined in the same indictment with the prisoner to be tried, may testify; provided he be *not put on trial at the same time*. 23 Ann. 78, *State vs. Boyone and Abriell*; 25 Ann. 522, *State vs. Prudhomme*; 7 Ann. 379, *State vs. Conner*; 4 Ann. 435, *State vs. McClaire*

The diligent counsel has collected quite a number of common law authorities, as well as decisions of the courts of other States, to the general effect that it is the duty of judges, "while explaining to the jury their right to convict on it"—(the testimony of an accomplice)—"*alone*, to caution them concerning it, advising them *in prudence*, not to return a verdict of guilty unless in their opinion it is confirmed by evidence from a purer source." Bishop on Crim. Procedure, 1 vol. secs. 1169, 1150, 1170, *et sequiter*; Wharton's Crim. Evidence, sec. 441; Wharton's Crim. Law, sec. 789.

Conceding, *arguendo*, the correctness of the rule mentioned as prevailing elsewhere, this record does not disclose that the witness in question was not corroborated by other witnesses.

While, under the given state of facts indicated in opinions of the learned authors quoted, the rule may be correct, yet the record under consideration should disclose their applicability in order to render the requested charge a proper one.

In the record appears an extract from a distinct and different charge, given by the judge *a quo* in lieu of the one demanded for the accused, and in which he says to the jury: "I will simply say that in weighing the testimony of one who has turned State's evidence, you should take this circumstance into consideration, as you would *any other* circumstance, which might affect the testimony of a witness who testifies—and if you are satisfied that this circumstance, or any other, has been of sufficient weight to induce him to speak falsely, and that he had done so, it would be your duty to reject such testimony."

This charge we think responds to the just demands of the accused, and that he has no reasonable ground of complaint.

Judgment affirmed.

State vs. Smith.

No. 9692.

THE STATE OF LOUISIANA VS. T. M. SMITH.

A verdict (on an information containing two counts) in these words, "*Guilty—with intent to murder*," being responsive to the first count, is not defective for not containing the words: *with a dangerous weapon*, which are necessarily implied.

A PPEAL from the Criminal District Court, Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and Lionel Adams, District Attorney for the State, Appellee.

Jas. O. Walker for Defendant and Appellant.

The opinion of the Court was delivered by
BERMUDEZ, C. J. The defendant was prosecuted on two counts:
1. Shooting with intent to murder.
2. Inflicting a wound less than mayhem.

The jury returned a verdict in the following words:
"Guilty—shooting with intent to murder."

On that verdict the defendant was sentenced to three years at hard labor. He appeals.

He contends here that the verdict is special, and to cover the first count of the information should express: *either* that the accused was guilty of shooting and wounding with a dangerous weapon with intent to murder, or that the accused was guilty of shooting Louis Smith with a dangerous weapon with intent to murder.

The complaint is therefore simply: That the verdict is defective for not containing the words: *with a dangerous weapon*, which are necessary to complete it.

This Court has held, that an *information* for assault by willfully shooting need not allege that the shooting was done "with a dangerous weapon," saying: "The common sense of prosecuting officers, judges and juries may be relied on to protect persons from imprisonment in the penitentiary for shooting with pop-guns, or like innocent playthings." *State vs. Cognovitch*. 34 Ann. 529.

If the words be not essential in an information, *a fortiori*, need they not be included in a verdict of "Guilty—shooting with intent to murder;" where the information specifically sets forth that the accused, "with a certain dangerous weapon, to wit: a pistol, feloniously did shoot one Louis Smith, with intent then and thereby, feloniously, wilfully and of his malice aforethought, to kill and murder the said Louis Smith.

38	479
50	643
38	479
107	302

State vs. Creech.

As the information contains two counts it was necessary for the jury, as they found the accused not guilty on the second, to have, in their verdict of "guilty," added the words: "shooting with intent to murder," in order to show that they found him guilty, as charged under the first count. 1 Bishop on Cr. Proc., §1005, a.

The Court, in this case, could pass sentence without supplying by intendment or strained implication that the shooting was done with a dangerous weapon.

Judgment affirmed.

No. 9696.

THE STATE OF LOUISIANA VS. WYATT CREECH.

The requirements of the jury law of this State contemplate the trial of causes by the jurors on the regular venire as long as any of them can be secured or obtained, and they consider talesmen simply in the light of substitutes for the jurors of the regular venire, who are to be called or used only when regular jurors are not to be had.

Hence, in a case in which a list of talesmen has been summoned under the orders of the court, because the regular venire had been exhausted, and it appears that while proceeding with the list of talesmen, a jury previously engaged on a case, reports and is discharged, it then becomes the duty of the trial judge to resume the call under the regular venire, until that be exhausted, before continuing to form a jury from talesmen.

The ruling of a trial judge in rejecting a juror under a challenge for cause by the State, affords of itself no legal ground of complaint to the accused. The right of peremptory challenge is a right to reject but not to select.

A PPEAL from the Tenth District Court, Parish of De Soto.
Hall, J.

M. J. Cunningham, Attorney General, *D. C. Scarborough*, District Attorney, and *E. W. Sutherland*, for the State, Appellee.

G. E. Head, *J. B. Lee* and *J. F. Smith*, for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Convicted of manslaughter under a charge of murder, the defendant seeks relief by two bills of exception.

I.

The first bill involves the formation of the jury. After exhausting the list of jurors of the regular venire who had answered, the court ordered twenty-five tales jurors, and had therefrom selected two jurors, and had drawn from the box five additional names thereof, when a jury composed mainly of jurors of the regular venire, engaged up to that time on another case, appeared, reported and were discharged. Whereupon the court ordered, on motion of the district attorney, that the sheriff should cease to draw from the list of talesmen, and to re-

38	480
45	1168
38	480
46	546
38	480
48	1281
38	480
50	1139
51	243
51	244
38	480
104	541
104	588
38	480
107	197
38	480
111	437
38	480
116	834
38	480
119	665

State vs. Creech.

sume the calling of jurors of the regular venire. Counsel for the accused objected to the execution of that order and insisted on his right to continue the calling of talesmen jurors.

They strenuously contend here that the course pursued by the trial judge was irregular, illegal, and grievously injurious to the accused. But they had made no attempt to show wherein their client was injured by the ruling complained of.

Our system of jury laws does not contemplate the use of talesmen in the trial of criminal causes when jurors of the regular venire are present and within the reach of the court. The very nature and easense of talesmen are that they are legal substitutes for the regular venire, when the latter is exhausted by challenges, by the absence of members thereof, or when a portion of the same is empannelled and actually engaged on another case.

But from the moment that a jury thus engaged is relieved from that work the jurors who composed it are then before the court, and from that moment the reason for the call or use of substitutes ceases to exist, and the plain duty of the court is thence to proceed with the regular venire.

Any other course would be vicious and in clear violation of law. That was the course pursued by the trial judge in Atkinson's case, 29 Ann. 543, and for that precise reason his ruling was reversed, the sentence appealed from set aside and the case remanded.

II.

In their second bill counsel charge error in the ruling of the judge in passing on the qualification of a juror.

The challenge for cause by the State was sustained over the objection of defendant's counsel, who urged then, as they do now, that the cause of alleged disqualification was not sufficient.

It is not suggested that at that stage of the proceedings, or even during the whole trial, the accused had exhausted his peremptory challenges, and that in consequence of the judge's ruling he had been compelled to accept an obnoxious juror. His counsel conformed the right of challenge, which is granted as a means of rejecting jurors with the exercise of that right, as a means of selecting jurors.

It is no longer an open question in criminal jurisprudence that the rejecting of a juror by the trial judge, even if erroneous, affords of itself no legal ground of complaint to the accused.

The point was submitted to this Court in the case of the State vs. Shields, 33 Ann. 1410, and we therein said :

McCan & Son vs. Bradley.

"Exception is taken to the action of the court in excusing a jurymen, for a cause which the defendant contends was not sufficient under the law. Admitting the cause was not sufficient, the judge exercised his discretion in determining the question, and his error in such matter would afford no ground for relief. 1 Bishop Cr. Pr. §926; State vs. Ostrander, 13 Iowa 435." See also Wharton Crim. Pl. and Pr. §620; State vs. Barnes, 34 Ann. 395; State vs. Eloi, ib. 1195; State vs. Farrer, 35 Ann. 315.

We therefore conclude that the accused has had a fair and impartial trial.

Judgment affirmed.

No. 9552.

D. C. McCAN & SON VS. ALFRED BRADLEY—TERRY, INTERVENOR.

The unpaid price of sale of movable property, unless it be specially provided to the contrary, is secured by vendor's lien.

A sale and counter-letter of movable property, recorded in the conveyance office in which transfers and contracts relative to real estate *alone* are required to be registered, are not notice to third persons equivalent to knowledge.

A contract, evidenced by an act of sale and a counter-letter, which together show that the sale, made part cash and part on time, although not designed by the parties to be absolutely final and conclusive, but intended to enable the vendor to use the notes in his business, the title to be put back in the vendor's name as soon as the notes issued are retired and returned to the purchaser and drawer, does not establish a simulation, but a real transaction, by which the title passed.

Purchasers of such notes, for a valid consideration and before maturity, are entitled to recover the amount thereof, with lien on the property sold.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

A. J. Murphy for Plaintiffs and Appellants.

E. E. Moise and *W. H. Rogers* for Intervenor and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action on a promissory note, said to be secured by vendor's privilege on what is known as the Clipper saw-mill.

The defense is want of consideration; that the note represents part of the purchase price of said mill; that the sale was a simulation; that the plaintiffs never looked to defendant as purchaser, but to Terry, the vendor; that they acquired the note with full knowledge of the simulation, and that Terry is the only party liable for the note.

Terry intervened, joining the defendant, averring a respite obtained from his creditors, claiming title to the mill.

On Terry's going into bankruptcy, his syndic prosecuted the intervention.

There was judgment in favor of plaintiffs against Bradley for the amount sued for, with costs; rejecting the demand in other respects.

From this judgment the plaintiffs appeal.

The evidence shows that Terry sold to Bradley the Clipper saw-mill for \$20,000, part cash, part on credit for which notes were issued, one of which is that sued on; that by the act of sale it is expressly stipulated that to secure the payment of the notes, vender's lien was retained on the mill, which it appears had been erected upon *leased* property, and continued in Terry's possession.

It also establishes that a counter-letter was issued by Bradley to Terry, establishing that the transaction was a simulation, and that it was a mere method to enable Terry to raise money to tide over difficulties, the title to be put back in Terry's name on delivery to Bradley of the notes raised by him.

This counter-letter was registered in the conveyance office some short time before the application of Terry to his creditors for a respite.

It is after the registry of the counter-letter and the filing of the respite proceedings, but before the maturity of the note sued on, that the plaintiffs acquired it.

It is not disputed that plaintiffs acquired it for a valid consideration.

The only ground upon which their demand is resisted is that they were aware of the simulation of the sale of the mill by Terry to Bradley.

No evidence has been adduced connecting them, as parties or privies, to the transaction; but it is strenuously urged that they are presumed to have had full knowledge of that fact, by reason of the registry of the counter-letter and of the respite proceedings which occurred prior to their acquisition of the note, and that the circumstance of the purchase before maturity is utterly insignificant.

While denying that the sale was a simulation and that they had any knowledge of it, the plaintiffs press that Bradley and Terry are estopped from setting up that simulation, in exoneration of liability, and that they acquired the note in good faith in the ordinary course of business, for a valuable consideration, before maturity and without notice of any equities between the parties.

It is proper to remark that neither the defendant nor Terry's syndic has prayed for any amendment of the judgment. So that the only

McCan & Son vs. Bradley.

question which this Court is called upon to determine is, simply, whether or not the plaintiffs are entitled to the vendor's lien on the mill, which was the object of the transaction, and which Terry placed on his Bilan as part of his assets.

Pretermittin the question whether Terry and Bradley are or are not absolutely estopped from setting up the simulation as a shield, and conceding *arguendo* that the knowledge of it might impair the right to recover, the fact of such knowledge was not actually established and is not inferrible.

The transaction was a real one. It was a sale, with a pact of redemption. The title passed to the purchaser, who was to retain it and to transfer it, but only after his notes would have been retired and handed back to him duly cancelled. The intention of the parties was the issue of notes, secured by vendor's lien, to be used by the vendor in his business in raising money, and the retirement of the notes and the return of them to the purchaser. The whole was for the protection of third parties and of the latter, who has continued to own the mill, as his notes have not been handed back pursuant to the agreement.

The registry of the act and of the counter-letter previous to the purchase of the note by plaintiffs did not convey knowledge of any simulation; the less so, as the transaction was a reality in form and substance.

One of the plaintiffs distinctly swears that he did not know of the simulation and of the counter-letter, and after inquiry from the notary before whom the sale was passed, being satisfied he took the note.

The thing sold was not real estate. The sale of it and the counter-letter were not required to be recorded in the conveyance office, where transfers of real estate and contracts of alienation relative thereto *alone* are to be part of the record. Such being the case, the plaintiffs were under no obligation to consult the records of that office, and registry therefore is not equivalent to notice and knowledge.

The idea that the plaintiffs are concluded from the fact that they voted at the meeting of creditors in the respite proceedings, can hardly be serious. It suffices to observe, if anything need be said, that they were their creditors for a paltry sum and had not yet acquired the note sued on.

The intervenor labors strenuously to show that the *mill* is not immovable property, and therefore not liable to be mortgaged. There can be no doubt that such is the law, but the plaintiffs do not claim a mortgage and it does not at all follow that the *mill* could not be affected or encumbered with a vendor's lien. R. C. C. 3227.

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It is perfectly true that this lien is not created by consent, but springs by operation of law only. It is also incontestable that when once thus created, it continues to exist and attach, either to the movable or immovable property sold, unless it has been expressly abandoned.

The lien in this case, far from having been given up or relinquished, was, by the act of sale, explicitly declared to be retained to secure the payment of the note sued on and others which had been issued and have been retired.

There is therefore no reason why the plaintiffs should not be recognized as entitled to the vendor's lien, which they claim.

It is therefore ordered and decreed that the judgment appealed, as far as it allows plaintiffs the amount of the note sued on, with interest, cost and charges, be affirmed; that it be amended so as to allow the plaintiffs, further, vendor's lien and privilege on the "*Clipper Saw-mill*," to secure the payment of said amount; that in all other respects it be reversed and that the intervention be rejected, the costs in both courts to be paid by the appellees.

No. 9600.

J. H. MAURY & Co. vs. LOUIS RANGER & Co.

Jurisprudence has discarded the former stringent rule which made agents of foreign principals personally liable on contracts executed by them in that capacity, without any distinction whether they describe themselves in the contract as agents or not.

In suits against agents to make them thus responsible, courts must endeavor to ascertain from the nature and tenor of the contract, to which of the parties credit was given, and, they will be guided by the rule that the agent of a foreign principal is not, as a question of law, personally liable on every contract made for his principal. It is rather a question of fact in each case, to be ascertained by the terms of the particular contract and the surrounding circumstances.

To avoid personal liability on a contract made for his principal, the agent must disclose his agency as well as his principal, either at the time that the contract is entered into or when he is sued as personally liable thereon.

In a contract of affreightment which contains on its face the fact of the agency and discloses by its terms the principal for whom it is executed, the agent will be exonerated from personal liability.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Farrar & Kruttschnitt for Plaintiffs and Appellees:

1. The agents of merchants residing in a foreign country, or in another State, are personally liable, whether they describe themselves as agents or not in the contract. In such cases it is presumed that the credit is given exclusively to them to the exoneration of their employers; but the presumption may be rebutted by proof that the credit was

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given to both, or to the principal only. *Newcastle vs. Red River R. R. Co.*, 1 Rob. 147; *Thorne vs. Tait et als.*, 8 Ann. 8; *Adler vs. Shuchardt*, 8 Am. L. R. 15; *Wharton on Agency*, secs. 514 and 791; *Dos Passos on Stock Brokers and Stock Exchanges*, p. 680; *Story on Agency*, § 268.

2. Where an agent fails to disclose the name of his principal, he is bound personally. *C. C. 3012*; *Bedford. Breedlove & Robeson vs. Jacobs*, 4 N. S. 529; *Nett & Co. vs. Papet*, 15 La. 310; *Parlange vs. Faures*, 14 Ann. 444; *Story on Agency*, § 267; *Kent's Commentaries*, 13th ed., vol. 2 (top paging), 631.
3. If a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, and that he acted on his behalf, so as to enable the party with whom he deals to have recourse to the principal in case the agent has authority to bind him. Defendants' brief, p. 32.
4. It is elementary in the law of carriers that the goods to be transported must be received by the carrier before his liability commences. *Hunt & Macauley vs. Mississippi Central R. R. Co.*, 39 Ann. 446.

D. C. & L. L. Labatt for Defendants and Appellants:

1. An agent acting within authority, who signs bills of lading in his principal's name, without any personal guarantee, and free from unfaithfulness, fraud or neglect, is not liable, personally, to the shipper, even for the admitted breach of such contract by his principals.
2. Where a written contract of affreightment is entered into by the master of a ship, and contains all the stipulations of the parties, conditioned on her arrival at a named port, and the ship is prevented from reaching her wharf by "force majeure," the contract is annulled, without liability for damages on either side; and a *fortiori*, the acknowledged agent of the ship, its consignee and husband, who was warranted by custom of the port in anticipating her arrival, and to prepare for her prompt dispatch by receiving the cargo on the levee, cannot be pursued personally for an alleged breach, simply because the principals are foreigners and reside "beyond seas."
3. An agent or consignee of a ship, duly authorized, whose owners are domiciled abroad, is no more personally liable for damages incurred by violation of a contract, than if he were the agent of a principal in another State of the Union, unless credit is exclusively given to the agent to the exoneration of the principal or upon the agent's personal guarantee. But where he has disclosed the name of his principal in the contract, or at the trial, he incurs no personal liability. 15 L. R. 306; 15 Ann. 189; 14 Ann. 444; 4 N. S. 430.
4. When a contract of affreightment or charter-party is annulled by *vis major*, the voyage is broken up and all parties are at arm's-length, and the relation of the ship, master and owners, who, in anticipation of her arrival, received cargo on the levee, must be governed by the law of *negotiorum gestor*, and *ipso facto* they become agents of the shipper, to forward it at the best rate of freight obtainable, unless the agents can control another ship of the same line under the clause of "liberty to tranship."
5. Where the cargo is forwarded by another steamer, of a different line, under the spur of the shipper's request or instruction, but at a higher rate of freight than that of the ruptured contract, which the shipper knew, or was bound to expect, as the result of the "quarantine blockade," the difference is a damage *abque injuria*, and must fall on the owner of the cargo, under the rule of "*res perit domino*," especially where all the charges, trouble and expenses of shipment were borne by the disabled ship, without reimbursement.
6. Where the agent gives to the other party a substantial principal, who recognizes and ratifies the contract and properly discharges obligations resulting therefrom, with the best intentions and in the interest of the shipper, and without compensation, he is free from personal liability, and requires no express stipulation to relieve or to rebut the presumption that the contract was made with him personally. 7 Ann. 674.

Maury & Co. vs. Ranger & Co.

7. Such an agent cannot be held responsible personally, merely because his principals are foreigners and reside "beyond seas," or in another State, in the face of a written contract negating the intention to bind themselves personally for its violation, or that credit was exclusively given to him to the exoneration of his principal. 15 L. R. 310, and Story on Agency, §§ 363, 267.
8. The civil law of mandate in Louisiana cannot yield to the "custom of trade in London," in specified transactions, the common law or the commercial law of other countries (in sales of personal property), if the agent discloses his mandate and designates his principals, by written contract, without personal guarantee.
9. The shipper paying the freight by the substituted ship, is in no worse position than if the original ship had paid the freight in Liverpool on its delivery, and then sued plaintiff to reimburse the amount expended or incurred as "*negotiorum gestor*." Plaintiffs only did what the law would have obliged them to do, and ought not to complain against anybody.
10. The "liberty to tranship" clause is not meant to obligate the master, owners or agent to ship by a vessel of another line, or incur loss; but is a privilege inserted to earn freight, *pro rata itineris*, or to forward by another vessel of the same line. 23 Fed. Rep. No. 16, p 918, June, 1885.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs seek to hold the defendants personally liable under a contract of affreightment which the latter had executed as agents.

The principal defense is that the defendants acted throughout the transactions which form the basis of this suit, merely as agents of the owners of the vessel in whose name they had signed bills of lading, and that they are not personally liable to plaintiffs under the contract declared upon. They prosecute this appeal from a judgment in favor of plaintiffs for the full amount of their claim.

The pertinent facts in the record are as follows:

In July, 1883, the defendants executed bills of lading to plaintiffs for 2709 bales of cotton, to be received on board of the steamer "Gracia," then on her way to this city, and consigned to Liverpool, England, at the rate of 19-64 of a penny sterling per pound. That under the effect of the quarantine then established by the State authorities at the mouth of the Mississippi river, the vessel "Gracia" was not allowed to reach the port of New Orleans, whereupon defendants, with the knowledge and consent of plaintiffs, shipped the cotton to Liverpool by the steamer "Chancellor," owned by a different line of steamers.

The bill of lading issued by the latter steamer was to the steamer "Gracia," but it called for freight at the rate of $\frac{1}{4}$ of a penny, which was exacted from the consignees at Liverpool before delivery of the cotton by the "Chancellor." It also appears that on delivery, some of the cotton was found damaged, for which the shippers were charged the sum of 118 pounds sterling.

The demand of plaintiffs is for the difference of freight charges on the cotton at the rate of 19-64 of a penny per pound and the charges exacted at the increased rate of $\frac{1}{4}$ of a penny, and for the amount paid by them on account of the damaged cotton, the whole amounting in our currency to \$2,977.10.

Plaintiffs' theory, which was adopted by our learned brother of the district court, under which they propose to make the defendants personally liable, presents two propositions of law:

1st. The agents of merchants residing in a foreign country, or in another State, are personally liable, whether they describe themselves as agents or not in the contract. In such cases it is presumed that the credit is given exclusively to them to the exoneration of their employers; but the presumption may be rebutted by proof that the credit was given to both, or to the principal only.

2d. Where an agent fails to disclose the name of his principal, he is bound personally.

While our appreciation of the facts in this case would justify the conclusion that the defendants would be exonerated even under the stringent and narrow rule contained in plaintiffs' first proposition, we prefer to rest our conclusions on other grounds, and to withhold our sanction of a principle which once prevailed in some English courts, but which has long since been repudiated by more progressive and enlightened jurisprudence, not excluding English tribunals.

The rule was formulated by Judge Story in his work on Agency, predicated on some adjudications in the jurisprudence of England, but he lived long enough to appreciate its harshness and its damaging effect on international commercial intercourse, which was subsequently encompassed in more liberal ties, and became in time immeasurably increased and facilitated by the application of steam to navigation on the seas, the invention of the electric telegraph, and the multiplicity of railroad communications. Hence, we find him in the revision of his work yielding a cheerful compliance with modern adjudications on the subject-matter, by the following material modification of his views as originally enunciated: "And probably the better rule is that the agent of a foreign principal is not, as a question of law, personally liable on every contract made for his principal. It is rather a question of fact in each case, a question of intention, to be ascertained by the terms of the particular contract and the surrounding circumstances." Story on Agency, 6th ed., § 268.

In the next section, 268 "a," the learned author adds another very wise and very significant qualification to the rule in the following words:

"This presumption of credit being given alone to the agent, and not to the foreign principal, applies with the most force to purchases made by an agent for a foreign principal; but when a written contract is made, and expressed to be with a foreign principal and not with the agent, the latter is not liable, although the contract be signed by him, for and on account of the foreign principal."

These principles are unqualifiedly sanctioned by respectable authority of other States of the Union; and in connection with the second proposition advanced by plaintiffs, they have been followed in several cases by our own Court. 33 Howard U. S. R. 49, *Oelricks vs. Ford*; *Lyon vs. Williams*, 5 Gray, 557; *Bray vs. Ketell*, 1 Allen (Mass.), 80; *New Castle vs. Red River R. R. Co.*, 1 R. 147; 13 La. 20, *Zacharie vs. Nash*; 15 La. 306, *Nott vs. Papet*; 8 Ann. 8, *Thorne vs. Tait*; 14 Ann. 448, *Parlange vs. Faures*; *Spotts vs. Cowan*, 9 Ann. 520.

In our examination of this case we have been guided by the jurisprudence thus established, and we conclude that the case is clearly with the defendants.

In a contract of affreightment such as the one disclosed in this record, we find an apt illustration of the wisdom of the rule that, in determining the question of the presumption as to which of the parties credit is given, which is the vital issue in all such cases, courts must deal with the question of fact in each case, with the question of intention to be ascertained by the terms of the particular contract and the surrounding circumstances.

Now, in this case the record shows that defendants were (like plaintiffs) commission merchants and factors and dealers in cotton; and that as an appendage to their main business they undertook the agency of a line of steamers known and designated as the "Serra Line of Steamers," plying between Liverpool and this port.

The nature of their connection with the steamer "Gracia," for whose account they entered into the contract under discussion, was made known to plaintiffs by the very freight brokers, *Dobell & Bell*, who negotiated the contract between them and the defendants, and was made manifest to them on the very face and in every line of the bills of lading which were executed by the defendants, formally accepted and at once transferred by endorsement by the plaintiffs as a commercial security.

The heading of the bill contains the words: "Serra Line of Steamers," "Louis Ranger & Co., Agents, New Orleans;" every stipulation

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in the bill is made in the name and for the account of the steamer, her commander and owners, and the contract is signed by the defendants as agents.

When, later on, circumstances prevented the literal execution of the contract through the steamer contemplated by the parties, plaintiffs were at once notified of the circumstance, and of the intention of the defendants to make the shipment by another steamer, the "Chancellor," of the "Harrison Line," and were requested to change their insurance accordingly; all of which was accepted without murmur or objection by plaintiffs. And the record further shows that through a "cable" to the managers of the line at Liverpool, the defendants also notified them of the unforeseen disability of the vessel to carry out their contract with plaintiffs, and that the consent of said managers was obtained to operate the change of shipment to the "Chancellor."

When sued in this case, the defendants again reiterated in their answer a statement of their true character in the premises and of their real and legal connection with the contract, and they amplified their previous disclosure of their agency as well as the names of the managing owners of the line of steamers. They therein declared that they were the agents of the "Serra Line, J. T. Nickels & Co., of Liverpool, managing owners," and defendants' principals.

We must hold these acts as a substantial and sufficient compliance with the very rule invoked by plaintiffs themselves, and as affording ample legal and equitable grounds to exonerate the defendants from all personal liability in the premises.

We pretermit any expression of opinion as to the right of plaintiffs to enforce their claim against any other party to the contract, and under the views as herein expressed we eliminate all discussion of the merits of their claims against the steamer "Gracia," or her owners.

The discussion would involve questions of great interest and of attractive study, but it would answer no useful purpose in face of the conclusion which we have reached.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed; and it is now ordered and decreed that plaintiffs' demand against defendants be rejected, and that their action be dismissed at their costs in both courts.

State vs. Bates.

No. 9709.

THE STATE OF LOUISIANA VS. MILES BATES.

A former acquittal for the same offense cannot be urged as newly-discovered evidence in support of a new trial. Such fact must have been known to defendant, and evidence to that effect could only have been offered under a special plea of *autrefois acquit*.

Jurors cannot be heard to impeach their verdict; and when no objection is urged to the correctness of the judge's charge, the allegation that the jury misapprehended its meaning, supported by the affidavit of a juror to that effect, cannot be sustained as ground for a new trial.

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

J. I. Hargrove for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The only complaint of error is embodied in a bill of exceptions taken to the ruling of the judge in refusing a motion for new trial, which was based on the following grounds, viz:

1st. That no evidence was offered on the trial to show any value to the property alleged to have been stolen.

How are we to determine whether such evidence was offered or not, or the sufficiency of the evidence offered? The judge does not substantiate the averment, and his refusal of the new trial must be taken as denying it.

2d. That defendant was *surprised* by the State's withdrawing a witness without examining him on a certain point.

This is frivolous. If the defendant wished to carry the examination further, he had the opportunity of doing so.

3d. On the ground of newly-discovered evidence, the amount of which is that he has discovered since the trial that he had been formerly tried and acquitted for the same offense.

The proposition that he had been tried and acquitted for the same offense, without knowing it, is difficult of comprehension; and, if it were true, should have been urged in a special plea of *autrefois acquit*.

4th. That the jury *misapprehended* the judge's charge.

It is not alleged that the judge's charge was incorrect or was not clearly expressed. The attempt is made to support the ground by the affidavit of one of the jurors; but he cannot be permitted to impeach the verdict. We know of no authority for granting a new trial on such a ground.

Judgment affirmed.

38	491
112	334
114	78

38	491
119	465

38	491
124	784

Succession of Anger.

No. 9675.

SUCCESSION OF JOSEPH ANGER.

A sale cannot be annulled by an opposition to a distribution of the proceeds of the sale.

When a sale is real, a direct revocatory action must be brought for its annulment.

Where there is opposition to the distribution of the proceeds on a bare allegation of fraud, collusion, etc., in making the sale, the Court will not delay the distribution until it shall suit the pleasure of the opponent to institute a proper action to annul it, unless he has used some conservatory process to prevent the distribution.

An error of calculation may be corrected by this Court upon an application for rehearing; but the rights of interested parties will be reserved.

A PPEAL from the Twenty-third District Court, Parish of Iberville.
Talbot, J.

D. N. Barrow and S. Matthews for the Appellees.

G. L. Bright and Read & Goodale for the Appellants.

The opinion of the Court was delivered by

MANNING, J. A provisional tableau of distribution of this succession was before us in 1884 on the opposition of Humble, tutor, holder of one of the mortgages, and our decision of the issue presented by him is reported in 36 Ann. 252. Of the two plantations of the succession, "Hermitage" had already been sold. "Forlorn Hope" has been sold in the interval, and the plan of distribution of the whole assets is now opposed by sundry creditors.

The Gourriers hold the first mortgage and vendor's lien on the undivided half of Forlorn Hope.

Graves holds the first mortgage on Hermitage and an undivided half of Forlorn Hope and the second mortgage on the other half.

McCan's mortgage rests on both plantations, Humble's on Hermitage alone, and Cousins' on both, and all are primed by Graves.

OPPOSITION OF SHAKESPEARE, SMITH & CO.

These opponents attack the sale of Forlorn Hope as fraudulent and collusive—the collusion being of the executrix and certain other creditors to reduce the appraisal and effect a sale for less than otherwise would have been possible, and the fraud being the consequent despoiling of the opponents. When they offered evidence to prove their allegations, objection was made that the sale could not be annulled in an opposition to an account, and the court sustained it and refused to hear the evidence.

The court ruled correctly. • The opposition is in substance an action to annul the sale, and such action cannot be instituted in the form of an opposition to the distribution of the funds arising from the sale.

 Succession of Anger.

The sale was real and a direct revocatory action should have been brought for its annulment. *Violett vs. Fairchild*, 6 Ann. 193.

The opponents concede the correctness of that rule of law but urge that they should be permitted to prevent the distribution of the proceeds of a fraudulent sale. Their contention amounts to this, that on a bare allegation of fraud, etc., in a sale, made in an opposition to the distribution of the proceeds, the court must delay the distribution until it shall suit the pleasure of the opponent to institute a proper action to annul the sale. The lower judge made the proper disposition of the opposition by dismissing it.

OPPOSITION OF B. COUSINS.

The brief of this opponent argues on the assumption that the executrix had given Humble priority over him in the distribution of the proceeds of Forlorn Hope, but his opposition is directed against the allowance of certain privileged claims and of other mortgage creditors. It is true, as he argues and as we have already stated, that Humble had no mortgage on Forlorn Hope, while Cousins had. The tableau does not propose to distribute any of the proceeds of Forlorn Hope to Humble. On the contrary it classes Cousins *quoad* this mortgage next after Graves and, after paying Humble out of the Hermitage sale, distributes the residue of that sale to Cousins as well as the residue of Forlorn Hope after paying antecedent mortgages. The judgment amends the tableau by reducing the sum coming to Cousins, and as the items of privilege allowed cause in part that reduction, this opponent attacks them. We think they were properly allowed.

OPPOSITION OF HUMBLE, TUTOR.

The complaint of this opponent was that our decree, rendered when the case was here before, had been disregarded in this, that the proceeds of Hermitage are by the tableau of distribution made to pay an undue proportion of the fees, taxes, costs, and other expenses of administration. His brief contains an arithmetical statement of what he thinks that proportion is, and seems to be fair. The principle we announced is that each plantation must bear the burden of its own taxation, and the general expenses of administration are chargeable to each proportionately. His brief says that "the lower judge sustained the opposition and rendered such judgment as was believed carried out the decree of this Court on the Conner appeal." He is not an appellant and filed no answer for an amendment, nor does his brief say that he desires any, and it would not suffice to procure amendment if it did.

Succession of Anger.

APPEAL OF P. S. GRAVES.

This appellant asks the correction of certain alleged errors in the judgment. His mortgage was first on the whole property save only the Gourriers on one-half of Forlorn Hope and there are funds to pay him. This contest is between the second mortgage creditors for the residue of the proceeds—"an issue," he says, "in which the present appellant would have no concern had not the genius of blundering presided over the writing of the judgment, and caused a serious and unaccountable though seemingly clerical error as to the amount therein stated to be due him at the time of this new calculation."

After quoting from our opinion in this case in 36 Ann. 252, his brief proceeds:

"The difficulty then presented to the court was this, should the entire proceeds of Hermitage go to Graves, the second mortgage on Hermitage would be worthless, while the second mortgage on Forlorn Hope would be of perhaps face value. Should the mere accident of the priority of the sale of Hermitage ruin the security of one creditor and enhance the value of that of another? And yet, the proceeds of Hermitage belonged to Graves, and as to him the court could not touch them; accordingly, the court decided, in substance, that while the proceeds of Hermitage should be given to Graves as fast as converted into cash, yet, whenever Forlorn Hope should be sold there should be a fictitious marshaling of the assets of both places, and the surplus remaining after paying in full the first mortgage creditors should be distributed between the second mortgage creditors, just as though both places had been sold together.

"Graves and the other first mortgage creditors might at this future date have been settled with, or they might not; it mattered not so far as the instant issue was concerned. The theory of the new problem was to be, that no payments whatever had been made to them. All the funds and all the debts were to be marshaled anew, merely to see how these second mortgage creditors should fare in reference to one another."

The following extract from our opinion will shew what was really decided. Humble had asked that the proceeds of Hermitage be held and distribution of them be deferred until the other property was sold and we said we could not do that, but "we shall effect the same purpose so far as the rights of the opponent (Humble) are concerned by reserving and recognizing his right, when Forlorn Hope and other property shall be sold, to require such a distribution of the proceeds as will award him the same amount in satisfaction of his claim as he would

have received had the proceeds of Hermitage been present for simultaneous distribution."

Obviously this means, when the property has all been sold and the whole proceeds are ready for distribution, the claims of the various creditors shall then be paid according to their rank, and no one shall be injuriously affected because the exigencies of the situation had compelled the sale of one plantation before the other.

But this marshalling of the assets now to be made is not to ignore payments that have been made to any creditor. Graves' contention is that for the purposes of this distribution the payments made to him are to be ignored, and the interest on his claim is to be calculated regardless of the payments and of the interest on them. The correct sum due him can be ascertained only by computing interest and applying payments in the usual way, and this was done by the amended account and the judgment. His brief says, "all we ask for is an interpretation of the judgment that accords with the pleadings, the law, and the facts of the case, and this gives Graves the amount very nearly as set down in the last account."

The matter is certainly very complex, but a pains-taking examination has not revealed to us any cause for disturbing the judgment.

Judgment affirmed.

ON APPLICATIONS FOR REHEARING.

WATKINS, J. With the principles announced in 36 Ann. 252, in which the previous account of same executrix underwent an examination, we are perfectly satisfied; and we find no occasion to disturb the recent decree, in so far as the oppositions of B. Cousins, Humble, tutor, or Shakspeare, Smith & Co., are concerned; but upon a careful examination of the provisional account filed February 4, 1885, and the supplement thereto filed on the 14th of April, 1885, we feel satisfied that the judge *a quo* made a clerical error in his decree, in making a deduction of the sum of \$6,075.10 from that of \$12,999.58, which is the true amount due P. S. Graves.

We adopt the following as a correct calculation, viz:

Principal of Graves' debt.....	\$16,000 00
Interest to March 3, 1883.....	1,436 44
Amount	\$17,436 44
By amount paid March 5, 1883.....	3,000 00
New principal.....	\$14,436 44
Interest to maturity first Hermitage note.....	1,187 99
Amount	\$15,624 43

 Succession of Anger.

By first Hermitage note.....	\$2,850 00	
By cash.....	600 00—	3,450 00
<hr/>		
New principal.....		\$12,174 43
Interest to date of sale of Forlorn Hope, February 7, 1885...		825 13
<hr/>		
Balance due.....		\$12,999 56

And to this sum he is entitled, to be paid out of the proceeds of the sale of the Hermitage and Forlorn Hope plantations, by preference recognized by the judgment of the district judge.

It is therefore ordered, adjudged and decreed that the former opinion and decree herein rendered, and that of the court *a qua*, be so amended as to conform to the aforesaid calculations; and that same remain in all other respects undisturbed; and that all costs of appeal be taxed against the succession—the right of any interested party to apply for a rehearing, upon the points herein decided, within the legal delay, being reserved.

ON SECOND APPLICATION FOR REHEARING ON THE PART OF THE
EXECUTRIX AND B. COUSINS.

In order to make our former opinion and decree plainer, and leave no room for doubt as to its true intent and meaning, we amend and alter the same so as to read as follows, viz:

It is ordered, adjudged and decreed that P. S. Graves is entitled to be paid and shall receive from the net proceeds of the sale of the one-half of Forlorn Hope plantation, not subject to the Gourrier mortgage, and the proceeds of the sale of the Hermitage plantation, the net balance of \$12,999.56; and if the proceeds of the sale of the Hermitage plantation, viz:

Amount paid on first account.....	\$3,000 00
Amount first Hermitage note.....	2,850 00
Amount cash	600 00

Aggregating the sum of.....\$6,450 00
have not been paid as stated in the account and judgment appealed from, same shall be paid him with rank and preference as a first mortgage creditor.

And as thus explained our original judgment remains undisturbed.

State vs. Bird.

No. 9750.

THE STATE OF LOUISIANA VS. ISAAC BIRD.

1. A charge of the judge, in a capital case, that is not reduced to writing, and to which no bill of exceptions was taken at the time, cannot be examined upon an application by accused for a new trial. 34 Ann. 106, 1213; 35 Ann. 543, 773.
2. An objection that the verdict of the jury is contrary to law and the evidence is bad. 33 Ann. 313; 11 Ann. 478.
3. An objection, raised for the first time upon an application for a new trial, that one of the jurors who tried the case was an unnaturalized citizen, comes too late; it should have been urged when the juror was offered to be sworn. 8 R. 590; 13 Ann. 276, 21 Ann. 546, 257; 26 Ann. 383.
4. A juror cannot be heard to impeach his own verdict. 3 Ann. 435; 6 Ann. 653; 35 Ann. 1032.

38	497
45	44
45	1157
38	497
48	463
49	356
38	497
104	45
104	230
38	497
114	78
38	497
117	467
117	470
117	1091

A PPEAL from the Ninth District Court, Parish of Concordia.
Young, J.

M. J. Cunningham, Attorney General, and *Hugh Tullis*, District Attorney, for the State, Appellee.

G. Lemle and *C. S. Duke* for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The accused was indicted for the murder of one John Stephenson, and from a verdict of guilty without capital punishment, he has obtained this appeal.

He relies upon a bill of exceptions reserved to the refusal of the trial judge to grant his application for a new trial; and upon one taken to the rejection by the court of certain testimony on the trial of that application.

I.

The grounds upon which accused predicates his motion for new trial are in substance as follows, viz:

- 1st. The verdict is contrary to law and evidence.
- 2d. The court erred in not instructing the jury, at its adjournment for dinner, after the evidence had been closed, and before the argument of counsel, not to speak about the case, or *reflect on the evidence* that had been adduced, or *form an opinion* in the case, until they had heard the argument of counsel and the law bearing on the case.
- 3d. That, during the adjournment of court for dinner, and prior to the argument of counsel, several jurors expressed themselves on the case.
- 4th. The district attorney erred in *not* reading to the jury the statute of the State under which the party was tried.
- 5th. The court erred in not instructing the jury as to the *penalty*

State vs. Bird.

attached to their finding the prisoner guilty of murder, without capital punishment.

6th. In consequence of said error of the court, many of the jurors were misled with regard to the term of his imprisonment in case the accused should be convicted.

7th. That if the jury had not entertained this opinion, they would have found a different verdict.

8th. That he believes *one of the jurors who tried the case*, by the name of Fritz Barnd, was not a *naturalized* citizen of the United States; and that the accused was not aware of the fact before going to trial.

II.

In *State vs. Beard*, 34 Ann. 106, we said: "Although in writing, the judge's charge was not excepted to: we held in *State vs. Ricks*, 32 Ann. 1098, that when the charge was in writing and embodied in the record, we would notice errors, under proper assignment thereof, although not presented by bill of exceptions. While not overruling this opinion, which, however, is contrary to prior authority (10 Ann. 450), and therefore, to be strictly construed, we deem it proper to say that it is preferable that charges should be excepted to when given, in order that the judge may have an opportunity of explaining and correcting his charge at the time; otherwise, the defendant would be at liberty to take his chances of acquittal on the charge as delivered, and, if convicted, to urge his objection in subsequent proceedings. Only in case of gross and unambiguous error will we sustain objections to the charge, not made and presented by bill of exceptions at time of delivery."

In *State vs. Curtis*, 34 Ann. 1213, this Court adhered to its ruling in the last cited case.

In *State vs. Sheard and Smith*, 35 Ann. 543, this Court said: "When in a criminal case no objection is made by the accused, or his counsel, to the charge delivered in writing, when given, and no bill of exceptions is taken thereto, and there is no proper assignment of errors, etc., the matter will not be reviewed by this Court, nor the sentence disturbed."

This ruling was approved in *State vs. Riculfi and McClung*, 35 Ann. 773; *State vs. Chopin*, 10 Ann. 458; *State vs. Mangum*, 35 Ann. 619.

This record fails to disclose that any such charge was requested at the time of trial and that same was refused by the court. Certain it is that there is in the record no written charge to the jury.

The correctness of the assumed misdirections of the judge in his charge to the jury cannot be heard and determined by way of motion for new trial.

This disposes of the second, third, fifth, sixth and seventh grounds of objection by the accused.

III.

The objection urged that the verdict of the jury is "contrary to law and evidence," is not good, as its determination necessarily involves questions of fact.

These were grounds of complaint that addressed themselves peculiarly to the discretion of the lower judge. 38 Ann. 313, *State vs Breckinredge*; 11 Ann. 478; 8 R. 543.

IV.

The belief of the accused that "one of the jurors who tried the case" was an unnaturalized citizen, and that he was not aware of it, comes with poor grace from the accused, after he has taken his chances of acquittal by the jury of which this person was a member.

It was long ago held that an objection to a juror, for want of residence, should be made when he is offered to be sworn.

Such an objection comes too late on a motion for new trial. 8 R. 590, *State vs. Kennedy*; 13 Ann. 276, *State vs. Nolan*; 21 Ann. 546, *State vs. McLean*; 21 Ann. 257, *State vs. Parks*; 26 Ann. 383, *State vs. Brown*.

V.

The question remaining for discussion is, whether a petit juror can be permitted to impeach his own verdict. Repeated decisions of this Court, and of its predecessors, have steadily maintained the negative of that proposition. 3 Ann. 435, *State vs. Caldwell*; 6 Ann. 653, *State vs. Butler*; 35 Ann. 1032, *State vs. Cheshire*.

VI.

Altogether, the motion of accused for new trial is without merit, and we find no ground of objection to the trial judge's conduct of the case; and it is therefore ordered, adjudged and decreed that the verdict of the jury and judgment of the court appealed from be affirmed, with costs of both courts taxed against the appellant.

No. 9732.

THE STATE EX REL. CITIZENS' BANK VS. JUDGE OF SEVENTH DISTRICT COURT, PARISH OF CATAHOULA.

Ejectment proceedings are summary in character.

A prayer that the defendant be *cited* is not a conversion of such proceedings into ordinary ones. The word used is that found in the statute.

Mandamus is the appropriate remedy to compel the trial as *summary*, of such suit, where the district judge has on that account ruled as a question of practice, or procedure, that it has ceased to be such and had been converted into an *ordinary* action.

38 496
47 1371

State ex rel. Citizens' Bank vs. Judge.

A PPLICATION for Mandamus.

Elam & Luce for the Relator.

F. L. Richardson for the Respondent.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *mandamus* to compel the district judge to try summarily a suit brought by the relatrix bank to eject a tenant from a plantation.

The judge returns, admitting his refusal to proceed in a summary manner, for the reason that the relatrix has resorted to the ordinary process and that the defendant, even then, was entitled to the usual delays before the case could legally be fixed, which delays were not given before the fixing.

The plaintiff in the ejectment suit prayed that the defendant, Liddell, be *cited*. The citation issued on the 2d of March, *ult.*, allowing eleven days to defend. It was served on the following day. On the 11th, the court fixed the case for trial on the 15th, at a stated hour.

The defendant then opposed the trial because the proceeding was one *via ordinaria*, and because the case was prematurely fixed.

It cannot be claimed that the plaintiff converted this case (which the law declares shall be tried in a summary way) into an ordinary one, because she asked for *citation* against the defendant.

The very law which provides for a summary trial, directs that the defendant shall be *cited*. R. S. 2155, 2156; see also, R. C. C. 2713.

It was in strict compliance with that law that citation was asked and issued.

We have no concern with the correctness of the proceeding in fixing the case before the expiration of the delay allowed by the citation to appear and defend the suit.

The judge refused to try the suit as a *summary* case, because it had been converted into an *ordinary* one, and the object of the present proceeding is to compel him to try it *summarily*.

Having reached the conclusion that the plaintiff, by asking that the defendant be *cited*, has not altered the character of the suit, it is the clear duty of the district judge to hear and determine it as such.

The remedy sought is appropriate. 34 Ann. 1178; 32 Ann. 543, 597, 774; High on Ex. Rem. §§ 151, 250.

It is therefore ordered that the alternative *mandamus* herein issued be made peremptory, as prayed for.

THE STATE OF LOUISIANA VS. GEORGE HARRISON.

A party who has been arraigned, even though it be on the very day of his trial, and who goes to trial without objecting to the lateness of the time at which he was arraigned, cannot take advantage of the alleged irregularity after trial, by means of a motion for a new trial.

The order of the trial judge separating the witnesses during the trial, falls within the legal discretion vested by law in trial courts, and a modification of the same by the judge, within reasonable bounds, will not be disturbed on appeal.

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

O. C. Henderson and *D. T. Land* for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. This appeal is taken from a sentence of death on a conviction of murder.

It brings up two points, by means of a bill of exceptions and a motion for a new trial.

The latter complaint involves an alleged error in having the accused arraigned on the very day of his trial. As the record shows that he was arraigned, it follows that issue had been joined between the State and himself; hence, it cannot be argued that no issue had been joined. *State vs. Epps*, 27 Ann. 227.

The complaint is therefore restricted to the lateness of the arraignment. If the accused felt injured by that course, he should have then objected to going to trial, and after a showing of the alleged injury, he should have taken a bill from the ruling of the judge refusing a postponement of the trial.

That objection is similar to a motion for a continuance, and it cannot avail as a motion for a new trial, in the absence of a timely application for further time before trial. An accused who has been arraigned and has thus joined issue with the State, though it be on the very day set apart for his trial, and goes to trial without objection and without requiring further time after arraignment and before trial, cannot be heard on a motion for a new trial, to urge that alleged irregularity.

In all the cases in which our reports treat of the question of the proper time of arraigning the accused, it appears that objection was made before going to trial.

In his bill the accused charges error in the ruling of the trial judge, who overruled an objection to the competency of a State witness, for

State vs. Griffin.

the reason that the witness had remained in court during the examination of the other witnesses, in violation of the order of the court sequestering all the witnesses in the case.

It appears from the bill that the witness was an officer of the law and had made the arrest in the case, and that he was not aware, and that the district attorney himself was then ignorant of the fact that his testimony would be needed in the case. Under these circumstances, the judge would have erred in excluding the testimony of the witness. *State vs. Gregory*, 33 Ann. 737.

In rulings involving similar questions, which properly belong to the proper discipline of their courts, the discretion vested by law in district judges will not be interfered with, except in extreme cases, rarely to occur, of arbitrary rulings operating great wrong to either party. *State vs. Watson*, 36 Ann. 148.

An almost identical point was presented in *Ford's case*, 37 Ann. 463, and in disposing of the argument thereon, we said:

"The order to separate witnesses is not one of right, and its modification by the judge, within reasonable bounds, will not be disturbed on appeal." See also *Bishop Crim. Procedure*, 2d ed., vol. 1, secs. 1086, 1087, 1088; and *State vs. Revela*, 34 Ann. 383.

The record discloses no error to the prejudice of the accused, who can therefore obtain no relief through his appeal.

Judgment affirmed.

No. 9605.

THE STATE OF LOUISIANA VS. MARY GRIFFIN.

Objection to an indictment based on the ground that a member of the grand jury that found the bill was disqualified, must be urged before trial, and cannot be taken advantage of by motion for new trial or motion in arrest.

Where there are two judges in the same district clothed with equal powers and jurisdiction and authorized by statute to provide rules for the regulation of their courts, and fix the terms thereof, and under this authority they have fixed their respective terms, it does not vitiate the proceedings, because an accused has been tried and convicted at a term of the court which the judge presiding thereat was only authorized to hold in the absence of or inability of the other judge to attend, to whom such term was regularly assigned under the rules, where such absence or inability is shown by the record.

A PPEAL from the Twentieth District Court, Parish of Assumption. *Beattie, J.*

M. J. Cunningham, Attorney General, and *E. A. Sullivan*, District Attorney, for the State, Appellee.

Walter Guion for Defendant and Appellant.

38	502
48	576
38	502
118	804

The opinion of the Court was delivered by
TODD, J. The defendant appeals from a sentence of life imprisonment for murder.

Among other defenses, she urged in the court below and again before this Court:

That one of the members of the grand jury that found the bill against her was not a citizen of the United States, and that such fact was not ascertained till after verdict.

She made this a ground of a motion for a new trial, and on the trial of that motion proved the fact alleged.

There is no doubt but that an indictment of a grand jury, one or more of whose members labors under such a disqualification as the one mentioned, is invalid. All authorities agree on this point. Wharton Criminal Practice and Pleadings, secs. 345, 346; 8 R. 513, 616; 21 Ann. 251.

The question of difficulty on this point is whether such disqualification can be urged after arraignment and plea or after conviction. Upon this point the authorities are divided.

In the case of the State vs. Parks, 21 Ann. 251, it was held that such disqualification was fatal to the indictment and could be urged in a motion for a new trial.

The judge *a quo* overruled the motion for a new trial on the authority of the case of State vs. McGee, 36 Ann. 207, which he claimed overruled the doctrine of the previous decision in the Parks case referred to.

It is claimed in the brief of defendant's counsel that the decision in this Parks case has been approved in several decisions rendered by the present Court, and he refers us to the cases of State vs. Washington, 33 Ann. 896; State vs. Washington, 1404; and State vs. Rowland, 36 Ann. 193.

In the first of the above cases, among the errors assigned was one to the effect that the grand jury that found the bill was incompetent because drawn by commissioners unknown and without legal authority to act. It was held, "that such objection, urged only after plea and trial and on motion for a new trial, comes too late;" and further, "that if it had been seasonably made before trial it would have been fatal;" the Parks case being mentioned only to distinguish it from the case then under consideration.

In the next case (Washington) the disqualification of the grand jury was sought to be taken by a motion in arrest of judgment. That was the precise issue, and it was held that it could not be done.

In the case of Rowland (36 Ann. 193), the issue touching the disqual-

State vs. Griffin.

ification of a grand juror was raised by a motion to quash, and the motion was sustained, the Court only deciding in accordance with settled jurisprudence on the point that the objection was seasonably made and was fatal where urged by this mode after indictment but before arraignment.

From this brief review it will be seen that this Court is not committed to the doctrine of the Parks case. On the contrary, we believe that the principle enunciated in the McGee case, 36 Ann. 207, is correct. That decision is amply sustained by the preponderance of authority, as shown by the precedents cited in the decision.

The other ground of resistance relied on by the defendant is the alleged want of jurisdiction or power in the judge who presided in the trial of the case. The facts relating to this point are these:

The appeal comes from the parish of Assumption, where the accused was tried and convicted. Assumption is in the twentieth judicial district, in which district there are two judges, Judges Beattie and Knobloch. Among the rules adopted by these officers for the regulation and performance of their judicial functions is one to the effect that the terms to be held by each judge and the months for holding same were specified; and it is urged that the trial took place before Judge Beattie at a term of court which, under said rule, should have been held by Judge Knobloch.

It may well be questioned, in view of the fact that the court before which this trial took place and all the proceedings were instituted and conducted had complete jurisdiction of the offense with which the accused was charged *ratione materia*, whether an alleged irregularity such as we are now considering, growing out of an infringement of a rule agreed on by the two judges, could be of such gravity as to vitiate the proceedings in question. But be that as it may, we find another of these rules adopted by the judges is in the following words:

"It is further ordered that the said judges may by agreement among themselves interchange the holding of these terms, and that either of them may, in case of the absence or nonability to preside of the other, hold the terms provided to be held by his colleague."

The record shows that in conformity to this rule, Judge Knobloch called on Judge Beattie to preside at the term to be held by him in the month of November, for the reason of his inability to be present at that term. Accordingly the term was held by Judge Beattie, when the defendant was tried and convicted.

State ex rel. Fisk vs Police Jury.

The rules referred to were not violated but fully complied with, and therefore the irregularity charged did not exist.

The accused was legally tried and convicted and sentenced, and there is nothing in the record to afford him relief.

The judgment is therefore affirmed.

No. 8261.

THE STATE EX REL. JOSIAH FISK VS. POLICE JURY OF THE PARISH
OF JEFFERSON, LEFT BANK.

1. In a case wherein the judgment of this Court has been reversed by the Supreme Court of the United States, and remanded "for further proceedings to be had therein not inconsistent" therewith, this Court is fully competent to judge of *all facts* not set forth in that finding, and decree as in its opinion justice may require. 91 U. S. 423, *Ex parte French*; U. S. R. S. 709, and authorities cited.
2. The failure of an appellee to request an amendment of the judgment of the district court, and an increase of the tax levy ordered therein, deprives him of remedy therefor in this Court.

ON MOTION and Suggestion of the Relator to Execute the Decree of the Supreme Court of the United States.

Chas. Louque for Plaintiff and Appellant.

S. S. Carlisle and *James D. Coleman* for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. It appears from a re-examination of the record herein that the relator avers that defendant parish was indebted to him in the sum of \$4,454 (in capital), which with costs and interest added, aggregates the sum of \$5,411, and which is evidenced by sundry judgments enumerated, that "were to enforce contracts which were made during the years 1871, 1872, 1874, 1875, 1876 and 1877. That during that period of time the limit of taxation for parochial purpose was 100 per cent of the State tax for any year. That during said years the rate of taxation was as follows: For 1871, —; for 1872, 21½ mills; 1873 to 1876, inclusive, 14½ mills; 1877, 13 mills. That during that period of time, the rate of taxes levied by the police jury was 10 mills on the dollar with the exception of 1876, when the rate was increased to 14½ mills. The assessment rolls of the police jury of Jefferson, left bank, amounts to the sum of \$594,719, and it is necessary to levy a tax of ten mills thereon.

"That it is made the duty of the police jury to *levy* the taxes, and no other person has the right to exercise that power."

State ex rel Fisk vs. Police Jury.

He further alleges that his sole remedy is by mandamus to compel the police jury to levy a tax sufficient to pay said judgments, and he prayed for an alternative writ of mandamus against the police jury, and the sheriff and *ex officio* tax collector, to compel the one to levy and the other to collect, "a tax of 10 mills on the dollar of all assessed property within said parish, left bank, to pay" said judgments; and to apply the same when collected to the payment of same.

He also alleged that said judgments evidenced protected contracts, in the sense of Article 10 of the United States Constitution.

The preliminary writ was granted. To this petition the defendant police jury aver that they have exhausted their power of taxation, and levied the highest rate authorized by law; and "that during the years from 1870 to the present time, inclusive, the several police juries exhausted their powers and limit of taxation that was authorized by law," and they pray for the rejection of defendant's demands.

On the trial it was "admitted that the rate of taxation, both for State and parish, is as stated in the petition filed in this suit, and for the years therein stated, and that the police jury has never passed any ordinance to levy a tax to pay the judgments mentioned." There was no counter-ruling evidence adduced by defendant.

The district judge assigned as one of his "reasons for judgment," that it appeared from the evidence that relator is a contract-creditor of the defendant parish, and that at the time "his judgments were rendered Act 69 of 1869, reenacted in the Revised Statutes of 1870 as Sections 2628, 2629, 2630, 2747, 2748 and 2749. was in full force and effect, and constituted a part of the contract, as well as of the judgments." 4 Wallace, 535; 31 Ann. 747, Moore vs. City of New Orleans.

But the district judge limited his decree to relator's judgments Nos. 4032, 4102 and 1337, and rejected and disallowed judgment No. 4302, on the sole ground that same "appears to have been rendered after the repeal of the Act of 1869."

The judgment appealed from ordered the defendant police jury to budget said first three judgments, and to levy "a tax of six mills on the dollar of the assessed property of the parish to pay the above judgments, interest and cost;" and that the sheriff and *ex officio* tax collector be ordered to collect said tax and apply the proceeds thereof to relator's judgments *pro tanto*.

From that judgment the *defendant* appealed; and in this Court, relator, in his answer to the appeal, prays "that the judgment of the lower court be amended so as to include in the mandamus judgment No. 4302,

State ex rel. Fisk vs. Police July.

for \$2,107.31, interest and cost, and *as amended* that the judgment appealed from be affirmed with cost."

This Court reversed the judgment of the lower court and refused the mandamus prayed for, at relator's cost.

The relator applied to the United States Supreme Court for a writ of error, and upon trial therein the judgment of this Court was reversed and remanded for "further proceedings to be had therein, not inconsistent with the opinion of" that Court, the mandate whereof was filed in this Court on the 9th of April, 1886.

It is proper that we should state that we feel ourselves restricted to directing a levy of six mills tax by reason of relator's failure to request this Court to amend the judgment of the district court which limited the tax levy to that rate.

It is therefore ordered, adjudged and decreed that the judgment appealed from be affirmed in so far as it orders defendant police jury to budget relator's judgment in suit No. 1432, for \$150, with five per cent per annum interest from the 20th of April, 1874, until paid, and sheriff's and clerk's cost, aggregating \$112.75; and the amount of judgment in suit No. 4102, for \$1,833.37 and clerk's cost, aggregating \$16, and five per cent interest per annum from the 20th of April, 1874, until paid; and the amount of judgment in suit No. 1337, for the sum of \$364, with five per cent per annum interest from March 1, 1875, until paid, and clerk's and sheriff's cost, \$8.50.

It is further ordered, adjudged and decreed that said defendant police jury levy an additional tax of six mills on the dollar of all the assessed property of the parish to pay the above judgments, interest and cost; and that the sheriff and *ex officio* tax collector proceed to collect said tax, and same, when collected, to pay relator in satisfaction of said judgments *pro tanto*.

It is further ordered, adjudged and decreed that said judgment and decree be annulled, avoided and reversed in so far as it rejects and disallows relator's judgment No. 4032, for \$2,107, with five per cent per annum interest from the 18th of March, 1878, and clerk's and sheriff's cost, \$50.

And it is now ordered, adjudged and decreed that said sum be included in, and covered by, the budget and levy the defendant police jury are herein required to make; said sum to be included in said six mills tax therein ordered to be levied, assessed, collected and applied to relator's judgments; as well as the cost of suit in the Supreme Court of the United States, and specified in the annexed mandate; as also the

State ex rel. Fisk vs. Police Jury.

the cost of this Court and that of the court *a qua*, taxed against the defendant.

It is finally ordered, adjudged and decreed that the alternative writ of mandamus prayed for be made peremptory—fully reserving relator's right to an additional tax if six mills levy proves inadequate.

No. 8363.

JOSIAH FISK VS. THE POLICE JURY OF THE PARISH OF JEFFERSON,
LEFT BANK.

The plaintiff and appellee having failed to make the police jury party to rule on sheriff and assessor, to assess the tax demanded, this Court cannot afford him relief. Proceedings by mandamus are *stricti juris*, and must conform to Code of Practice.

ON MOTION and Suggestion of Plaintiff to Execute the Decree of the Supreme Court of the United States.

Chas. Louque for Plaintiff and Appellant.

S. S. Carlisle and *James D. Coleman* for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. It appears from the record herein that plaintiff, on suggesting to the district court that he had two judgments against the defendant parish, Nos. 1291 and 1292, in which the court rendering the same ordered a tax to be levied to pay said judgments, prayed an order of the court requiring the "sheriff and *ex officio* tax collector, and the police jury of Jefferson, left bank, to show cause on Monday, the 4th day of April, at 11 o'clock A. M., why a *mandate* should not issue from this court ordering said *sheriff* to collect a tax sufficient to pay said judgments in accordance with the terms thereof."

To this proceeding defendant excepted on the grounds, viz:

1st. Because said motion and rule are defective and insufficient in their grounds.

2d. Because said judgments are absolutely null and void, etc.

3d. Because plaintiff's proceeding for mandamus herein is not by petition and oath, as required by C. P. 829.

Subsequently, a similar rule was taken on the assessor, and a like exception taken; and thereafter said exceptions were overruled, and a judgment rendered requiring "that the State assessor, P. A. Bienvenu, be ordered to assess a parish *tax* at a *sufficient* rate per cent upon the assessment roll of the current year 1881, of all assessed property within said parish of Jefferson, left bank, to pay said judgments;" and requir-

ing the sheriff and *ex officio* tax collector to collect and apply the same to their payment.

From this judgment the defendant appealed to this Court, and they decided that: "The judgment orders the *assessor* to *assess* a parish tax to an amount sufficient to satisfy plaintiff's judgments. No such authority as that imposed upon the assessor, *i. e.*, the *levying* of a tax, is authorized by law. Taxes for parochial purposes, or to settle parochial indebtedness, can only be levied under the conditions established by the legislative will—by the *police jury*. This levy must first be made by the proper authorities, without which the assessor and the sheriff are powerless to extend on the roll the amount of the tax, or to collect the same.

"As we have said before, in order to enforce the law (since repealed) which was in existence at the time the debt was contracted and the judgment rendered, it must be shown that the repeal of the law was inoperative, because impairing the obligation of a contract, and that the judgment was based upon a contract. No such evidence is afforded by the record herein."

From this judgment a writ of error was prosecuted to the United States Supreme Court, and upon trial therein the judgment of this Court was reversed and remanded to this Court "for further proceedings to be had therein not inconsistent with the *opinion*" of that Court.

Referring to the opinion on file herein, we find this expression, viz: "These cases are brought before this Court by writs of error to the Supreme Court of Louisiana. As they involve the same questions, between same parties, they may be decided together." The Court then proceeds to discuss the ground of their jurisdiction to review these judgments, viz: whether "they are founded on a law of the State which impaired the obligation of his contract, to wit: the contract on which he procured the judgments already mentioned," and held that plaintiff's judgments evidenced protected contracts in that sense, and the constitutional provision invoked as limiting the power of the defendant police jury in levying taxes was in plain violation thereof, and inoperative so far as they are concerned.

But that decree did not alter, amend or revise the *other* portion of the former decree of this Court to the effect that the *assessor* had no power to *levy* a tax—hence that part of same remains in full force and effect.

It is therefore ordered that former decree of this Court remain undisturbed, and that all costs of the district court and of this Court be taxed against the plaintiff and appellee—without prejudice, however, to his right to enforce his judgments against defendant by such other and further proceedings as he may be entitled to under the decree of the Supreme Court of United States.

No. 9554.

SUCCESSION OF R. F. THEURER.

ON PETITION FOR NULLITY OF WILL.—OPPOSITION TO ACCOUNT, ETC.

Abstracts of inventories recorded to preserve the mortgage of minors are not evidence of the validity of the minor's claim, much less are they conclusive against the tutor as to the amount appearing on them to be due the minor.

And as the general mortgage created by recording these abstracts is not fixed in amount by such recording merely, so a special mortgage on a particular piece of property, executed under permission of the court to replace that general mortgage, does not irrevocably fix the sum stated therein as the sum secured to be the sum due the minor.

And hence it follows that where a special mortgage has been given by a natural tutor to secure to his son and ward the one-half of the community property as it appears on the inventory without deduction of the community debts, and in subsequent proceedings in settlement of the succession it is claimed that the sum secured in the mortgage is reducible by the debts that have been paid, evidence of such payment and of the condition of the succession when it fell to the heir is admissible in order to ascertain what was the actual value of the succession at that time.

This does not abrade the general doctrine that protects the sanctity of judicial declarations and authentic acts. These acts of a tutor are required to be done in certain contingencies to accomplish certain purposes, and the law that required the performance of them fixes their meaning and limits their effect and consequence.

In the interpretation of wills the principal aim must be to discover the intention of the testator and the first duty is to give effect to that intention unless the law reprobates it. To accomplish this, conflicting clauses must be harmonized or if they are irreconcilable, the last disposition must prevail over those that precede it. Courts will presume that a testator meant to dispose of his property as the law permits him to do rather than that he intended to do what was unlawful, and will construe his disposition accordingly.

There is not a prohibited substitution in this disposition of property by last will;—"I give and bequeath to my wife all the property movable and immovable which I leave at my death but in usufruct only, and after her death said property is to be divided equally between my son and the heirs of my said wife, and for that purpose I give her in full ownership one-half of what I may leave, and the other half to my said son to be by him enjoyed after the death of my said wife."

Construed to mean that one-half of the estate was bequeathed to the wife in full ownership and the other half to the son, but as the testator could give to his wife no more than one-third of his estate, the son being of a previous marriage, her bequest was reduced to one-third.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Braughn, Buck, Dinkelspiel & Hart for Plaintiff and Appellee.

White & Saunders, Semmes & Legendre and *E. J. Wenck* for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. The first wife of R. F. Theurer died in 1869 leaving a son sole issue of her marriage. The only asset of her succession was her share of the community, and the inventory shewing the appraised

38	510
45	1304

38	510
48	733

38	510
1122	547

38	510
125	190

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value thereof to be \$37,897.31, one-half of that sum was certified by the clerk as the appraised value of the minor's property. The property consisted of a stock of goods appraised at \$24,897.31 and the residue was the appraisement of the real estate. No mention of debts appeared on the inventory. Shortly after the wife's death the husband applied for the adjudication to himself of her share of the community and after the usual proceedings the adjudication was made. The husband then applied for permission to substitute a special mortgage in lieu of the general one that resulted from recording the abstract of the inventory and permission having been given, a special mortgage was given by him for \$18,948.65 the full amount of the inventoried value of one-half of the community property.

Theurer married again shortly after his first wife's death. This second marriage lasted about fifteen years but there was no issue of it. He died in 1864 leaving his second wife surviving and the son of his first marriage as his only heir. His will was probated and contains this disposition of his property;—

"I give and bequeath to my wife Wilhelmina Henrietta Theurer all the property movable and immovable which I leave at my death, but in usufruct only; and after her death said property is to be divided equally between my son and the heirs of my said wife, and for that purpose I give her in full ownership one-half of what I may leave, and the other half to my said son to be enjoyed by him after the death of my said wife."

Mrs. Theurer was appointed executrix in the will, qualified, and filed a provisional account which was opposed by C. W. Theurer the son, the opposition being based mainly on the claim asserted by him to be recognized as a creditor of his father's estate for \$18,948.65, the inventoried value of one-half of the community between his father and mother, with interest from the date of his mother's death. Pending this opposition he filed a suit against his step-mother to annul his father's will and demanded a partition, which she answered denying that he was a creditor on the ground that the community of the first marriage was insolvent, and averring the validity of the will but admitting that the disposition in her favour was reducible to the disposable quantum. This suit and the opposition to the account were tried as one and the court sustained the opposition, declared the will to be valid, interpreted it as giving to the second wife the usufruct of one-half of the estate and reduced it to one-third.

Two questions are presented for adjudication;—

1. Whether it is permissible to receive testimony of the insolvency

Succession of Theurer.

of the first community in the face of the judicial proceedings whereby the wife's share thereof was adjudicated to the surviving husband and a mortgage executed to secure the amount thereof to his son and him.

2. Whether the will is valid and if valid, what was the meaning and intent of the testator.

The widow offered in evidence an act of sale from Caspar Theurer to R. F. Theurer of date Aug. 18, 1868, of the stock of goods, the price being \$25,000 payable in two equal instalments one and two years from date—also these two notes which she proposed to prove were paid after the dissolution of the first community, and she offered further to prove the payment of other debts of the first community such as law charges, revenue taxes, etc. On objection by the son the court excluded the evidence on the ground that it contradicts the judicial admissions and declarations of the testator and the adjudication made to him of the community property at a stated price and the judgment homologating and accepting the special mortgage to secure that price.

The first wife died June 12, 1869. The first maturing note for the purchase of the goods was not due until Aug. 18, 1869. It is therefore certain that the whole of the purchase price of the goods was unpaid when the first wife died, and that price constituted two-thirds of the appraised value of the community property. If evidence to shew this condition of things is legally inadmissible, it is not difficult to foresee what incalculable injury may ensue from the establishment of such a principle, and how a second set of children and their mother a surviving widow may be put at the mercy of those by a first marriage.

It would do violence to the spirit as well as the letter of the enactments providing for the recording of abstracts of inventories in the interest of minors to hold that they were conclusive of the sum due them. A natural tutor cannot be confirmed until this abstract has been recorded. Rev. Stats. sec. 2360, and to wait until the debts have been paid and the residuum of the estate ascertained before recording would leave the minor for years sometimes without any protection, while on the other hand if the immediate or speedy recording of the abstract is to irrevocably bind the parent to the payment of the sum appearing thereon, he is seriously injured and his resources perhaps fatally crippled. The legislature therefore has *ex industria* declared that the recording of any instrument of this kind shall in no manner be evidence of the validity of the debt or claim. Rev. Stats. sec. 2365.

And if the recording an abstract of the inventory for the purpose of creating a mortgage upon the general property of the tutor is in no manner evidence of the validity of the debt that such mortgage se-

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cured, how can the execution of a special mortgage by the tutor upon a particular piece of property for the purpose of lifting this general mortgage be regarded as conclusive proof of the existence as well as the amount of the debt. One and perhaps the chief object in permitting a tutor to give a special in lieu of the general mortgage upon all his property was to prevent a mass of property being put out of commerce, but this would be wholly defeated if a tutor should wait until the residuum of an estate should be ascertained and the minor's share fixed, and wait he must if it is established as law that when he gives this special mortgage he is forever bound by its recitals of the sum due.

While there has been no express adjudication on the question now raised the judicial mind was manifestly penetrated by the same thoughts we have now expressed, for in *Vascocu v. Smith*, 2 Ann. 828, the court say "adjudications of common property to the surviving parent are generally made without taking into consideration the charges of the succession of the deceased and their gross amount does not of itself make proof of the shares of the heirs, but if it did, the father in this case is the warrantor of the defendant so far as the assets left by him will go," and in *Massey v. Steeg*, 12 Ann. 78, the court say "the heirs of the deceased it is perfectly clear can only claim one-half of the price of the adjudication in right of their mother, after deducting therefrom the debts of the community which may have been extinguished or payment effected by their father and natural tutor, and the costs incurred in the proceedings relative to the administration of the estate and adjudication of the property to him." This Court has held that a special mortgage given by a tutor does not import a confession of judgment for any specific sum, and that executory process cannot issue thereon unless there has been a settlement of accounts or a statement of them shewing the actual indebtedness. *Ritter v. Faessel*, 34 Ann. 416.

This being so, and it must be so if the laws touching the descent of property and the settlement of successions are regarded, how are heirs to be restricted to their shares if evidence is excluded by which alone the shares can be ascertained. The minor child of Theurer was only entitled to his mother's half of the community, and that half cannot be ascertained until its debts are paid. If evidence of the debts is excluded there can be no just conclusion reached of the sum really due him.

We apprehend it is not disputed as a general proposition that the heir is entitled only to the residuum of an estate after its debts are

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paid, but it is argued the rules of evidence vigorously forbid proof offered, as this is alleged to have been offered, to contradict judicial admissions and recitals in an authentic act.

In ruling that the evidence tendered by the widow should have been received, we have no idea of abrading the general principle that protects the sanctity of judicial declarations and authentic recitals, nor do we think that principle at all involved in the present discussion. We but give effect to an express law when we say that recording an inventory is no evidence that any sum is due a minor, and we deduce the corollary that as that act is done for the purpose of creating a general mortgage, the substitution of a special mortgage in lieu of it no more concludes the parties as to the amount of the debt than does the recording of the inventory. They are each and all particular acts required to be done in certain contingencies to accomplish certain purposes, and the law that required the performance of them fixes their meaning and limits their effect and consequence.

The will is attacked as containing a prohibited substitution. Undoubtedly it does, if one clause is to be read to the exclusion of another, or if a part of a clause is to be read omitting other significant parts of it.

Modern jurisprudence has long imperatively demanded that the intent of a testator must be extracted from his language however obscure, if it be possible, and that effect must be given to that intent unless the law reprobates it, and therefore apparently conflicting clauses must be harmonized or if they cannot be, one must prevail over another. Words are accordingly construed in their common acceptation rather than by their technical meaning. *Succ. of Burnside*, 35 Ann. 708.

There was a time when the courts, saturated with a blind subservience to forms and dominated by a haughty determination to make men speak in the language of legal formulas, would not tolerate the use of any other than those formulas. The common-law lawyers with their vigorous notions of the sacramentality of certain words would sacrifice an estate to save a definition, but the common sense of the profession and the liberal spirit that animates it revolted from this bondage and an emancipation from the slavery of technical construction began.

Our Code textually instructs the courts to endeavor to ascertain the intention of the testator as a principal aim, *Rev. Civ. Code*, art. 1712, and this Court has often repeated its recognition of that duty, and has said it must in cases of doubt presume that the testator intended to do

Succession of Theurer.

that which was lawful rather than that which was prohibited by law, and it must carry into effect his will unless it clearly violates some prohibition of the legislature. *Roy v. Latiolas*, 5 Ann. 552.

The first clause of the will gives the wife the usufruct of all the property, and the second gives to her one-half of it in full ownership and to the son the other half subject to the wife's usufruct of that half.

The lower court held there was no substitution, maintained the validity of the will, and construed it as giving to the wife the usufruct of one-half of the property and reduced it to one-third under the Act of 1882. Sess. Acts, p. 10.

The first part of the judgment is right. The second is error. The wife takes one-third of the estate in full ownership.

It is obvious there is no substitution. The first disposition is:—I give and bequeath to my wife all the property movable and immovable which I leave at my death but in usufruct only, and after her death said property is to be equally divided between my son and the heirs of my said wife.

Standing by itself this would be a bequest to the wife of the usufruct of the whole property, and a bequest of the property to the son and the wife's heirs in equal parts.

The succeeding clause is in part inconsistent with that disposition, modifies it, and being last controls it. *Rev. Civ. Code*, art. 1723; *Suc. Boone*, 7 Ann. 127. It begins significantly "and for that purpose," that is to say, in order to carry out my real intention and to prevent misconception of that intention I now proceed to say what I mean;—for that purpose I give her (the wife) in full ownership one-half of what I may leave, and the other half to my said son to be by him enjoyed after the death of my said wife.

And that meaning thus expressed is that his wife should have the usufruct of the whole estate and full ownership of one-half, and that the son should have the ownership of the other half subject to the wife's usufruct thereof, but as the testator cannot give to his wife either in full property or in usufruct more than one-third of his estate, the bequest is reducible to the full ownership of one-third and the residue goes to the son.

It is often difficult to ascertain the real intention of a testator because of the want of precision of the writer of his will. We do not encounter in the will before us the difficulties that the counsel for the son thinks are insuperable, but if they were greater than they appear

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to us we should feel our duty to be to reconcile conflicting dispositions unless irreconcilable, to extract from crude expressions and ill-arranged sentences their real meaning, to give effect to the testator's intention however inartistic his language, and to annul only so much of his testament as is reprobated by law or is contrary to its express enactment. *Aubry v. Cajus*, 8 La. 43; *Clark v. Preston*, 2 Ann. 580.

We conform to these cardinal rules for the interpretation of wills in our decree, but as the evidence of the debts of the first community was excluded the case must be remanded to admit and consider it. Therefore

It is ordered and decreed that the part of the judgment of the lower court that sustains the validity of the will is affirmed; that the part that construes the will as bequeathing to the widow Theurer only the usufruct of one-third of the estate is amended, and that she is adjudged and decreed to take under the will one-third of the estate in full ownership; that the part that recognizes the son Charles W. Theurer as a creditor for over eighteen thousand dollars is avoided and reversed, and that the cause is remanded for the purpose of admitting the testimony which we have declared was improperly rejected and for trial of any issue arising thereon in accordance with the views expressed in this opinion, the costs of this appeal to be paid by C. W. Theurer and those of the lower court to await the final decision of the cause.

ON APPLICATION FOR REHEARING.

FENNER, J. The final clause of article 331, R. C. C., has no application to a special mortgage given to secure the value of the entire interest of the minor in the property of the deceased parent, said interest having been adjudicated to the surviving parent at its appraised value according to law. In such case there is no liquidation, and no necessity for liquidation of the minor's rights which can only be ascertained after settlement of the community.

The mortgage being, by its terms, given only to secure the rights of the minor, "up to the sum of \$18,948.65," that sum is the limit, but not the measure, of the amount secured, which latter amount is the eventual right of the minor. See *Linn. vs. Dee*, 31 Ann. 217.

We see no reason to disturb our opinion or decree.

Rehearing refused.

Browne et al. vs. New Orleans et al.

No. 9576.

R. H. BROWNE ET AL. VS. CITY OF NEW ORLEANS ET AL.

38 517
47 1287

No injunction lies to restrain the enforcement of a municipal ordinance which has been abandoned and become inoperative, whether that fact is brought to the knowledge of the court of the first instance or on appeal.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

E. H. Farrar, R. H. Browne, W. W. Howe, Chs. E. Schmidt and E. D. White for Plaintiffs and Appellants.

W. H. Rogers, City Attorney, for Defendants and Appellees.

The opinion of the Court was delivered by

WATKINS, J. The plaintiffs, alleging themselves to be residents and taxpayers of the city of New Orleans, join in this suit for the purpose of resisting the enforcement of a municipal ordinance known as No. 1214, Council Series, appropriating \$5,000 for the purpose of defraying the expense of returning the Liberty Bell to the city of Philadelphia, and directing the comptroller to warrant on the treasury in payment of this appropriation.

They aver that this appropriation is *ultra vires* and void, and that the city council has no power or right to take money of the taxpayers of this city for any such purpose; and they pray for an injunction, but same was refused and petitioners appealed.

In this Court the mayor of the city has filed his affidavit, in which he states that said ordinance and appropriation have been abandoned and have become inoperative, and that the Liberty Bell has been returned to Philadelphia and the cost of its transportation has been paid by private contribution and nothing remains for this Court to decide.

In this state of the case there is no real issue before this Court, and the suit must be abated.

It is therefore ordered that this be stricken from our docket, and all costs taxed against the appellants.

Successions of Byrne.

No. 9604.

SUCCESSIONS OF MADELINE AZEMA BYRNE AND JOHN BLIGH BYRNE.
(Consolidated.)IN THE MATTER OF THE RULE OF CHARLES H. BYRNE ET AL. VS.
JULES CASSARD, ETC.

1. A consent to take up a case for trial that has been fixed for a different day, is not such a consent as will vitiate a judgment, although a minor be a party thereto.
2. Members of a family meeting have the right to waive the three days delay allowed by law for their citation, and convene at an earlier date. R. C. C. 285; 9 Ann. 560, *Gasson vs. Palfrey*.
3. A judge has at all times the right, upon proper proceedings and proof, to correct clerical errors that occur in interlocutory orders, or chambers decrees he has granted, on giving due notice to interested parties.
4. To relieve a purchaser of real property from compliance with the terms of his bid at a judicial sale, he must show that there is a cloud upon the title of the vendor; mere irregularities in proceedings in sale will not avail him, as he is protected by the decree under which the sale is made, and his right to restitution, in case of loss or injury thereto.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

A. Goldthwaite for Plaintiff and Appellant:

- A judgment is conclusive of every fact necessary to uphold it, whether the final adjudication resulted from tedious litigation or from a suit in which obstacle was presented. Freeman on Judgments, sec. 350; 2 Howard U.S. 340; Succession of Hebrard, 18 Ann. 485.
- A judgment is not a consent judgment when prepared by one of the attorneys and submitted to the court as a proper judgment, and adopted by the judge as the judgment of the court. 20 Ann. 276; 12 Ann. 426; 28 Ann. 713.
- When a court has jurisdiction of the subject-matter and the proper parties are before it, its decree will protect purchaser at a probate sale from all informalities which may have preceded it in the absence of any charge or proof of fraud. 21 Ann. 505; 1 Clifford C. C. 437; 14 Ann. 622; 11 La. 156; Rorer on Judicial Sales, sec. 479; 1 Wallace, 634.
- Rule may be taken contradictorily to amend proceedings, *nunc pro tunc*. 31 Ann. 530.

W. B. Lancaster, attorney for absent heirs, on the same side.

P. E. Théard & Sons and *Braughn, Buck, Dinkelspiel & Hart* for Defendants and Appellees:

1. The judgment ordering the partition is a nullity. A judgment rendered by consent of the parties *inter se*, and without evidence, cannot bind third persons. All parties must be before the court. In judicial partitions, all formalities must be strictly pursued. 16 Ann. 157; 3 Ann. 35; 5 Ann. 499; 15 Ann. 225, 697; 28 Ann. 715 (dissenting opinion); 4 Ann. 260, 261, 56; 19 L. 36; 17 L. 348; 25 Ann. 531; 32 Ann. 97, 635; 30 Ann. 898; 26 Ann. 445; 27 Ann. 198; 11 Ann. 368; 34 Ann. 909; 18 Ann. 882; R. C. C. 1330, 2275, 2440.
2. The formalities required for the sale of the share of the minor were not complied with. The curator of the minor was not sworn. The judgment against the minor may be rescinded. The family meeting was not held according to law. The deliberations thereof were not homologated in time. The error in the name of the minor in the homologation order is fatal. The advertisement was not published during thirty days

Successions of Byrne.

- 27 Ann. 463, 32 Ann. 956; 5 Ann. 208; 12 Ann. 153; 15 Ann. 697; 9 L. 545; R. C. C. 285, 334, 341, 1167, 1339, 1341; C. N. 411, *Marcadé*, vol. 2, p. 211; C. P. 615.
3. A purchaser is not bound by additional terms imposed by the auctioneer, not contained in the decree of the court, and which increase the price. Custom cannot supersede the law or change an order of court. The law requires also the reading of the mortgage certificate at the time of the sale. R. C. C. 21, 1963, *et seq.*, 3010; 11 Ann. 46.
 4. No evidence can be offered after rendition, signature and execution of a judgment, especially where it is shown that the evidence was taken or procured after the execution of the judgment. The adjudication having dispossessed the owners, they could make no alterations thereafter. The evidence offered after the adjudication cannot bind the purchaser. Even if admissible, the evidence offered is still insufficient to protect the purchaser. 32 Ann. 97; 18 L. 351.
 5. No one is required to take a property subject to encumbrances. Plaintiff should have produced a clear certificate from the mortgage office on the trial of the rule.

The opinion of the Court was delivered by

WATKINS, J. On the 11th of April, 1885, in the matter of the partition of the real estate belonging to the successions of Madeline Azema Byrne and John Bligh Byrne, the lot of ground and three-story brick building, forming the southeast corner of Canal and Carondelet streets, were adjudicated to Jules Cassard, now deceased, and herein represented by Adrien, Augustus, Jr., and John E. Cassard, as his surviving legatees, and who have appeared and made themselves parties to this appeal.

The purchaser declined to pay the amount of his bid, and the plaintiffs in the partition suit took a rule on him, on the 1st of June, 1885, to show cause on the 5th of same month why he should not comply with the terms of sale and accept a title to the property.

To this rule the purchaser answers, and assigns various objections to the judgment in the partition suit, and the sale thereunder, which he avers to be sufficient to exonerate him from compliance with the adjudication made thereof.

They may be summarized thus:

1. The judgment is a nullity being by consent.
2. The share of the minor, Thomas Byrne Seller, was not sold according to law.
3. The terms of sale, as advertised, do not conform to the judgment.
4. The proceedings taken and evidence offered *after* the adjudication cannot bind the purchaser.
5. The property sold is not free from encumbrances, and certificate of mortgage was not read.
6. The property was not advertised for thirty clear days.
7. The proceedings of the family meeting recommending terms of sale of the interest of the minor, Thomas Byrne Seller, were not homologated until the property had been advertised for sale for several days.

Successions of Byrne.

We need not argue these objections separately:

The complaint made of these partition proceedings is that they were had by consent and not contradictorily, and hence same could not have the force and effect a judicial partition, and a sale effected thereunder would not confer a valid title on the adjudicatee.

The following facts and circumstances attracted our attention, viz: That the partition suit, though regularly fixed for trial on the 2d day of March, 1885, was taken up for trial and judgment *rendered* on the 26th of February previous, and by consent of parties.

The minor, Thomas Byrne Seller, having an interest in the property of *one-seventh of one-third of eleven-eighteenhs*, was represented by a curator *ad hoc*; all the other interested parties being majors, and present or represented.

The judgment was *signed* on the 6th of March, 1885, regulating and fixing the shares of the different heirs, ordering a partition of the property by licitation, and directing that a family meeting be convened for the purpose of advising and recommending the terms of sale of the interest of Thomas Byrne Seller, the only minor.

Upon the *same day* the family meeting was convened and recommended sale upon *like* terms as were provided in the judgment with reference to the majors.

These deliberations were not homologated by the judge until the 11th of March, 1885; but the sale was regularly advertised in the New Orleans Picayune and Bee, on the 8th of March previously, and continued until the 11th of April, 1885, the day of sale and adjudication.

On the 26th of May, 1885, plaintiff, in the partition suit, ruled the defendants to show cause on 29th of May following, why certain affidavits should not be filed on the record *nunc pro tunc* as of February 18, 1885, and also why the certified copy of an act of sale from Citizens' Bank to John Bligh Byrne should not be likewise filed *nunc pro tunc*.

Upon the same day, a like rule was taken to show cause why "a clerical error" in the order of the judge of the 11th of March, 1885, homologating the deliberations of the family meeting, mentioning the interest as that of *John Bligh Byrne* in lieu of that of *Thomas Byrne Seller*, should not be corrected.

Upon same date, a like rule was taken on same defendants to show cause why the testimony of certain experts, which through inadvertance of counsel, had not been filed at the time should not be filed *nunc pro tunc* as of the 18th of February, 1885.

On the 29th of May, these rules were called for trial and made absolute and thereupon this appeal was taken.

Successions of Byrne.

The nullities or irregularities of which respondent complains, are not absolute, but relative and could be cured by the prescription of five years or a monition.

I.

The fact that the partition suit was not tried on the particular day upon which same had been fixed for trial, is not such a consent as will vitiate it, notwithstanding one of the parties be a minor represented by a special tutor. 9 La. 276, Cooley vs. Seymour.

II.

The judgment and decree of the court directing that a family meeting be convened for the purpose of recommending the terms of sale, was regular and proper, and the officers and members thereof had the right to waive the three days delay provided by law, and convene immediately as they did.

"The family meeting may be held at an earlier day by consent of the members composing the family meeting." R. C. C. 285; 9 Ann. 560, Succession of Gasson vs. Palfrey, is quite a similar case.

III.

We do not attach any importance to the fact that the sale of the property was advertised *prior* to the homologation of the deliberations of the family meeting.

1st. Because the family meeting recommended *like* terms of sale for the interest of the *minor*, as those fixed by the judgment of the court respecting those of the *majors*.

2d. Because the month of March carries *thirty-one* days, and hence there were twenty clear days of that month remaining after the 11th thereof, when the judgment of homologation was signed; and there are ten clear days of April preceding the 11th thereof, the day of sale.

IV.

The fact that a certain affidavit, act of sale, and testimony of experts were permitted to be filed *nunc pro tunc* by the judge *a quo* did not vitiate the partition proceedings and judgment previously signed.

The judge was satisfied that same properly formed a part of the evidence adduced on the trial; and even if same had not been, in point of fact, so adduced, this Court would assume that his decree was based upon sufficient testimony until the contrary is legally established.

V.

The judge *a quo* has at all times the right, upon proper proceedings and proof, to correct the clerical errors that may occur in the interloc-

Successions of Byrne.

utory judgments he has rendered, or chambers orders he has granted, on giving due notice to interested parties. 3 N. S. 392; 6 Ann. 548.

We do not regard the alleged irregularities in the partition proceedings of such a character as to cast a cloud upon the title of Madeline and John Bligh Byrne in the sense of 9 Ann. 560, *Gasson vs. Palfrey*, and 16 Ann. 420, *Succession of Webber*, cited. Indeed, the respondent urges no complaint of *their* title at all; his complaints are of irregularities in the partition proceedings alone.

It was stated by counsel for successions in argument before the court, and not denied by counsel for the respondent, that the minor has attained his majority; and, hence, it will be necessary for him to accept the purchase price *pro tanto*, and that would estop any complaint on his part, and all of which are *personal* to himself.

It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided, annulled and reversed; and proceeding to render such judgment as should have been rendered by the judge *a quo*, it is ordered, adjudged and decreed that the rule taken in behalf of Charles H. Byrne on the purchaser, Jules Cassard, now deceased,—and herein represented by Adrien, Augustus J., and John E. Cassard, residuary legatees—requiring him to comply with the terms of the sale and adjudication of the property in controversy, and pay the purchase price in conformity with the terms specified in the judgment of the court and the recommendations of the family meeting, and accept title thereto, be made absolute, and that all cost of both courts be taxed against the respondents and appellees.

DISSENTING OPINION.

POCHÉ, J. I dissent from the opinion and decree of the majority in this case, and will file my reasons at some future time.

ON APPLICATION FOR REHEARING.

WATKINS, J. Upon a careful consideration of the application for rehearing presented by counsel for residuary legatees of the purchaser, we have reached the conclusion that our original opinion and decree should be so amended as to dispense the purchaser from the payment of all taxes due upon the property sold at the date of sale, April 11, 1885; and as thus amended, said opinion and decree remain undisturbed.

Poché, J. As I adhere to my dissent, I take no part in this decree.

 In the Matter of William Ross.

NO. 9758.

IN THE MATTER OF WILLIAM ROSS.

1. The Supreme Court has no original jurisdiction in *habeas corpus* cases, which do not come within the provisions of article 89 of the Constitution.
2. Under an application for a *certiorari*, a question of law involving the validity of the proceedings attacked, may be determined by the Supreme Court.
3. Proceedings under sec. 1768 R. S., relative to the confinement of lunatics and insane persons in the State insane asylum, are not violative of the constitutional provision, (art. 6) which requires "*due process of law*," previous to deprivation of life, liberty or property.
4. A judgment of interdiction is not a condition precedent essentially required for proceedings under sec. 1768 R. S.

APPPLICATION for Habeas Corpus.

O'Sullivan & Blake for the Relator.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a *habeas corpus* and for a *certiorari*.

The complaint of the petitioner is, that he has been proceeded against, under sec. 1768, R. S., and that the district judge has illegally ordered him to be confined in the State Insane Asylum.

He charges that he has been deprived of his liberty without due process of law and that a judgment of interdiction is a condition precedent *sine qua non*, for such incarceration.

It is settled that this Court has no jurisdiction over the application as far as it prays for a *habeas corpus*. Art. Const. 89; 32 Ann. 1225, since affirmed.

It appears from the petition that the proceedings were conducted in strict accord with the requirements of sec. 1768, R. S.

Whether the *evidence* on which the district judge acted, was or not sufficient to justify the issuing of the warrant, is a question with which this Court has no concern. The application for a *certiorari* contemplates solely the determination of the question whether the proceedings in point of form and not of substance have been carried on according to legal requirements.

As the provisions of the Statute averred to have been observed, the application cannot be made to rest on the ground of non-compliance with the same.

But it is contended that the judge had no right to hear and determine *at chambers* and that the trial and decision of the matters submitted were without "*due process of law*."

In the Matter of William Ross.

The Statute distinctly provides, that the person, represented as a lunatic, shall be brought before the judge *at chambers* and that if, after inquiry, the judge finds that such person ought to be sent to the insane asylum, he shall make out his warrant addressed to the sheriff, directing him to convey such person to said *asylum*.

The law giver has thus wisely provided for the protection of both such person and society; for cases may and do arise in which a most summary disposition should be made of those unfortunate persons, whose mental derangement may be such as to prove a just cause of alarm to individuals and to the public at large.

By the words "*due process of law*," found in the organic law is meant: that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society. Dartmouth College case, 4 Wheat. 519.

By the law of the land is intended a general law; a law which hears before it condemns, which proceeds upon inquiry and renders judgment only after trial. *Ib.*

The right to due process of law, does not imply that, in every case, the parties interested, shall have a *hearing in court*. Cooley on Const. Lim, 355, note and authorities there cited; also 12 N. Y. 209; 6 Cold. 233; 2 Tex. 251; 4 Wheat. 235; 32 Ann. 1256; also Cooley, Const. Lim. p. 441, (351) notes.

Provision having been fully made for the hearing and determining of the matter under sec. 1768, R. S., and the hearing and determining having taken place in every respect in point of form, as required by the Statute, the petitioner cannot be listened to complain that he has been deprived of his liberty *without due process of law*.

The averment in the petition that the action of the district judge is not reviewable by appeal, is not at issue and besides, is not presented in the form in which the question might have been considered.

Although we have no jurisdiction to pass upon the sufficiency of the *proof* on which the district judge acted, still, as the question submitted is one of law affecting the regularity of the proceedings, we think we are authorized to consider and determine, whether a judgment of interdiction is or not required as a condition precedent *sine qua non* for the exercise of the powers delegated to the district judge under sec. 1768, R. S.

The Statute does not and could not require it. If such judgment existed, it would not, of itself, authorize the commitment of the party, in the State Insane Asylum.

The interdiction laws apply to persons mentally debilitated, whether

from senility, idiocy or other cause of unsoundness of mind—who own property, which they are unable to administer and have no necessary reference to persons in necessitous circumstances, while sec. 1768, R. S. relates to impecunious “lunatics and insane persons.”

The proceedings under that section are quite different from those prescribed by the Code for the interdiction of persons. They are carried on in the name of the State for the protection of society summarily and *ex parte*. The commitment and keeping of the person sent to the State Asylum there to remain are at public expense.

In the case of an interdiction, the curator may, with the authority of the judge, have the interdicted attended either in his own home or placed in a bettering house and confined for safe custody. R. C. C. 417; but could not place him, as a matter of right and free of charge, in the State Insane Asylum.

As a judgment of interdiction does not then necessarily prove lunacy, it is not therefore a condition precedent, *sine qua non*, a foundation for proceedings and the issuing of a warrant under sec. 1768, R. S.

It is therefore ordered that the application be dismissed with costs.

No. 9673.

R. L. COCHRAN VS. MRS. E. A. VIOLET ET AL.

Exceptions which affect the very foundation of the suit should be decided *in limine*, and should not be referred to the merits.

A demand for the payment of the price of property, which is in fact an action for the specific performance of a contract of sale, is inconsistent with a demand for the rescission of the sale for non-payment of the price, and on a timely exception by defendant, plaintiff should be required to elect between the two inconsistent demands.

A final judgment rejecting, on the ground of prescription of four years, an action by a minor against his tutor for acts of the tutorship, cannot sustain the plea of *res adjudicata* to a subsequent action between the same parties for an account of the usufruct by the surviving parent of the property of his child, after the termination of the usufruct.

The legal effects of a purchase by the surviving father or mother of the community property at a sale thereof at public auction to pay debts, are not the same as a purchase by the same party of said community property at the price of estimation, on the advice of a family meeting, under Article 343, C. C. Under the latter sale, the property remains mortgaged to secure the price; while under the former, no such mortgage is recognized by law. The only mortgage is in favor of minors on account of the tutorship, but not for the usufruct.

The action for account of the usufruct is barred by the prescription of ten years only, to be computed from the termination of the usufruct.

38	525
115	102
38	525
123	818

Cochran vs. Violet et al.

A PPEAL from the Ninth District Court, Parish of Tensas.
Newell, Judge ad hoc.

Wade R. Young for Plaintiff and Appellee.

Percy Roberts and Steele & Garrett for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff sues his mother for his share in the price of adjudication to her of the property hitherto belonging to the community between herself and his deceased father, of which she had had the usufruct until she contracted a second marriage in October, 1881, and for a recognition of a legal mortgage to secure the payment of the sum due to him.

As there were three heirs, issue of the marriage, he fixes his share at one-sixth of the price of adjudication, after deduction of the debts of the community paid by the widow and usufructuary.

He prays in the alternative for an account of administration of the succession and community of his deceased father, so as to judicially settle the amount accruing to him. And he finally prayed for the rescission of the sale of the community property in default of payment of his share of the purchase price, and to be recognized as the owner of one-sixth of said property.

His suit was met by two exceptions:

1st. That his petition contained inconsistent demands, and that he should be compelled to elect between his demand for payment of the balance due him and his prayer for rescission of the sale.

2d. In her second exception defendant urged numerous points, the principal of which was the plea of *res adjudicata*, predicated on the judgment rendered by this Court in a suit between the same parties, reported in 37 Ann. 221; and denying plaintiff's right to demand the rescission of the adjudication to his mother generally and also in the absence of an allegation of a previous tender of the parties of the price admitted to have been paid; and she finally pleaded the prescription of four, five and ten years.

In keeping with the irregular but prevailing practice which we recently took occasion to discountenance, the district judge referred all these exceptions to the merits, when the ends of justice required a decision of several of them at least *in limine*. *A. A. Farmer vs. W. C. Hafley*, 38 Ann. (not yet reported.)

For answer, the defendant denied any indebtedness to plaintiff, averring specially that, owing to the value of the slaves included in the

adjudication, and to the debts of the community which she had paid, she was fully discharged in law for the entire purchase price of the community property and for her usufruct thereof.

The judgment below was mainly in favor of plaintiff, but it rejected his prayer for recognition of a legal mortgage. The trial judge found the sum of \$16,114 28 due to plaintiff as his share in the community property subjected to the usufruct of the surviving widow, but he allowed her the privilege, by further accounting within a reasonable time, to reduce the balance thus found against her.

The defendant appeals, and plaintiff moves for an amendment of the judgment so as to finally adjust the specific amount due him, without any further accounting by the widow in usufruct, and to obtain recognition of his legal mortgage.

After this unavoidably long statement of the very complicated pleadings and of the complex judgment which we are called to review, we now reach the examination of the merits of the controversy.

1st. A demand for the purchase price of property, which is in the nature of a suit for specific performance of a contract of sale, is certainly inconsistent with a prayer for the rescission of that very sale. Hence, the lower court was in error in refusing to compel plaintiff to elect under the first exception urged by the defendant.

But as an end must be reached in this apparently interminable litigation, we shall not correct this error by remanding the cause.

In her second exception, defendant puts directly at issue the right of plaintiff to sue for the rescission of the sale under any circumstances; and under that exception we have the means of setting that question at rest, and of thus eliminating it from further consideration in the progress of the cause.

From the record it appears that the purchase of the community property in this case did not result from an adjudication of the same to the widow at the price of estimation on the recommendation of a family meeting, under the provisions of Article 343 of the Civil Code, but that it was operated by means of a public sale by the sheriff, ordered by the court at the instance of the surviving widow and testamentary executrix, in order to pay the debts of the succession and community, at which sale the widow was empowered to purchase under the provisions of Article 1146 of the Code.

Under the effect of such a sale, the balance of the purchase price which accrued to her children after the payment of the community debts, which the purchasing widow has the right to retain in her hands, does not legally represent any portion of the purchase price, and is not

Cochran vs. Violet et al.

retained by her as purchaser, but it passes into her hands as funds belonging to her children, of which she has the legal usufruct. In such a transaction she deals in a double capacity; as a purchaser she pays to herself as usufructuary the shares of the purchase price accruing to her children. Hence, she ceases to be a debtor for the purchase price, but under her rights of usufruct she becomes a debtor to her children for the shares accruing to them, to be accounted for at the termination of the usufruct. 24 Ann. 79, Gaiennié vs. Gaiennié.

It is therefore clear that her children are not her creditors as vendors, and that she is not their debtor as vendee; hence, they are not in a condition to sue for a rescission of the sale. Wade vs. Murray, 35 Ann. 546.

We therefore conclude that the exception to plaintiff's right to claim the rescission was well taken, and hence that part of his demand is fully disposed of.

We now take up the plea of *res adjudicata*, which rests on our judgment in the case reported in the 37th Annual of our reports, p. 221.

It is true, as argued by defendant, that the cause of action in the present case, and in that suit, arises from the same transaction: the purchase of the community property by the surviving wife; but the nature of the demand is not the same in the two cases. In the former case the contest was for an account of tutorship, and we rejected plaintiff's demand for such an account on the ground that his right thereto was barred by the prescription of four years; holding at the same time that certain judgments purporting to establish the amount of the widow's liability to her children growing out of her purchase of the community property, and which had been set up as means of interrupting prescription, were not moneyed or executory judgments having the effect of the thing adjudged between the parties, but as affording merely *prima facie* proof of indebtedness by the tutor to his ward.

In the present case we are called on to enforce the alleged rights of plaintiff to an account from his mother for her usufruct of his property, consisting of his share in the proceeds of the sale of the community property purchased by her, on the ground that the usufruct was terminated by her second marriage in October, 1881.

It therefore appears that our judgment in that case does not affect the rights which plaintiff seeks to enforce in the present case, and hence the plea of *res adjudicata* cannot be maintained in its entire scope.

It is good, however, as to the nature and effect of the various judgments relied on by plaintiff in both cases as the legal foundation determining the precise amount due to him by his mother, on account of her

tutorship in the former suit and on account of her usufruct in the present litigation. We shall therefore treat them here as we did there, as *prima facie* proofs of the liability which they purported to establish—and shall use them as the basis of the settlement which we propose to make between the parties in this controversy.

We now reach the plea of prescription of four, five and ten years.

Having already distinguished the issue in this case from the demand for an account of tutorship, it follows that the prescription of four years, which under the law is a bar to the action of minors against their tutors for the acts of tutorship, does not apply to the action for an account of usufruct. C. C. Art. 362; 37 Ann. 223, Cochran vs. Violet; Bedell vs. Calder, 37 Ann. 805.

Our Code does not in terms fix the kind of prescription which can be invoked in bar of the demand for an account from the usufructuary of the property or things which he has held in usufruct. Hence, we have no settled lights to guide us as to which of the five or ten years prescription would apply in such cases. But a mature consideration of the articles of the Code on the subject has led us to the conclusion that such an action is a personal action, not enumerated in any of the articles treating of the prescription of either one, three or five years, and that it must be governed by Article 3544 of the Code, which reads: "In general, all personal actions, except those before enumerated, are prescribed by ten years."

The next inquiry must be directed to ascertain the time at which prescription begins to run. It is clear that it cannot run against minors; hence, under that principle, it did not begin to run before the 23d of October, 1875, at which time plaintiff became of age, and this suit was brought on the 4th of April, 1885, therefore within the ten years.

But in actions for account of the usufruct, the correct rule is to date prescription from the time at which the right to demand an account accrued, and in logic and reason, as well as in law, that right accrues only at the termination of the usufruct, just as clearly as prescription on a promissory note must be computed only from the date of its maturity, and not from the date of its execution. No one can be debarred by prescription from the exercise of any right, to be computed from a time at which the right did not exist. The doctrine of "*non contra valentem*," etc., most unequivocally applies to such actions. 36 Ann. 412, McKnight vs. Calhoun; 32 Ann. 1041, Succession of S. M. Farmer.

Defendant contracted her second marriage on the 15th of October, 1881, at which time her usufruct expired, and that is the date from which prescription must be computed against plaintiff's demand for an

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account of the usufruct of his mother. Conceding, therefore, that the prescription of five years could apply in such a case, it is apparent that the plea is not good, as this suit was brought in April, 1885.

Having recognized the right of plaintiff to recover judgment for so much of his funds as had been subject to his mother's usufruct, we must now establish the state of her accounts with him.

But before entering into the facts, we must meet two legal questions which we find at the threshold of the investigation.

1st. The right granted by the judgment to the defendant to present an additional account of the matters connected with her usufruct, is, in our opinion, not sanctioned by law, and hence it must be denied.

Even in giving full effect to the prayer in plaintiff's petition for an account of defendant's administration of his share of the proceeds of which she had the usufruct, we find that she was allowed every opportunity on the trial of the case to give such an account, and that she did present all the elements within her reach toward a full accounting. Even-handed justice to all parties requires that the accounts should now be finally balanced, and we therefore conclude that this feature of the judgment below is erroneous.

2d. Can the defendant be allowed to deduct from the gross proceeds of the sale of the community property the estimated value of the slaves which then formed part thereof?

Without entering into a discussion of the alleged nullity of obligations contracted for the purchase price of slaves, by reason of their subsequent emancipation, we find in the record other and abundant reasons to defeat defendant's proposition on that score. We showed in another part of this opinion that under the operation of law, the surviving widow, being entitled to retain in her hands all that accrued out of the sale and to her children, is legally held as having, as purchaser, fully complied with her bid, and to be therefore and thereby entirely discharged from all her obligations as a vendee; and that her indebtedness, if any, to her children, after paying the community debts, arose from a new obligation, the relation of usufructuary, it follows that she cannot be heard now to urge any defense in mitigation of her obligations under the purchase. She has in law paid for the slaves which she bought at that sale; the debt which she now owes does not arise out of her purchase, but out of her usufruct. Hence, she cannot be allowed the credit of \$76,000 which she sets up as the estimated value of the slaves included in her purchase of the 9th of April, 1860. That rule is as just as it is inflexible. On the question of plaintiff's demand for a rescission of the sale, it defeated him because he was not a ven-

dor seeking to enforce claims against his vendee. On this point, and for the same reasons, it must shield him against the pretensions of the defendant, who now erroneously assumes the attitude of a vendee.

The judgment invoked by plaintiff as settling the amount of his mother's indebtedness to him, shows that the amount of the adjudication was \$156,470, and that up to that date (1867) she had paid community debts up to the sum of \$59,783.25, leaving a balance of \$96,687, of which he claims one-third of one-half, say \$16,114. * * *

But in the course of the trial, defendant established her right to additional credits which must be allowed her, and which are not seriously controverted.

She is entitled to be credited for the sum of \$20,000, as a donation from her mother, which sum was used in paying part of the purchase price of the plantation by her first husband; and to the further credit of \$20,000, amount of a debt of the community which she paid; and for an additional sum of \$6,000, paid by her on what is known in the account as the "Dunbar mortgage."

She claims \$10,000 for that item; it was the amount of the debt, but she compromised it for \$6,000; she paid nothing more, she can claim nothing more.

In her answer she claims to have paid four notes of \$17,500 each, or \$70,000, secured by vendor's privilege on the plantation which was adjudicated to her at the succession sale. She has credit for two of the notes in the judgment of 1867, as included in the credit of \$59,783.25, and from her own testimony it appears that she has thus far paid \$20,000 on the two other notes, for which we have already allowed her credit.

This leaves to her debit the sum of \$50,686.75, one-sixth of which accrues to plaintiff, thus entitling him to a judgment against her in the sum of \$8,447.75.

The next and last question is to ascertain whether he is entitled to the recognition of a legal mortgage to secure that balance.

His counsel bases his right thereto on the provisions of Article 343 of the Civil Code, which regulates the mode of effecting, and the legal mortgage resulting from, the adjudication of the community property in which minors have an interest, to the surviving father or mother, and on Article 3317, which recognizes the same mortgage created by the other article.

But from the recitals already made in this opinion, it appears that the sale in this case was not made under the provisions of Article 343 of the Civil Code, but under the provisions of Articles 930, 931 and 992

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of the Code of Practice, touching authorized sales of succession property to pay debts.

There is a vast difference between the mode of making and the effects of such sales.

From the very nature of the sale made under Article 348, there can be no competition and no bids; no other person but the surviving father or mother can there become an adjudicatee; and hence, the effects of that sale are peculiar, and are specially provided for by the law; and one of those effects is that "the property so adjudicated shall remain specially mortgaged for the security of the payment of the price of the adjudication and the interest thereon."

Now, no such mortgage is, or could be, created by law, as resulting from an adjudication under a sale to pay debts. One of the very objects of that sale is to release, instead of creating, mortgages. At such a sale, which is made at public auction, competition is of the very essence of the proceeding, and any person, be it the surviving father or mother, or anybody else, making the highest bid, can become the purchaser. If it be a stranger, the property goes to his hands free of all encumbrances on his paying the price, and the proceeds go into the hands of the succession representative. If the surviving father or mother is the purchaser, and is also the succession representative, the payment is made by operation of law, as twice explained herein above; and no mortgage is provided for concerning the payment of the price. If the surviving parent is the tutor of the minors, the latter have a legal mortgage on the former's property on account of the tutorship, but not on account of the usufruct, which is regulated by other and different laws. *Gaiennié vs. Gaiennié*, 24 Ann. 79.

Our laws on the subject of usufructs do not provide for a mortgage on the property of the usufructuary in favor of the owner of the things, money or other property subject to the usufruct. Hence, courts are powerless to recognize or enforce any.

A bond is the only security which the law exacts of the usufructuary, and the father and mother are relieved even from that obligation. C. Art. 560.

Plaintiff's claim of a legal mortgage must therefore be rejected.

We note that the judgment below is silent on the subject of interest. Plaintiff is entitled to legal interest from the termination of the usufruct, and under his prayer for amendment he asks for and he must be allowed the same.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended in the following particulars:

State ex rel. Luminais vs. Tax Collector.

1st. In allowing the right to defendant to further reduce plaintiff's claim by further accounting, which right is hereby denied, so as to make the judgment herein absolute and final.

2d. By allowing plaintiff legal interest on his claim from the 15th of October, 1881.

3d. By reducing plaintiff's claim and fixing it at the sum of \$8,447.75 (eight thousand four hundred and forty-seven dollars and seventy-five cents).

And that, as thus amended, said judgment be affirmed, at the costs of defendants in both courts.

No. 9480.

THE STATE EX REL. E. A. LUMINAIS VS. J. D. HOUSTON, TAX
COLLECTOR.

The State Tax Collector cannot be compelled by a mandamus to receive from a purchaser of land forfeited to the State, and again offered for sale in payment of the price bid, where the property is burdened with back taxes due the State and city, three per cent Louisiana bonds, known as "Baby Bonds," though the purchaser has paid the amount owing for costs, fees, commissions, etc., in cash.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

E. L. Bemiss for the Relator and Appellant.

W. H. Rogers, City Attorney, and *Blanc & Butler* for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. The relator became the purchaser of certain property in the city of New Orleans, described in the petition, which had been forfeited to the State for non-payment of taxes and sold again under Act 82 of 1884, and adjudicated to the relator for \$2550.

The amount of charges, fees, costs, etc, aggregating \$175, was paid in cash, and for the balance (\$2375) he tendered in payment Louisiana 3 per cent bonds, commonly known as "Baby Bonds," which tender was refused, and thereupon a mandamus was applied for to compel the officer to receive said bonds in satisfaction of said balance, which is the proceeding now before us.

The tax collector and the city of New Orleans, also made party, for return to the alternative writ, answered that the said balance of the relator's bid could not be entirely paid in "Baby Bonds," but must be paid in cash or in such State and city obligations as would enable the

State ex rel. Luminaja vs. Tax Collector.

tax collector to make a distribution of the adjudication proportionately between the State and city, according to the amount of their respective claims against the property, that is, a portion of the sum derived from the sale going to the General Fund might be paid in "Baby Bonds," or in valid outstanding Auditor's warrants; the portion due the "Interest Fund" in matured coupons of interests; the portion due the "Levee Fund" in warrants of the levee company.

The relator relies on the 2d section of Act 82 of 1884 to support his contention.

The main object of this act, as we gather from its title, was "to provide for the sale of property bid in for and adjudicated to the State, and of property on which taxes are due the State prior to December 31, 1879."

This section (2) reads:

"That said property shall be adjudicated and sold to the last and highest bidder for cash. All bids may be paid in any lawful money of the United States, or in any warrant, bond or other obligation which, by the laws and Constitution of the State, is made receivable for taxes and licenses due the State prior to January 1, 1879, except the costs incurred in adjudications to the State and in sales under this act, and the commissions and fees established by this act, which shall be paid by preference and in current money."

This section quoted must be considered in connection with article 1 of the miscellaneous ordinances of the Constitutional Convention which explains its meaning.

The first paragraph of that article provides "that taxes and licenses due the State prior to January 1, 1879, shall be paid as follows: That portion of said taxes and licenses due the General Fund, except as hereinafter provided, in any valid Auditor's warrants, outstanding at the date of the adoption of this Constitution," except certain warrants mentioned and not necessary here to enumerate.

It next provides that the holders of said warrants may fund them in the bonds above referred to, known as stated, as "Baby Bonds," and further provides that these bonds shall be receivable for amounts due the State for the redemption or purchase of property which has been forfeited or sold to the State for delinquent taxes and licenses of any of the years named in the article.

The second clause of the same article further provides that the portion of said taxes and licenses due the Interest Fund subsequent to 1874, may be paid in any matured interest coupons issued by the State since said date; and the third paragraph of the article directs that the

portion of said taxes due the Levee Fund from 1871 to 1876 inclusive, can be paid in any valid warrants issued by the levee company and indorsed by the Auditor and Treasurer in the manner therein prescribed.

In the last paragraph of the article it is directed that all taxes and licenses due any parish or municipal corporation prior to January 1, 1879, can be paid in valid warrants, scrip or floating indebtedness of said parish or municipal corporation, except judgments.

It is apparent from a reading of this ordinance and a critical examination of its several provisions that all of the then back taxes which, under the law, pertained to the General Fund might be paid by the obligations of the State described in the first clause of the article above recited and subsequently represented by "Baby Bonds," but that the portions of said taxes legally appropriated to the Interest Fund and the Levee Fund, and the city taxes could not be paid by these bonds, whether these taxes were collected directly from the defaulting taxpayers or derived from the sales of lands previously forfeited to the State or otherwise. The second section of Act 81 of 1881, so far it may be construed as conflicting with these constitutional requirements, of course would be without force or legal effect.

The record shows that the larger portion of the back taxes against the property in question, was due the city, and the contention of the relator is that these city taxes even could be paid in "Baby Bonds." The fifth section of the act referred to (82 of 1884) reads:

"If the price paid for said property is not sufficient to pay in full all costs and charges herein set forth, and the taxes due prior to December 31, 1879, with interest, costs and charges thereon due by said property, then the price, after the payment of the costs and charges herein provided to be paid first, shall be divided and distributed proportionately to the payment of all unpaid State, city, parish or municipal taxes, interest, costs and charges due on or by the property prior to December 31, 1869."

It strikes us as a strange proposition that the taxes and licenses due the city could be paid by these bonds, which, as shown, represent exclusively a debt owing to the State, and particularly in view of the clause in the constitutional ordinance quoted, requiring them to be paid in the obligations of the city.

The proposition has no support whatever in the law.

From no point of view can we discover that the relator is entitled to the relief he asks at our hands.

Judgment affirmed.

State vs. Tucker.

No. 9697.

THE STATE OF LOUISIANA VS. JOE TUCKER.

When a bill of exceptions recites the facts which the counsel had contended before the jury, had been established by the evidence, and refers to the evidence in support thereof, and asks for charges applicable to the state of facts recited, the judge's refusal to give the charges on the ground that they are inapplicable to the case, is error, unless the judge states that there was no evidence in the case supporting or tending to support the contentions of counsel.

It is the duty of the judge to give full instructions to the jury covering the entire law of the case as respects all the facts proved or claimed by counsel to be proved, provided such claim is supported by any evidence.

Authorities reviewed and criticised.

The functions of the judge in such case, is different from that involved in rulings on admissibility of testimony, when he is entitled to weigh the testimony as to proof of necessary foundation, as a matter involving the exercise of his own discretion.

A PPEAL from the Third District Court, Parish of Union.
Young, J.

M. J. Cunningham, Attorney General, and *E. H. McClendon*, District Attorney, for the State, Appellee.

G. A. Killgore and *Jas. A. Ramsey* for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The errors charged are presented on two bills of exceptions.

As the first bill raises important principles of practice dependent in great measure upon its recitals, we shall transcribe it in full, notwithstanding its length.

"Be it remembered that, upon the trial of the above entitled case during the argument, defendant's counsel contended before the jury that it had been proved on the trial by the testimony of the witness Alex. Bryant, who was the injured party, that he, the said witness Bryant, saw defendant armed with a gun in his (Bryant's) yard near his dwelling house, in the night time, before any of the older members of his family had gone to bed, and that he, the said Bryant, saw the defendant approach the house and come close to it three different times, and at one of those times the defendant come up to the door of the house and placed his hand against it, but made no effort to open it, and at each time the defendant went away without making any effort to break into the house or do any violence to any one; and that on the defendant approaching the house the fourth time, still having his gun

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State vs. Tucker.

in his hand, and that the said witness, Bryant, without saying anything whatever to the defendant, fired upon him, striking him with several shot, some buck shot and some small shot, and that at the firing of the gun, by Bryant, the defendant cried out "*Oh! Lordie,*" and immediately began to run away toward his (defendant's) house without making any effort at that time to return the fire or shoot at said Bryant; that soon after the defendant began to retreat, the said Bryant began to follow him up, and fire upon him; that the effect of the shot received by the defendant disabled him so that he could not travel without something to support him; that the witness Bryant and his wife both followed up defendant, and fired upon him and that at or about the third time, the witness Bryant shot at defendant, and at or about the first time his wife had shot at defendant, defendant having retreated about thirty yards away and got behind some beegums, the defendant fired upon the witness Bryant, who was then nine steps from him and still approaching the defendant, the shot from defendant's gun taking effect in the witness Bryant's thigh and hip; and that at the moment defendant's gun fired, the said witness Bryant fell and the defendant then hobbled away leaning on his double-barrelled gun for a support as he went. Both of defendant's counsel contended before the jury that all of the above facts had been proved by the State's witnesses before the jury, and after the judge had charged the jury and when he asked defendant's counsel if they had any special charge, the defendant asked the court to charge the jury as follows, to wit:

1st. "A man has no right, under the law, to violently assault and shoot at another simply because he has found the other upon his premises in the night time."

2d. "A man has a right to order another to leave his house or premises, but has no right, even when such order is given, to put him out by force until gentler means fail, and if the owner attempts to use violence in the outset and is slain, it will not be murder in the slayer if there be no previous malice."

3d. "A man has a right to drive a party away from his premises who is there without his authority, and if the intruder should start away immediately in good faith, the owner would have no right to follow him up; but if he should follow him up, and while still retreating in good faith, it should become absolutely necessary for him to fell his pursuer, in order to save his own life, he is justifiable."

And the court refused to give each and every one of said special charges to the jury, stating at the time and in the presence and hear-

State vs. Tucker.

ing of the jury that they, the special charges, were not applicable to the facts of the case, and for that reason he refused to give them in charge to the jury; and the defendant, by counsel, retained a bill of exception both to the ruling of the court in refusing to give said special charge in charge to the jury and also to his statement in the presence and hearing of the jury that the said charges were not applicable to the facts of the case, and defendant tenders this, his bill of exception, to be signed by the judge and filed in the case which is accordingly done.

I did not give the first charge, because I did not deem it at all applicable to the facts. I refused to give the third charge for the same reason; and I refused to give the second because as too erroneously stated if applicable, and as not applicable. I do not assent by any means to the facts as recollected by counsel, as stated above.

Signed in open court, this February 12th, 1886.

It will be observed that the bill raises two objections to the action of the judge, viz:

1st. In stating in *the presence of the jury*, that the charges were not applicable to the facts of the case, which is complained of as an expression of the judge's opinion as to what the facts were.

2d. To the ruling itself and the ground thereof.

As to the first, it not appearing from the bill, that the charges themselves were read in the hearing of the jury, the statement of the judge that they were not applicable was, so far as the jury was concerned, entirely insignificant.

The second objection, however, is very serious.

The bill is carefully drawn. It recites with precision and distinctness, the facts which, the counsel contend before the jury, had been established by the evidence.

If the facts were as recited in the bill, or if there was evidence in the case supporting or tending to support the contentions of counsel, it is obvious that the charges asked were not inapplicable to the case.

The bill is drawn in accordance with the suggestions made by this Court in Stouderman's case, 6 Ann. 286, where it was said:

"The charge required might not have had a precise application to the case. It was the duty of the counsel to have shown by his bill of exceptions that he asked for instructions to the jury that would have had a material bearing on his case, and that he did not require the judge to charge the jury upon abstract principles of law. * * * If the counsel of the accused had distinctly stated the facts he contended the evidence had established, and then required the court to charge the

State vs. Tucker.

jury that if they believed those facts, etc., it would have been the duty of the judge to have instructed," etc.

So it is held by other authorities that "it is the duty of the judge to give full instructions to the jury, covering the entire law of the case, as respects all the facts proved or claimed by the respective counsel to be proved," and that though "if no evidence was given upon a point, the judge is not under obligation to charge the jury respecting it, though requested," yet "as far as the evidence goes, he should give any pertinent instruction asked for, conformable to the law." 1 Bishop Cr. Proc. § 980, citing *Hinch vs. State*, 25 Ga. 699; *Longnecker vs. State*, 22 Ind. 247; *State vs. McDonnell*, 32 Vt. 491; *McCay vs. State*, 15 Ga. 205; *Drake vs. Curtis*, 1 Cush. 395; *State vs. Wilson*, 2 Scam. 225; *Davis vs. State*, 10 Ga. 101.

In *Riculf's case*, 35 Ann. 775, we said: "In *Stouderman's case*, it was said to be the duty of the prisoner's counsel to have shown by his bill of exceptions that he asked for instructions to the jury that would have had a material bearing on the case, and that he did not require the court to charge upon abstract principles of law. * * * It is not possible for this Court to determine their applicability unless the bill of exceptions informs us of the circumstances to which the law is to be applied."

In *Daly's case*, 37 Ann. 576, we said: "The bill contains no averment that proof had been made of the fact embodied in the proposed charge. * * * Hence, under the circumstances, the judge in giving the charge as suggested would simply have instructed the jury on an abstract principle of law."

In *Melton's case*, 37 Ann. 82, the judge's refusal to give a charge because inapplicable was sustained, on the judge's statement that "it referred to facts of which there was no evidence whatever."

In *Ford's case*, 37 Ann. 464, it does not appear that the bills contained the necessary recitals, and the judge stated "that the principles announced in the respective charges are foreign to the nature of the case on trial, and have no application to or connection with the facts which had been established by the evidence."

Other cases touching on the point will be found to rest on like foundations, and do not cover a case like the present.

Here the bill recites the facts which the counsel contended had been established by the evidence and refers to the testimony supporting the same, and asks for charges certainly applicable to such facts. If the

judge had distinctly negatived these statements and, as in Melton's case, had stated that they were supported "by no evidence whatever," we should have been bound to take his statement against that of counsel, and to have sustained his ruling. But his mere dictum, "I do not assent by any means to the facts as recollected by counsel," does not assert or necessarily imply that there was no evidence supporting or tending to support the contentions of counsel so explicitly stated in the bill, and does not, therefore, sustain his refusal to give the charges on the ground of inapplicability. In this matter it was not the function of the judge to pass upon the weight or value of the evidence which had gone to the jury and was subject to their exclusive cognizance.

There is a class of cases to which a different rule applies, viz: those involving rulings of the judge, in the course of the trial, upon the admissibility of evidence, such as whether the proper foundation had been laid for evidence of character, threats, etc. In such cases, it is the necessary function of the judge, for the guidance of his own action in a matter addressed exclusively to his own discretion, to determine whether the foundation has been laid, and, for that purpose, to consider and weigh the evidence in support thereof. Hence, we have held that, as the foundation must rest on *proof* of the antecedent conditions required, it is in the sound discretion of the judge to determine whether such proof has been made. State vs. Labuzan, 37 Ann. 491; State vs. Janvier, *Id.* 645; State vs. Ford, *Id.* 461.

But when the evidence is closed and the case has gone to the jury, it is the latter's exclusive province to consider all evidence before it, and to determine its weight and credibility; and it is the judge's duty to charge the law applicable to any state of facts supported by evidence, whether he believes or attaches value to such evidence or not.

Neither the judge nor the counsel for the State question the correctness, in point of law, of the first and third charges asked, and the judge should have given them.

The second charge is taken *verbatim* from the text of Wharton, and is supported by authorities. Wharton Cr. L. sec. 1025, citing McCoy vs. State, 3 Eng. 451; State vs. Sloan, 47 Mo. 604; Greschia vs. State, 53 Ill. 295.

It may be remarked that all three of the charges would suffer modification in their application to *felonious* assaults or intrusions on premises; but their terms exclude such application and, as asked and as referring to the facts stated in the bill, there is no sound objection to them.

The second bill of exceptions is as follows:

"Be it remembered that, upon the trial of the above entitled case, after the court had charged the jury, he asked the district attorney if he had any special charge which he desired given; and the district attorney requested the court to charge the jury as follows, to wit: 'That he who provokes a difficulty cannot avail himself of the plea of self-defense as a justification for shooting the person whom he has provoked into the difficulty.' And the court gave said special charge as requested, and the counsel for the defendant excepted to that special charge as given by the judge and retained this his bill of exception. Then counsel for defendant asked the court to charge the jury as follows, to wit: 'That when two parties have had a difficulty, if one of them quits the combat and retreats in good faith and is pursued by the other, who continues to follow him up with violence and hostility, and should it become absolutely necessary for the one retreating to turn and fell his pursuer in order to save his own life, he is justifiable whether he was the aggressor in the beginning of the difficulty or not.' And the court refused to give said special charge in charge to the jury and stated as a reason therefor, in the presence and hearing of the jury, that the special charge was not applicable to the facts proven in the case, and defendant, by counsel, excepted both to the ruling of the court refusing to give said special charge and to his stating in the presence and hearing of the jury that the special charge was not applicable to the facts in the case; and defendant tenders this, his bill of exception, to be signed by the judge after giving his reasons for said ruling."

"The charge asked for by defendant as above stated, was read by the counsel in the presence of the jury, and in giving the only reason which could be given, I stated it was not applicable, as in my opinion it clearly was not, although proper when the facts justified it. The charge asked for by the district attorney and given as excepted to above, I believed applicable to the facts as given. In refusing the charge requested by defendant's counsel I abstained from commenting on the facts or even alluding to them except that the charge requested was not applicable."

We think there is no ground for plaintiff's complaint that the judge stated the reason of his ruling in presence of the jury. If counsel saw fit to read his requested charge in presence of the jury and to ask the judge's ruling thereon, he cannot complain that it was then and there given.

If this bill stood by itself, containing no recitals of facts or contentions, the judge's refusal on the ground that the charge asked was inapplicable would not be reviewed by us.

State vs. Balize.

But, as the case must be remanded, we would state that the charge asked by defendant is correct and is a proper exception to, and qualification of, the correct general principle embodied in the special charge before given on request of the district attorney.

We would say, in conclusion, that the learned judge has, no doubt, been misled in this matter by some too general *dicta* contained in opinions of this Court. But we feel bound to avail ourselves of the opportunity to restrain their application within proper limits.

It is, therefore, ordered that the verdict and sentence appealed from be annulled and set aside, and that the case be remanded for further proceedings according to law.

Bermudez, C. J. and Poché, J. concur in the decree.

No. 9658.

THE STATE OF LOUISIANA VS. ALEXANDER BALIZE.

1. Where, in country cases, appeals are taken before judgments are signed, they may be considered as taken *nunc pro tunc*. 12 Ann. 596, State vs. McKeown.
2. Appeals prosecuted from judgments on forfeited bonds are treated as taken in "criminal matters" in the sense of Act 30 of 1878. State vs. Cassidy, 7 Ann. 276; State vs. Williams, 37 Ann. 200.
3. When the return day is fixed by the court on its own motion and not at the suggestion of appellant's counsel, though in direct violation of Act 30 of 1878, the fault is not imputable to the appellant and he cannot be prejudiced thereby.
4. An appearance bond taken by the sheriff, without an order of court admitting the accused to bail, or fixing the amount of bond is null. 6 Ann. 700, State vs. Longineau; 19 Ann. 224, State vs. Cravey; 12 Ann. 349, State vs. Smith; 10 Ann. 532, State vs. Gilbert.
5. When the record enables the court to decide on the merits, either party may, at any time, refer the court to any error *apparent* on the face of the record, without making a formal assignment thereof.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

M. J. Cunningham, Attorney General, and *L. D. Beale*, District Attorney, for the State, Appellee.

G. W. Buckner and *Rouse & Grant* for Defendant Appellant.

ON MOTION TO DISMISS

The opinion of the Court was delivered by

WATKINS, J. This appeal is prosecuted from a judgment of forfeiture of an appearance bond, bearing date 20th of July, 1885, whereon "Alexander Balize as principal and Tim Duggan as security on said

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44	597

38	542
48	1020
48	1362
49	1160
49	1570

38	542
50	1158
31	1649

38	542
104	483

38	542
122	315

38	542
123	438
125	314

State vs. Balize.

bond, are adjudged to pay in *solido* the sum of one hundred dollars to the State.

In this Court a motion is made to dismiss the appeal upon the ground:

1st. That the appeal was taken before the judgment was signed.

2d. That it was not made returnable within ten days after the order of appeal was granted; and was not made returnable to this Court when it was then sitting, through the fault of the appellant.

1st. The record discloses that the judgment *nisi* was rendered on the 16th of June, 1885, forfeiting the bond; on the 8th of July following the order of appeal was granted in the following words, viz:

"In this case, on motion of defendant's counsel, on forfeited bond, it was ordered by the court that defendant be allowed a suspensive appeal from the judgment of this court, by his furnishing a bond in an amount according to law, returnable before the honorable, the Supreme Court of the State of Louisiana, in New Orleans, on the second Monday of February, 1886."

The judgment of forfeiture was signed on the 20th of July, 1885, and it is commenced with the words: "This case was *this day* called up and defendant, Alexander Balize, failing to appear and answer, etc."

The minutes of the court, the order of appeal, and the judgment itself, fully demonstrated its error, and that the judgment was actually rendered on the 16th day of June, 1885, and during same term of court.

In *State vs. McKeown*, 12 Ann. 596, the Court said: "We are of opinion that this motion ought not to prevail. It is usual in the country to apply for an appeal before the judgment is signed. The appeal is considered as being taken *nunc pro tunc*." 23 Ann. 705; 15 Ann. 521; 25 Ann. 497.

We approve that ruling.

2d. It will appear from the minutes of the court above quoted that the appeal was not made returnable *within* ten days after the order of appeal was granted; and the question to be determined is whether same was attributable to the appellant or not.

This is a criminal case in the sense of Act 30 of 1878. *State vs. Cassidy*, 7 Ann. 276; *State vs. Williams*, 37 Ann. 200.

In *State vs. Jenkins*, 36 Ann. 866, this Court said: "The return day fixed was in gross violation of Act 30 of 1878, which requires appeals in criminal cases to be made returnable within ten days after granting the order of appeal, whenever the Supreme Court may be in session on the return day."

"The error is unquestionably fatal to the appeal unless saved by the provisions of Act 53 of 1836, now section 360 of Revised Statutes, which

provides in substance, that such error shall not occasion the dismissal of the appeal unless imputable to the fault of the appellant."

In that case the counsel for the accused prepared and signed a *written* motion of appeal, in which was suggested the improper return day, and the appeal was granted *as prayed for in the motion*.

It is the settled jurisprudence that when the *appellant suggests* an improper return day, and the judge granting the order of appeal, adopts the appellant's suggestion and fixes the return day accordingly, the error is attributable to the appellant, and the appeal will be dismissed. State vs. Jenkins, 36 Ann. 866; State ex rel. Lee & Co. vs. Allen Jumel, 35 Ann. 980, and cases therein cited; Wooten vs. LeBlanc, 32 Ann. 692.

We find in the brief of appellee's counsel the suggestion that the sessions of this Court at Shreveport and Monroe have transpired since this appeal was granted, and that the appellant has ignored same.

In quite a similar case this Court held that, "an appellant should not be prejudiced by an error committed by the *judge* in fixing the return day of appeal," quoting with favor *Chaffe vs Haynor*, 31 Ann. 595.

In that case the Court said: "It is alleged herein that the defect is imputable to the appellant, because the motion is *written by his attorney* and the day is fixed therein, and the judge merely adopted the day thus fixed. An order of court, whether written by the attorney of one of the litigants, or by the clerk, is the act of the judge. * * * It was the judge who made the order of appeal, and who named an improper day for its return, and the appellant cannot be prejudiced by the act.

This record discloses no written motion of appeal prepared by the counsel for the accused. The minutes of the court recite: "In this case, on motion of defendant's counsel on forfeited bond, it was *ordered by the court* that defendant be allowed suspensive appeal, etc."

Clearly, it was the judge who made the order of appeal, and not the counsel of the accused who suggested it, and the motion to dismiss the appeal is denied.

ON THE MERITS.

We find in the transcript no bill of exceptions, and there has been no assignment of errors filed in this Court. The only grounds upon which the appellant relies are stated in his counsel's brief and they can only prevail if the defects complained of appear upon the face of the papers, and are in themselves sufficient in law to justify the reversal of the judgment. They are as follows, viz:

State vs. Bazile.

1st. There is a fatal variance between the charge contained in the information and that recited in the appearance bond forfeited.

2d. That the record does not show that the accused was released under bond in pursuance of an order of the judge, and that said bond is utterly void.

There is no merit in the former objection as we find that the crime denounced in the information is an assault on Anthony Scott "by wilfully shooting at him," and the crime recited in the appearance bond is the same—but the latter is more serious.

An appearance bond taken by the sheriff *without an order of court* admitting the accused to bail, or fixing the amount of the bond, is null. 6 Ann. 700, State vs. Lonzoneau; 12 Ann. 224, State vs. Craig; 12 Ann. 349, State vs. Smith; 10 Ann. 532, State vs. Gilbert.

There is nothing in the record to show that the trial judge made any order admitting the accused to bail or fixing the amount of the appearance bond; and the certificate of clerk of the court *a qua* is to the effect that the record contains "a full true and complete transcript * * of all the proceedings had and of all the documents filed in the case," etc.

It has been frequently held by this Court, that when the record enables this Court to decide on the merits, either party may, at any time, *refer the court to any error apparent on the face of the record*, without making a formal assignment. State vs. Bank of La., 5 N. S. 327; State vs. Bonder, 14 La. 368; Wood vs. Henderson, 2 Ann. 220; Hicstand vs. New Orleans, 14 Ann. 137; State vs. Henderson, 13 Ann. 489; Bossier vs. Carrodine, 18 Ann. 261.

This, counsel for the accused has done, and the defect complained of is fatal, as it discloses the nullity of the bond forfeited.

It is, therefore, ordered, adjudged and decreed, that the judgment of forfeiture appealed from be avoided, annulled and reversed, and that all costs be taxed against the plaintiff and appellee.

DISSENTING OPINION.

POCHÉ, J. In my opinion, the appeal in this case should have been dismissed, and in support of my conclusion, I submit these considerations:

"The order of appeal reads as follows:

"In this case, on motion of defendant's counsel on forfeited bond, it was ordered by the court that defendant be allowed a suspensive appeal from the judgment of this Court by his furnishing bond in an amount according to law." * * *

State vs. Bazile.

The bond was furnished by the surety on the appearance bond alone and the point in contention is to ascertain who is the appellant in the case.

The accused is the only defendant in this case, or in the judgment of forfeiture; no construction founded on law could justify the conclusion or even the inference that the surety on the appearance bond is the defendant in a criminal prosecution.

Hence, it follows that, the party who has furnished the appeal bond in this case, is not a party to the appeal.

His bond is, therefore, valueless as a factor in the appeal.

If the accused, who is the real and only defendant in the case, is held up as the appellant before us, the position is not fortified because he has furnished no bond of appeal.

While it is true that appeals like the one under discussion fall under the jurisdiction of the Supreme Court, as incidents to the main action; the criminal prosecution, when from the nature of the penalty attached to the offense charged, the case is appealable, it is equally apparent that the accused, in an appeal from a judgment of forfeiture, is not entitled to the immunity from furnishing an appeal bond, resulting from the provisions of Act No. 30 of the General Assembly of 1878. *State vs. Williams*, 37 Ann. 200.

Under that legislation the immunity from furnishing an appeal bond applies exclusively to cases of appeal from a *sentence*, and it is too clear for argument that it cannot be extended to an appeal from a moneyed judgment.

This proposition is very ably and tersely stated in the brief of appellant's counsel, in an argument on another ground of dismissal urged by the Attorney General. Referring to Act No. 30 of 1878, they say:

"But the benefit and the restriction are both limited to persons appealing from a sentence. That it does not apply to moneyed judgments upon appearance bonds, is evident from the fact that it makes all appeals from a sentence, whether imposing a fine or imprisonment, suspensive without bond."

The condition of the present appeal is illustrated by the following dilemma: If the defendant is the appellant, the appeal falls for want of an appeal bond; if the surety on the appearance bond prosecutes the appeal, the latter falls for want of an order of appeal.

The appellant seeks relief under a technicality, and it was meet and proper that he should have been met with the same weapon.

I therefore dissent from the ruling which maintains his appeal, and I take no part in the opinion and decree on the merits.

The Chief Justice concurs in this opinion.

Phelps vs. Reinach.

No. 9578.

N. B. PHELPS VS. ABRAHAM REINACH.

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An adjudicatee may be compelled to comply with the terms of a sale when the title tendered is such as he is bound to accept.

Such adjudicatee cannot urge, as a defense, that the title offered him by the owner was made to such owner by an agent whose procuration was, at the time, revoked by the *notorious* insanity and seclusion of the principal, *unless* the mental derangement was such as would have justified interdiction, and the purchaser was aware of the incapacity.

Where the purchaser bought in good faith and paid a fair price, which ensured to the benefit of the principal, and where the principal or his curator, after his interdiction, could not successfully claim the nullity of the transaction, or could not be made to take back the property, the sale will not be vitiated.

A power of attorney is revoked by the interdiction of the principal, but continues in force until the judgment to that effect has been rendered. The mandate does not expire by the *seclusion* of the principal or his confinement for treatment in an insane asylum; but it does by the *reclusion*.

The word *seclusion*, found in Article 3027 R. C. C., line 5th, should be read *reclusion*. It was introduced in the Code of 1825 by the compilers. In case of discrepancy between the French and English texts, the former prevails.

Reclusion means incarceration under a sentence, to undergo an infamous punishment, carrying civil degradation, in a house of forced labor.

Seclusion means a voluntary confinement, or retreat from social life.

Ignorance of the revocation of a power of attorney will protect an innocent third party dealing in good faith with the agent, as such.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

A. J. Murphy for Plaintiff and Appellant.

E. T. Florance for Defendant and Appellee.

The opinion of the Court was delivered by

BERMÚDEZ, C. J. This is an action to compel compliance by defendant with an adjudication of real estate, made to him on February 14, 1885.

In justification of his refusal, the defendant charges that plaintiff has no valid title to the property, because, at the date of his pretended purchase, March 8, 1884, his vendor was *notoriously* insane and actually *incarcerated* in an insane asylum, to his knowledge and to that of his agent, who officiated as such in the act of sale.

The evidence shows that on August 20, 1870, E. F. Stockmeyer gave to Carl Stockmeyer his general and special power of attorney, couched in terms broad enough to sell and to cover almost every business transaction; that vested with this authority he caused the property in question to be offered for sale at public auction, and in furtherance of the adjudication made of it for \$4,650, he, on the 8th of March, 1884, made title thereto to N. B. Phelps; that the latter caused the same property

Phelps vs. Reinach.

to be offered for sale at auction, and that on the 14th February, 1885, it was adjudicated to the defendant for \$4,625.

The record also shows, as indisputable facts, that on February 20, 1884, E. F. Stockmeyer, suffering greatly from mental excitement, was, on the advice of a physician, placed in the Louisiana Retreat, an institution in which persons mentally debilitated are taken for treatment, and that there was hope then that the said Stockmeyer would recover.

It also establishes that some seven months at least afterwards, proceedings were instituted and his interdiction pronounced 11th November, 1884.

The contention of the defendant is *double*: that E. F. Stockmeyer was notoriously insane and actually incarcerated, to the knowledge of Carl, his agent, and of Phelps, the plaintiff; that by his notorious insanity and subsequent interdiction, the agency was revoked and annulled.

I.

The law applicable to a case like this is found in Articles R. C. C. 402 and 1788 (3). The former provides:

"No act, anterior to the petition for the interdiction shall be annulled, *except* where it shall be proved that the cause for such interdiction notoriously existed at the time when the acts, the validity of which is contested, were made or done; or that the party who contracted with the interdicted person could not have been deceived as to the situation of his mind.

"*Notoriously*, in this article, means that the cause of interdiction was generally known by the persons who saw and conversed with the party."

The latter article provides:

(2) "As to contracts, made prior to the application for the interdiction, they can only be invalidated by proving the incapacity to have existed at the time the contracts were made.

(3) "But, in order to prevent imposition, it is not enough to make the proof mentioned in the last rule; it must also be shown that the person interdicted was known by those who generally saw and conversed with him, to be in a state of mental derangement, or that the person who contracted with him, from that or other circumstances, was acquainted with his incapacity."

In the case of Teresa Baumgarden, curatrix, vs. Langlea, which was a suit to annul a sale on the grounds of notorious insanity at the date of the sale, and of fraud on the part of a knowing purchaser buying at a price much less than the value of the thing sold, the validity of the

transaction was recognized and the purchaser quieted, although the vendor was interdicted in the fifth month after the sale.

After reviewing the law and the jurisprudence on the subject, this Court said:

"The question now in hand is, not whether Baumgarden was, to a certain extent, mentally and physically weakened by disease, but whether he was so affected to a degree rendering him incapable of validly consenting to a contract and so a fit subject for interdiction. * *

"We fully recognize the fact that a person may be mentally and physically weakened by disease without being legally incapacitated to contract, and the law extends its sheltering arms over such person to the extent of scrutinizing contracts made by them and protecting them from imposition, undue influence, improper advantage, and other fraudulent conduct by persons dealing with them." 12 Ann. 624, 652.

The Court found that a proceeding for the interdiction of Baumgarden, based on the evidence in the record as to his mental and physical condition and as to his actions and conduct prior to the date of the sale, must necessarily have failed, and held that, as there was no concealment, no misrepresentation, no threats, no improper influence, no advantage taken; as the transaction was based on a give or take offer, and was conducted openly and with the knowledge of his wife and friends, and finally executed under the supervision of his selected friend and lawyer—the sale could not be invalidated.

In the present controversy it cannot be claimed, without successful contradiction, that on March 8, 1884, E. F. Stockmeyer was a fit subject for interdiction; that his mental condition was such that he could have entered into no valid contract; that he was notoriously insane, and that Phelps knew of his condition and incapacity.

The evidence shows that it was only some eighteen days before the sale was executed that E. F. Stockmeyer was confined; that Phelps never knew him or saw him, never had any dealing with him; that he did not even inquire or ascertain whether he was purchasing from a principal or an agent.

It is also to the effect that what he was suffering from was not habitual or general insanity, but merely a mental excitement thought to be temporary, which made him, without cause, judge harshly of himself and feel so *melancholic* that he would engage in conversation with no one.

The most important testimony in the record is that of Carl Stockmeyer, produced by defendant, who says that when E. F. Stockmeyer was sent to the Retreat, no one considered him insane, not even the

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physician, for up to then he was rational; that it was he who had instructed the sale; that he knew that the property was to be sold. He further states that the proceeds were placed to his credit and went to his use and benefit.

The witness also says the condition of his mind was known among his friends.

It is an important feature in this case that the price paid by Phelps was \$4,650, while the amount of adjudication to the defendant Reinach was \$4,625, the difference between the two being \$25.

In the case of *Holland vs. Miller*, 12 Ann. 624, the then Court well said:

"Contracts would rest on a very weak foundation if those of the most solemn character could be avoided on allegations of insanity when the proof is contradictory.

"It would be necessary for contracting parties, before the execution of the contract, to inquire into their mutual mental soundness."

It is striking that the fact of the knowledge of the alleged insanity was deemed of vital importance by the defense, for it is formally set forth in strong terms as a foundation for resistance.

It is to be noticed that there is no charge and no proof that any undue advantage was taken, or fraud practiced, detrimental to the vendor, and that to the reverse it is proved that the price was paid to the agent and enured to the benefit of the principal.

It must also be noted that the sale was made between the second and the third week following the confinement of the patient for care and attendance in the Louisiana Retreat.

In the absence of proof of the knowledge charged and of undue advantage, or of injury, and in the presence of good faith on the part of the purchaser at least, and that the price went to the benefit of the vendor, how can the sale be invalidated?

II.

Counsel for defendant urged in the answer that the notorious insanity and subsequent interdiction of E. F. Stockmeyer revoked and annulled the agency to Carl Stockmeyer; but in his argument he presses that the *change in the condition* and the *seclusion* of the same person has produced the same effect.

There can be no doubt that, if the mental derangement of E. F. Stockmeyer had been such as to incapacitate him from contracting and to annul contracts made by him, it would have set at nought the sale to Phelps had he been personally a factor in its transaction; but surely

as his mental condition was not such, it cannot be claimed that it brought to an end the power of attorney given to Carl.

There can be no dispute, that the interdiction produced that effect; but of what relief can this fact be, touching the sale made by the agent between seven and eight months previous? If the judgment of interdiction revoked, as it did, the procuration, this revocation took place only on the 13th of October, 1884, when the petition was filed, for the judgment retroacts, the power of attorney however continuing in force until then, therefore protecting the sale of March 8th, previous.

The "change in condition" invoked does not apply to a case like the present one. It would to that of a woman contracting marriage; to that of an agent becoming the curator of an interdicted principal; to that of an executor removed from office, etc. It does, however, if reference is made to the change operated by the interdiction; but, as said, this could not affect the sale of March 8th.

It cannot be insisted that the power was revoked by the simple fact of the *seclusion*, or confinement, of E. F. Stockmeyer in the Louisiana Retreat.

The word is found in Article 3027 R. C. C., and is a literal transcription from Article 2996 of the Code of 1825.

By reference to that Code, French text, it will be perceived that the word used is not *seclusion*, but *reclusion*.

It was not inserted in the Code of 1808; but was added to that of 1825, by the compilers, as appears from the "*Travaux préparatoires*."

It is not found in the Napoleon Code, but Article 2003, which enumerates the causes for which a power of attorney is revoked, states that the procuration expires * * * by the death, natural or civil, * * * of the agent or principal. Civil death no longer exists in France. Laurent, vol. 28, p. 87, § 80.

The two words *seclusion* and *reclusion* have quite different meaning.

The former signifies a *voluntary*, the latter an *involuntary*, confinement.

Reclusion is a legal word, a technical expression, to which a legal signification or meaning attaches.

Legislation, jurisprudence and commentators accord, in expounding it, as being: A temporary afflictive and infamous punishment, consisting in being confined in a hard labor institution and carrying civil degradation. Rep. Journal du Palais, vo. Reclusion, vol. II, p. 83.

It is well settled, that when there exists a discrepancy between the English and French texts of the Code of 1825, the latter prevails.

Under that rule, the word *seclusion* found in Article 3027 R. C. C., 5th line, should therefore be read *reclusion*.

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It is, consequently, impossible to conclude that the power of attorney was revoked by the *seclusion* of E. F. Stockmeyer.

It is a significant circumstance that Carl Stockmeyer, who was the agent and who has since become the curator of E. F. Stockmeyer, has testified establishing all the material facts required to affirm the sale to Phelps.

A critical examination of his testimony shows that whatever the knowledge be which he had of the condition of the mind of his principal, he never supposed that the mental excitement from which he was suffering could operate or had operated a revocation of his powers, and that he continued to exercise them in his dealing with one who was like him, and more than he, in perfect good faith.

The law in such a case wisely provides, that if the attorney, in ignorance of the cessation of the rights of his principal, continue under his power, the transactions done by him are valid and must be carried out in favor of third persons acting in good faith. R. C. C. 3032-3.

Were it not so, exclaims Troplong while commenting on the corresponding French article, what would become of the security of transactions, the rights to credit, the respect due to good faith, that civil and commercial equity, so much praised by Ansaldus, Straccha, after Paul and Ulpian? Troplong, Mandat No. 824, p. 729; see also, Laurent, vol. 28, No. 115, p. 122; also Baudry Lacantinerie, vol. 3, No. 939, § 3.

Under the law and the circumstances, we do not feel authorized to justify the grounds of resistance and to forever block up in the hands of the plaintiff property to which he has acquired a valid title, of which E. F. Stockmeyer himself could not divest him and which he could not be made to take back. On the contrary, we feel bound to recognize the reality of plaintiff's title and to enforce the adjudication of the property to the defendant.

It is therefore ordered and decreed that the judgment appealed from be reversed; and it is now ordered and decreed that the defendant be commanded to comply with the adjudication made to him on the 14th of February, 1885, of the property described in the petition, on petitioner furnishing him a title free from all encumbrance, save such as he was to assume; said purchaser to pay the cash then demanded and which has since become due; and that in default of such compliance within fifteen days after this judgment shall have become final and the title tendered, plaintiff recover from defendant the following sums:

1st. Two thousand three hundred and twelve dollars and fifty cents (\$2,312.50), with legal interest from judicial demand till paid;

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2d. Seven hundred and seventy-five dollars (\$775), with seven per cent from 14th February, 1885, till paid;

3d. A similar sum (\$775) with similar interest from same date till payment;

4th. Eight hundred and twelve dollars and fifty cents (\$812.50), with eight per cent interest per annum from said February 14, 1885, till paid; Over and above the taxes due and exigible in 1885; the plaintiff to receive the above two amounts of \$775 each, or \$1,500 both, only on production of the two notes which the purchaser was to have assumed; the defendant to pay costs in both courts; the whole amount, in capital and interest, to be secured by vendor's lien on the real estate adjudicated and described in the partition.

No. 9572.

KIRKPATRICK & CO. VS. CLAY OLDEHAM.

It is now settled in jurisprudence that the property held in pledge by a creditor may be seized out of his possession by another creditor of the pledgee, and sold subject to the pledgee's claim.

If the thing pledged is a promissory note the pledgee made garnishee cannot be heard to urge the defense that the note is only accommodation paper, pledged for a specific purpose, and not to be enforced against the drawer for any other purpose, as such defense could be resorted to by the drawer only when sued on the note.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

Jonas & Nixon for Plaintiffs and Appellees.

Blanc & Butler for Garnishees and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. Answering interrogatories propounded to them in a garnishment process, the appellants, garnishees, stated that they held a note past due of \$2500 the property of the defendant Oldham, who had deposited the same with their firm in pledge as a collateral security for such balance as he might owe them on account of advances of money which they made to him from time to time for the purchase of cotton.

They further stated that at the date of the garnishment, he owed them \$42, which was secured by pledge on the note, and that they would

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have a further claim on the note for the reimbursement of attorney's fees and other costs of collection, the note being then in the hands of their agents in the State of Texas for collection.

They prosecute this appeal from a judgment ordering them to deliver the note to the sheriff to be held by him under judicial process issued in the cause, recognizing their rights as pledgees to the note to the extent of \$42, and to cover such expenses as had been incurred by them in efforts to collect up to the date of the garnishment proceedings.

We find ample support for that judgment both in the facts of the case and in well settled jurisprudence.

The right of the pledgor's creditor to seize the thing pledged out of the possession of the pledgee to be sold subject to the latter's claim, was presented as a question, and was recently discussed by this Court in the case of *Horner vs. Dennis*, 34 Ann. 389, and the right was fully and unequivocally recognized both on reason and on abundant authority.

But it is suggested that the State courts had no jurisdiction whatever on the note, as the same was in Texas for collection. But the garnishees admitted that it was their property to the extent of their stated claim and under their control, and as the court had jurisdiction over them, that included jurisdiction over the note, which follows the person of its owner or holder.

But appellants' most confident reliance is on the argument, that as the note, which was subscribed by two brothers of the defendant Oldham, was left in their possession by the latter as accommodation paper, exclusively for one purpose, which was to secure their advances to Clay Oldham, they could not use it for any other purpose. Hence, they contend that plaintiffs, or any body else, could not hold the drawers of the note thereon.

If the latter were before the court and urging that defense, their contention might be considered. But that question is foreign to the only issue presented by the pleadings in this case, between the parties thereto.

We are not now concerned with the practical result to plaintiffs through their proposed seizure of the note in question, or with the rights which they may or may not enforce on the note against the drawers thereof.

That is a matter exclusively of their concern, and which can be passed on judicially in future and distinct proceedings only.

Judgment affirmed.

Bell vs. Riggs & Bro.

No. 9553.

MRS. JESSIE R. BELL VS. A. RIGGS & BRO.

38	555
44	622
38	555
118	868

Injunction will not lie against a prospective nuisance, except in cases where its establishment will occasion imminent danger or irreparable injury, or at least where there is no question that the proposed erection will be a nuisance in the sense of the law.

Defendants having obtained permission from the city to erect a steam engine on their own premises, plaintiff, a neighbor, cannot enjoin them from such erection in advance, upon allegations of apprehended danger and injury, when the evidence leaves it doubtful whether such danger or injury will result from the erection in the mode proposed by defendants, and when, if they arise of a nature to justify legal redress, the remedy then afforded will be ample and sufficient to abate them.

It is not necessary to determine what amount or character of danger or injury would support plaintiff's right to judicial relief.

A PPEAL from the Civil District Court for the Parish of Orleans.
Righthor. J.

Sam'l L. Gilmore and James D. Hill for Plaintiff and Appellant.

Albert Voorhies and Branch K. Miller for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. Defendants are cistern makers, who carried on that business on property owned by themselves and adjoining the dwelling house of plaintiff.

Being desirous of applying steam power to their factory, they presented a petition to the city council for permission to do so, representing that it would not injure neighboring property, and declaring their intention "to confine the boiler used in their factory within a brick room with iron roof and doors, and the whole independent of and away from their main factory building." They accompanied their petition with one signed by eighteen owners of property in the immediate neighborhood, expressing the opinion that no injury would result, and approving the granting of the permit.

The plaintiff, with thirteen other property holders of the vicinage, presented a counter-petition opposing the permit.

The council, after consideration of the premises, on July 24, 1884, adopted the following resolution: "Resolved, That permission be granted to A. Riggs & Bro. to erect and maintain a small steam-engine and boiler on their premises, used as a cistern factory, No. 247 Delord street; this privilege revocable at the pleasure of the council."

It seems sufficiently obvious that the council, in this exercise of the police power, has been influenced by the representation that the work would not injure neighboring property, and has carefully guarded itself

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in case such representation should prove to be false, by reserving the power of revoking the privilege at its pleasure.

It is equally evident, in view of this reservation and of the right of neighboring proprietors to have legal redress against private nuisances, that it would be the interest as well as the duty of defendants so to construct their works as not to injure, or to injure to the least possible extent, their neighbors.

Nevertheless, without waiting to see in what manner the works would be built, what safeguards would be adopted to prevent apprehended injury, and whether such injury would actually result, the plaintiff rushes into court with this suit for an injunction to restrain defendant "from proceeding to erect and from erecting any steam-engine, boiler or appurtenances thereto on the premises No. 247 Delord street."

The action cannot be sustained.

The rule is founded in reason and firmly established by authority that injunction will not lie against a prospective nuisance except in cases where its establishment will occasion imminent danger or irreparable injury, or at least where there is no question that the proposed erection will be a nuisance violative of legal right. Wood, Law of Nuisances, §§ 103, 104.

The grounds of plaintiff's action are substantially:

1st. That by reason of the accumulation of lumber and shavings in defendant's business, the erection of a steam-engine would create danger of fire, imperilling the property and lives of plaintiff and her family.

2d. Because the noise and smoke and steam therefrom would injure the health and peace of herself and family and impair the value of her property.

We consider these apprehended consequences by no means so certain as to justify the judicial interference now invoked.

The evidence establishes that the defendants propose to erect their engine and boiler at a point as remote as possible from their own factory and from plaintiff's house; that the boiler, in connection with which alone fire is to be used, is to be detached from the engine and enclosed in a brick, fire-proof building; that a smoke-stack considerably higher than the surrounding buildings is to be used; that it is to be fitted with a spark-arrester or other arrangement to prevent the emission of sparks; and that the escape of steam is to be in the smoke-stack, so as to neutralize the noise as far as possible.

It may be that the effect of such precautions may demonstrate the apprehensions of plaintiff to be imaginary; but, at all events, she

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may well await the result before seeking redress for apprehended injuries.

We can discover no such imminent danger or irreparable injury from the erection of the steam power, as may not find redress by prompt resort to judicial remedy when the danger or injury has arisen.

What amount or character of danger or injury would entitle plaintiff to relief, in any event, is a question not now presented, and will be determined only when necessary. But see *C. C. 669*; *Blanc vs. Murray*, 36 Ann. 167; *Lewis vs. Behan*, 28 Ann. 130; *City vs. Lambert*, 14 Ann. 247.

Judgment affirmed.

Watkins, J., not having heard the argument, takes no part.

ON APPLICATION FOR REHEARING.

We have given attentive consideration to the very able and earnest brief filed in support of this application.

Counsel complains that our opinion herein conflicts directly with that in *Blanc vs. Murray*, 36 Ann. 162.

Consistency is a jewel more precious, perhaps, in jurisprudence than anywhere else, and it is our sincere desire to guard and preserve it. But we are utterly unable to discover the conflict suggested.

In *Blanc's* case, the complaint was against an established nuisance; in this, against a prospective nuisance. This difference is essential, and at once destroys all possibility of conflict between the two opinions.

It is claimed that, entirely independently of the addition of steam power, the existing conditions of defendants' establishment were identical with those which we pronounced a nuisance in *Blanc's* case.

But, in the first place, plaintiff makes no complaint and seeks no abatement of existing conditions; and, in the second place, the predicate of identity is not correct.

In *Blanc's* case, we gave a very careful statement of the conditions, saying, amongst other things. "The upper story is open. Within is collected a quantity of seasoned pine and cypress. The defendant is a cistern builder, and this shed of two stories is his shop. Shavings are plentiful within, and without are piles of lumber. * * A steam railway passes in the middle of St. Joseph street several times a day, puffing out sparks of fire. Of course, the danger of ignition of the shavings and the seasoned lumber is always imminent."

In our opinion on rehearing, we said: "We have not held that the construction of a wooden building, even within the fire limits of the city is *per se* a private nuisance. Nor have we held that the business

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of cistern maker is a private nuisance *per se*. What we have held is, that the business of cistern making, pursued in the manner which the evidence exhibits, in a structure of the kind built by defendants, in such a locality and with such surroundings as here shown, is a private nuisance," etc.

Now, without advertent to other differences between the conditions thus stated and those here prevailing, it is sufficient to say that, in this case, the premises are not located on St. Joseph street and the steam trains, "puffing out sparks of fire," do not pass by them; and the consequent "imminent danger of ignition" does not exist.

In the next place, the structure in which the business is conducted, instead of being an "open two-story shed," is a closed one-story building, sheathed on sides and top with iron.

Indeed, leaving out the question of the application of steam, the evidence leaves it doubtful whether Riggs & Bro.'s establishment does not conform to the requirements imposed by the modified injunction in Blanc's case.

The sole question was whether the erection of a steam-engine would convert a business, not complained of as actually carried on, into a nuisance.

The city authorities, in the exercise of the police powers confided to them, upon due consideration, had determined that such would not necessarily be the result but, out of abundant caution, had reserved the right of revoking the privilege at pleasure. The evidence made it probable that, erected and conducted in the manner proposed, it would not expose plaintiff to the danger or inconvenience anticipated.

Under such circumstances, it would have been surely a rash exercise of judicial power for us to have overruled, in advance, the decision of the police authority, upon allegations of apprehended danger, which defendants denied and the evidence left doubtful.

In refusing to do this, we conformed to precedents, and certainly impugned, in no degree, the principles cautiously and carefully defined in Blanc vs. Murray.

Rehearing refused.

No. 9724.

THE STATE EX REL. JOHN HEPTING ET AL. VS. N. H. RIGHTOR, JUDGE
CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS.

1. A judgment of this Court, the execution of which is made to depend upon a protestative condition, and dependent on an event which it is in the power of one of the parties to bring about, or to hinder, cannot be executed until it is first determined whether the condition or event has transpired within the time fixed and limited in the decree.

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2. The ascertainment of the fact whether the condition on which the execution of said judgment is made to depend, is a judicial one, and cannot be ascertained or determined in a mandamus proceeding.
3. One having resorted to a judicial proceeding by rule to show cause taken on the interested party, who joined issue by answer, and the introduction of proof with regard to the performance of said condition, cannot, after an adverse judgment thereon, withdraw therefrom and resort to a mandamus to obtain his desired relief.

A APPLICATION for Mandamus.

J. S. & J. T. Whitaker for the Relators:

The duties of inferior courts in executing the decrees of the Supreme Court are simply ministerial. They cannot prevent the clerk from issuing process deemed necessary by the party who has prevailed or by his attorney. Their sole power is to order to be entered upon the minutes of the Court such mandates and to declare them executory. Acts of 1855, p. 51; Revised Statutes of 1870, sec. 464; State ex rel. Bovee vs. Herron, 24 Ann. 619; Cox vs. Thomas, 11 La. 369; Lovelace vs. Taylor, 6 Rob. 92.

Inferior courts are without power to change the terms of the decrees of the Supreme Court, and where no ambiguity exists in said decrees to stay their execution. Milliken vs. Rawley, 3 Rob. 253; Rightor vs. Winter, 14 La. 548; Morrison vs. Winberly, 14 Ann. 713; Avery vs. Police Jury, 15 Ann. 223.

The taking of a rule (when so ordered by the court) to set aside an *ex parte* order illegally issued is not a compliance with the same, or an acquiescence in said order.

There can be no appeal taken from final decision of the Supreme Court. Lovelace vs. Taylor, 6 Rob., p. 92; Cox vs. Thomas, 11 La. p. 369; State of Louisiana ex rel. Villavae vs. Judge, 20 Ann. 521.

The supervisory power of this Court is enlarged and extended by Article 90 of the present Constitution. State ex rel. Murray vs. Lazarns, Judge, 36 Ann. 578.

Kennard, Howe & Prentiss for the Respondent:

1. The questions submitted by the rule of May 6, 1885, the answer thereto and the evidence were judicial in their character, and the action of the respondent in discharging the rule was judicial. His duty was not ministerial. No mandamus can lie to review or reverse his judgment. 36 Ann. 112; 34 Ann. 1016, 1114; 32 Ann. 977; 33 Ann. 268.
2. The remedy of relators, if any, is by appeal. 7 Rob. 442; 19 Ann. 4.
3. Reasons for judgment form no part of the judgment. It is the judgment which shows as matter of record what was decided, and this rule applies "even where the judgment is not a logical sequence of the opinion." 12 Ann. 737; vide 19 La. 324; 14 Ann. 446; 18 La. 14; 14 Ann. 767. But apart from this, the reasons of the judge show that the rule was properly discharged.
4. Even if the relators' construction of the reasons could be admitted, yet the judge, if he found that the decree had been complied with, though in a dilatory manner, could discharge the rule at the defendants' costs. He would not be bound to remove a track merely that it might be put down again in the same place.
5. If any mandamus could issue herein, which is denied, it should only issue to compel the respondent to take up and decide the rule on the evidence, *de novo*, to the end that the railway company might be heard before respondent, and take such other steps as might be justified by the rules of practice.

The opinion of the Court was delivered by

WATKINS, J. In *John Hepting et al. vs. New Orleans Pacific Railway*.

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Company, 36 Ann. 898, the following decree was rendered, viz: "and it is now ordered, adjudged and decreed, that the defendant, the New Orleans Pacific Railway Company, be and it is hereby required to *reconstruct* the track of its road through Third street in the villages of Gretna and Mechanicsham, in the parish of Jefferson, in such manner that the line of the track shall be parallel with the buildings fronting on said street, and as near the centre of said street as practicable, and on a level with said street, or at so slight an elevation above the same as to admit at all places the easy and convenient crossing of the track of the road by vehicles.

"It is further ordered and decreed, that such reconstruction of the track of said road through said street, in the manner above set forth, shall be completed or the track entirely removed therefrom *within three months following the rendition of this judgment*, and that in default of *such reconstruction or removal*, the defendant company be prohibited from using said track; reserving to the plaintiffs, *in the event of a non-compliance with this judgment, to have the track removed by the lower court through the sheriff*, at the expense of the defendant."

It is conceded that the three months delay, within which defendant company was required to reconstruct its track, expired on the 17th of February, 1885.

On the 18th of same month, counsel for the railway company filed in the Civil District Court and in said cause a certificate of the deputy surveyor to the effect that he had "assisted in, examined and inspected the work done by the defendant company in the reconstruction of the track * * * in pursuance of said decree, and that said decree has been fully and fairly complied with by said work."

On the same date, respondent judge entered the following order, viz: "On motion of Kennard, Howe and Prentiss, attorneys for defendant, and suggesting that the decree of the Supreme Court rendered herein—and which became final on the 17th of November, 1884—has been duly executed and satisfied by the payment of the costs, and the performance of the work required by the said decree *within the time specified therein*, as by annexed receipt, certificates and affidavits will appear; said certificate being *signed by some of the plaintiffs herein*, and by other citizens of Gretna and Mechanicsham, it is ordered that this motion, suggestion and documents be filed herein and put of record; and that *no further process issue herein against defendant except on notice to and rule on said defendant.*"

On the 5th of May, 1885, W. H. Staub, deputy clerk of the Civil District Court issued an informal writ addressed to the sheriff in the

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suit of Hepting et al vs. New Orleans Pacific Railway Company, in which occurs the following recital, viz: "Now, inasmuch as *we are advised by plaintiff*, that defendant has not complied with said judgment, either as to the reconstruction or removal of said track, we therefore command you to execute the above decree, prohibiting said defendants from the use of said track, and we require you to remove the same at the cost of said defendants," etc.

This writ is not preceded by an order of "the court," and it bears no endorsement showing it to have been received by the sheriff, and it has no seal affixed.

On the following day plaintiffs in that suit obtained from the respondent judge an order directing defendant to show cause on the 15th of May inst. at 11 o'clock a. m., why the sheriff of the parish of Jefferson should not forthwith execute the decree of this Court and remove said track, "on the issuance to said sheriff of the *usual* process, in such case made and provided."

Respondent returns that, to this rule to show cause, defendant's counsel filed an answer "denying non-compliance with the decree and averring compliance;" and upon the issue joined testimony was taken for both parties, the oral testimony alone amounting to over eight hundred pages, and whereby "it was established by the railway company that it had, between November 17, 1884, and February 17, 1885, reconstructed its track."

He further returns that he "heard this mass of testimony with attention, and after an argument, which consumed about three days, took the matter under advisement," and becoming satisfied that the decree of this Court had been complied with by defendant company within the delay specified therein, and had reconstructed its track, he discharged the rule.

At this stage of the proceedings, relators—who are plaintiffs in the original suit—alleging the expiration of the delay, the default of the defendant company, and *respondent's want of authority* to interpret the decree of this Court "*as he has done*," and averring that his duties were *ministerial* only, said that he "could not render any judgment that would authorize or make an appeal necessary; and * * * they have no relief nor remedy by order, or process of law; nor have they any right of appeal in the premises, and that a writ of mandamus is necessary in order to prevent a denial of justice;" and they pray accordingly that a writ of mandamus issue to the respondent judge commanding him to issue an order to the sheriff of the parish of Jefferson to prohibit defendant from using its railway track, and to remove the same.

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Respondent submits that the questions thus necessarily decided by him are judicial, and that his duties in the premises are not ministerial, and that the decision which he made cannot be reviewed in a proceeding by mandamus.

In this view of the question decided by him, we think respondent is correct; and that the relief sought by relators cannot be granted them.

Their proceeding by rule on the N. O. Pacific Railway Company to show cause; their participation in the trial thereof; and their introduction of testimony upon the issues joined thereon, necessarily subject them to the rule entered by the respondent judge on the 18th of February, 1885, and to his discharge of the same on the 8th of March, 1886.

Neither can be revised by a mandamus. Such is not the province of this Court.

In *State ex rel. E. K. Bryant et al. vs. N. H. Rightor*, judge, 36 Ann. 112, this Court said of this writ: "The writ issues to proceed, not to recede; to do, not to undo." 33 Ann. 268; 35 Ann. 765.

In *State ex rel. Wise vs. Taylor*, 32 Ann. 977, this Court held: "The judge of a district court cannot be compelled by mandamus to issue an order of seizure and sale."

This Court has refused to compel a judge of an inferior court, by mandamus, to grant a writ of injunction and of sequestration. 28 Ann. 905, *State ex rel. Beebe vs. Judge*; 31 Ann. 794, *State ex rel. Prados vs. Judge*; 32 Ann. 549, *State ex rel. City vs. Judge*.

The peremptory mandamus prayed for is refused.

No. 9702.

THE STATE OF LOUISIANA VS. WILLIAM A. STRADO.

The issue by the trial judge of a bench warrant on the motion of the prosecuting attorney for the arrest and detention of a witness who had just testified before the jury on the charge of perjury, is not an act prohibited by the Statute, which forbids the judge "in his charge to the jury to state or repeat the testimony of any witness, or to give any opinion as to what facts have been proved or disproved," particularly when there is no allegation that he alluded to or commented upon the testimony of such witness.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee.

D. C. Moise for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The accused appeals from a sentence of five years at hard labor, on a verdict of guilty of stabbing with intent to murder.

State vs. Mansfield.

He complains that, during the trial, after a witness had testified in his favor and was about to leave the room, application was made of a *capias* directing his detention and granted.

No bill of exception was taken at the time of the occurrence; but the alleged grievance was made the ground for a motion for a new trial which was refused. To this overruling, a bill was reserved to which no testimony is attached and in which no recital of facts is set forth, though the motion for a new trial is annexed.

The court, however, declares that the detention of the witness was only proposed, but not acted upon.

It is claimed that sec. 1963, R. S., was transgressed in its prohibitions. It reads:

"In his charge to the jury, the judge shall not state or repeat the testimony of any witness, nor shall he give any opinion to what facts have been proved or disproved."

This injunction has frequently been subjected to judicial scrutiny and in several instances as rigidly enforced; but no precedent has been referred to in which an act similar to that complained of, was pronounced as coming within the prohibition of the statute.

In the present case, there is no averment either in the motion for a new trial or in the bill of exception, or even in the brief for the defense that the trial judge expressed any opinion with reference to the testimony of the witness, or in his charge stated or repeated the same, or gave any opinion as to what facts had been proved or disproved.

It cannot be inferred in the least that, by not refusing the order moved for by the prosecuting attorney, the judge has indicated and implied unequivocally or otherwise in the hearing and presence of the jury, that the testimony was indeed wilfully and corruptly false and untrue.

It was the right and probably the duty of the trial judge, under the circumstances, to have issued the order for the caption and detention of a witness charged almost *flagrante delicto* with the offense of perjury.

He surely can no more be considered as having trenched on the facts in that circumstance than he can be for presiding over the trial of the accused at the bar.

Judgment affirmed.

No. 9715.

THE STATE OF LOUISIANA VS. ANDY MANSFIELD.

The appeal taken by a party from a conviction and sentence for a crime, and who escapes from custody during the pendency of the appeal, cannot be prosecuted by counsel, and hence must be dismissed. *State vs. Edwards*, 36 Ann. 863, affirmed.

State vs. Schlessinger.

A PPEAL from the Third District Court, Parish of Lincoln.
Young, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

G. L. Gaskins for Defendant and Appellant.

The opinion of the Court was delivered by
 POCHÉ, J. The motion of the Attorney General to dismiss this appeal must prevail.

He has shown by proper evidence that during the pendency of this appeal the defendant has broken jail and is now a fugitive from justice.

The defendant doubtless considered that as the safest mode of avoiding the penalty of the crime for which he stood convicted. Reason, law and justice require that he should abide the result of his option in the premises.

The identical question was presented to us in the case of *Edwards*, 36 Ann. 863, and we therein said: "A prisoner under conviction and sentence, who has escaped from custody during the pendency of his appeal, cannot by counsel prosecute his appeal.

It is therefore ordered that this appeal be dismissed.

No. 9721.

THE STATE OF LOUISIANA VS. ERNEST J. SCHLESSINGER.

In an indictment for perjury it is not essential that the authority and jurisdiction of the court administering the oath should be expressly averred, if they sufficiently appear from the facts set out.

When the prosecution for perjury is in the same court in which the perjury was committed, it may take judicial cognizance of its own jurisdiction, if the indictment sufficiently sets forth the facts.

Although the materiality of the matter sworn to be not expressly averred, yet if the indictment sets forth the facts from which the materiality appears, that is sufficient.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee:

I.

The question of the jurisdiction of the court is merely a matter of inducement, and according to the universal rule of criminal pleading it will be sufficient either to charge in words that the officer had jurisdiction, or to aver facts from which the jurisdiction would in law appear, both not being required. 2 Bish Cr. Proc. §§ 910, 904.

The general rule as to jurisdiction is that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so. Archb. Cr. Pr.

 State vs. Schlessinger.

and Pl., 1721. Pomeroy's notes. And if it appear *prima facie* that the court had jurisdiction of the matter, the burden of proving the contrary devolves upon the prisoner. 3 Greenl. on Ev., 185.

Even where the court is an inferior one, if it derives its jurisdiction from a public statute, it is sufficient to describe the proceeding so as to bring it within the statute; for the court which tries the perjury must take judicial notice of the jurisdiction. 3 Arch 594. The Criminal District Court is a superior court vested with general criminal jurisdiction. An indictment which sets out that issue was joined between the State and certain defendants on a charge of murder brought against them before the Criminal District Court in a prosecution duly and regularly apportioned by lot to section B thereof, is a sufficient averment of facts to authorize judicial notice to be taken of its jurisdiction in the case.

It is no longer necessary in an indictment of perjury to set out "bill, answer, information, indictment, declaration or any part of any record or proceeding;" nor is it necessary to set out "the commission or authority of a court or person before whom the perjury was committed. R. S. 858."

II.

Materiality may be pleaded in one of two ways. It may either be averred on the face of the indictment that the matter alleged to be false was material, or the pleader may set out the facts from which its materiality will appear; and the latter is sufficient even where the bare averment of materiality is defective. 2 Bish. Cr. Proc., § 931; 3 Whar. Cr. Law, § 1304.

The materiality of the matter sworn to must depend upon the state of the cause and the nature of the question in issue. Rosc. Cr. Ev. 758. If the materiality evidently appears upon the record, as where the falsehood affects the very circumstance of innocence or guilt, express allegations of materiality may be omitted. 2 Russel on Crimes, 638; 2 Chit. Cr. Law, 307; Hawk. P. C. b. 1. C. 69. S. 8.

Where, upon a trial for murder, a witness deposes that he was present when the deceased and the accused met, and saw the deceased fire two shots at one of the accused before the fire was returned by any of the persons present; and that the first two shots were fired by the deceased,—the materiality of the evidence appears from the facts and need not be averred in the indictment.

Jas. O. Walker for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The defendant appeals from a verdict and sentence for perjury committed by false swearing as a witness under oath in a certain case of State of Louisiana vs. T. J. Ford et al., then pending in the Criminal District Court for the Parish of Orleans.

A motion in arrest of judgment was filed on the grounds:

1st. It does not appear by the indictment herein, and it is not alleged, that the Criminal District Court for the Parish of Orleans was vested with jurisdiction to hear and determine the case of the State of Louisiana vs. T. J. Ford et al.

2d. The said indictment does not charge that the facts which the defendant is therein accused of having falsely sworn to were material.

I.

Our Section 858 R. S. is a substantial copy of the first section of the English Statute, 23 Geo. 2. See 2d Bishop Cr. Proc. § 901.

The words "averring such court or person to have competent authority to administer the same," have been eliminated from the English law by statute, 14th and 15th Victoria, and under this latter such averment is no longer essential. 2d Bishop Cr. Proc. §§ 901, 902, 914, and notes.

But even under the former statute the courts have held it sufficient, even in absence of express averment, that the jurisdiction and authority should appear from the facts set out. *Id.* § 914, and authorities.

Now, in the indictment here, it is averred that the cause of the State vs. T. J. Ford et al., which is described to be a trial for a certain murder, etc., was pending before Section B of the Criminal District Court for the Parish of Orleans, to which it had been regularly and duly apportioned by lot, etc. The contention of defendant is that these averments do not establish that the murder charged was committed in the parish of Orleans, and, therefore, omits an essential fact required to vest the court with jurisdiction. But when we consider that the prosecution for perjury was before the same court in which the perjury was committed, and that the cause referred to was in the same court, we think the court is authorized to take judicial cognizance of its own jurisdiction in said cause.

Thus we read in Archbold, that "where an inferior court derives its jurisdiction from a public statute, it is sufficient to describe the proceeding so as to bring it within the statute; for the court, which tries the perjury, will take judicial notice of the jurisdiction." 3 Archbold, 594.

If the court may take judicial notice of anything, surely it may do so of its own jurisdiction in a case which was pending before itself.

The facts charged are ample to enable the court to determine from the face of the record "whether they are sufficient to support a conviction of the particular crime and to warrant judgment;" and this accomplishes the full object of the requirement. 1 Starkie Cr. Pl. 73; Wharton Cr. Pl. and Pr. § 166; 2 Bishop Cr. Pr. § 904. See on this point: State vs. Newton, 1 Iowa, 160; Com. vs. Knight, 12 Mass. 274; Hallock vs. State, 11 Ohio, 400; People vs. Phelps, 5 Wend. 9.

In criminal matters technicalities are not to be disregarded; but they must be subjected to reasonable restraints and cannot be allowed to reduce the law to a mere "rhapsody of words."

II.

. Although the materiality of the matter sworn to be not expressly averred, yet if the indictment sets forth the facts from which the materiality appears, that is sufficient. 2 Bishop Cr. Proc. § 931; 2 Wharton Cr. L. § 1304; 2 Russell on Cr. 638; 2 Chitty Cr. L. 307.

This disposes of the point; for it is perfectly clear from the recitals of the indictment that the matter sworn to was material to the issues in the case. It is only by the most strained suppositions that the testimony might have referred to a different encounter between the same parties, that the ingenious counsel of defendant seeks to impugu their materiality.

Judgment affirmed.

No. 9734.

THE STATE OF LOUISIANA VS. GEORGE GROVER.

38 567
49 21

In an indictment for perjury, it is not essential to charge expressly that the court in which the perjury was committed was of competent jurisdiction, or that the matter sworn to was material, if facts are set forth which justify the inference that the court had jurisdiction and that the matter was material.

Neither is it essential to state in such an indictment, that the judicial proceeding which was a prosecution for murder and in which the perjury was committed, and which is described specifically, was pending on an indictment found by a grand jury.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee:

The action of the trial judge in overruling a motion for new trial, on the ground that the verdict is contrary to the law and the evidence, is not subject to review on appeal. This Court has no jurisdiction in criminal cases, except upon unmixed questions of law.

Any particular fact or circumstance sworn to by a witness to show that an accused on trial had nothing to do with or was not present at the commission of the offense for which he was being tried, was material to that issue, and if untrue forms a legal basis for prosecution for perjury.

An indictment for perjury need not set out the indictment or information upon which the trial was had in which the perjury is claimed to have been committed, nor set out in detail all the proceedings in that case. It is sufficient to charge that upon the trial of the case named and designated the perjury was committed.

It is sufficient to aver that the court in which the case was pending had jurisdiction, or to aver facts from which the jurisdiction would in law appear, both not being required. 2 Bish. Cr. Pr. §§ 904, 910.

A statement that the cause was pending in a particular Section of the Criminal Court of the parish of Orleans, to which it had been duly and regularly apportioned by lot, is a sufficient averment of facts from which its jurisdiction does in law appear.

- It is sufficient either to allege that the false evidence was material or to aver facts from which its materiality is evident.

State vs. Grover.

When a party is on trial for murder, the evidence of a witness that, at the time of the homicide, the accused was at another place, is material on its face; and its materiality need not be specially averred in an indictment for perjury in which the evidence is set out

J. C. Walker and W. L. Evans for Defendant and Appellant:

An indictment for perjury should expressly aver that the court had jurisdiction to hear and determine the cause wherein it is alleged that the accused swore falsely; or it should appear conclusively from the nature of the proceedings that such jurisdiction was vested in the court, in order to enable the appellate court to take judicial notice of the fact

An indictment for perjury should expressly aver that the matter sworn to and upon which the perjury is assigned was material, or it should appear conclusively on the face of the facts set forth in the indictment that the matter sworn to was material.

Where perjury is charged as having been committed by a witness in the course of a trial for murder, it should appear affirmatively that the proceedings in the murder case were by indictment found by a grand jury. Const. Art. 5.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant appeals from the verdict and judgment thereon sentencing him on a charge of perjury to three years at hard labor.

He relies on a motion in arrest, a bill of exception and an assignment of errors which together are based on three grounds:

1. That the indictment does not expressly aver that the court had jurisdiction to hear and determine the cause wherein it is alleged the accused swore falsely, or that from the nature of the proceedings, such jurisdiction was vested in the court, to enable the appellate court to take judicial notice of the fact.

2. That the indictment does not aver that the matter sworn to and upon which the perjury was committed was material, or does not show on its face facts showing that the matter sworn to was material.

3. That the indictment does not affirmatively charge that the judicial proceeding charging the defendant with murder, and in which it is averred that the perjury was committed, was by indictment found by a grand jury.

I AND II.

The first and second grounds are kindred to those urged for a similar offense in the case *State vs. Schlessinger*, recently decided, in which it was held, *that* in an indictment for perjury, it is not essential that the authority and jurisdiction of the court administering the oath, should be expressly averred, if they sufficiently appear from the *facts* set out; *that* when the presentation for perjury is in the same court in which the perjury was committed, it may take judicial cognizance of its own jurisdiction, if the indictment sufficiently sets forth facts and *that*, though the materiality of the matter sworn to be not expressly averred,

State ex rel. Girardey vs. Steele et al.

yet if the indictment sets forth the facts from which the materiality appears, that it is sufficient.

For the reasons given in that case, the two grounds stated are untenable.

III.

The indictment against the accused, is full and explicit, that he appeared and was produced as witness in the case of State vs. Thos. J. Ford and others named—"being then and there *charged* with *wilful murder*."

The Constitution of this State, art. 5, provides that prosecutions for capital crimes, such as murder, shall be by indictment, or presentment of a grand jury.

No charge for willful murder could be pending in the district court against Thos. J. Ford et als. unless preferred by *indictment found by a grand jury*.

These words, if essential, are necessarily, forcibly implied in the word "*charged*" which the indictment contains.

It is worth notice, that the indictment in the present case, distinctly alleges "to which *charge* said Thos. J. Ford and others, and each one pleaded *not guilty*"—issue being thereby formed.

There is no reason to disturb the judgment appealed from, which is affirmed with costs.

No. 9710.

THE STATE EX REL. C. E. GIRARDEY VS. O. B. STEELE ET AL.

An application for a prohibition will not be considered, *unless* a plea to the jurisdiction has been first filed and overruled in the lower court.

APPPLICATION for Prohibition.

B. R. Forman for the Relator.

Cunningham & Moise for the Respondents.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an application for a prohibition, to prevent the trial of an injunction proceeding over which, it is claimed, that the Third Judicial District Court has no jurisdiction.

In the suit of the present relator vs. Steele, *Auditor*, reported in 37 ANN. 317, which involved the right of the Auditor to cancel an auctioneer's license, this Court held that he had no such power, under the

38	569
106	376
38	569
113	429
38	569
120	377

38	569
122	386

 Shakspeare, Smith & Co. vs. Ware

circumstances of the case, and decreed "that relator recover *his costs* in both courts."

The mandate was duly filed in the lower court and ordered to be executed.

A writ of *fi. fa.* having issued against O. B. Steele for an amount claimed by relator as his costs in that case, the defendant in writ, contending that the judgment of this Court, not having condemned him to pay *individually*, but *officially*, the costs, applied to the Third Judicial District Court having jurisdiction of his domicile, for an injunction, which was allowed by the *clerk*, arresting the execution for costs.

Thereupon, the relator presented to this Court his application for a prohibition to stay and annul the injunction proceedings, on the main ground that the said district court has no jurisdiction "to entertain a suit to annul or restrain an execution of a judgment of this Court."

The Code allows relief to the party who complains that the court *wishes* to transcend its jurisdiction. Hence, precedents establish that this Court will not entertain the application, *unless* it appears that an exception has been filed and was overruled to the jurisdiction, and it clearly appears that the lower court has usurped a competency which it does not possess. C. P. 847; 10 R. 169; 29 Ann. 806; 37 Ann. 845; see also, C. P. 846, 849.

It does not appear that the relator has excepted to the jurisdiction of the district court. It is necessary he should do so.

It may well be that the district court may decide that the writ properly issued against Steele, just as it may well happen that it may rule otherwise.

It is perfectly clear that it is not until after such exception has been filed and overruled, that the relator can have a hearing in this Court for a prohibition against the district court, to prevent the trial of the injunction suit on its merits.

At this stage, the present proceeding is surely premature and cannot be entertained.

It is therefore ordered that the restraining order herein made *in limine* be remanded, and that the application for a prohibition be dismissed with costs.

 No. 9683.

SHAKSPEARE, SMITH & CO. VS. JAMES A. AND JOHN M. WARE.

In civil actions the verdict of the jury, like a judgment, forms the authority of the thing adjudged upon all matters and demands set up in the pleadings; and it is not required that the verdict should contain a statement of all the considerations which led the jury to find a general verdict.

38	570
46	1008
38	570
51	1743
38	570
106	88
38	570
410	238

Shakspeare, Smith & Co. vs. Ware.

Thus, the jury in finding a verdict in favor of plaintiff in full of his demand against parties who are sued as partners, need not say that they found the existence of the partnership, although the same may be especially denied as a means of defense.

The silence of the jury on a reconventional demand, when they return a general verdict in favor of plaintiff, will be construed as a rejection of said demand.

The same construction will be applied to a privilege prayed for by plaintiff.

The furnisher of machinery and materials for a vacuum pan apparatus in a sugar-house, which are removable, acquires no privilege for the price thereof on the sugar-house, all the machinery therein and on the one acre of land on which it is situated; the law restricts his privilege to the machinery and other things which he has sold to the owner of the sugar-house. The decision in *Scannell & Lafaye vs. Beauvais*, 38 Ann., affirmed.

A PPEAL from the Twenty-third District Court, Parish of Iberville.
Talbot, J.

Samuel Matthews for Plaintiffs and Appellees.

David N. Barrow for Defendants and Appellants:

The joint ownership of real estate does not create a partnership between the owners. A special contract in writing is necessary for that purpose. *C. C. 2807; Benton vs. Roberts*, 4 Ann. 216; 14 Ann. 11.

So where the joint ownership is severed by sale duly recorded in conveyance book, every one is bound to take notice of same; and articles furnished the plantation after said sale, cannot be recovered of the party selling out before they were furnished.

To preserve a privilege against a sugar house and one acre of land on which same is situated, for machinery, etc., erected on same, the account must be sworn to and there must be a description of the property on which the privilege is claimed. *C. C. 3348*. And to effect prior mortgages it must be recorded in accordance with requirements of *Art. C. C. 3274* and *Act. 1877, No. 45, p. 59*.

The fact that defendants had made payments on a contract for erecting machinery, etc., in a sugar house, does not prevent them from disputing the bill for the balance unpaid, nor from setting up damages in reconvention. 25 Ann. 518, *Gordy vs. Veazie*; *Levy vs. Schwartz & Bro.*, 34 Ann. 214.

One is concluded by the first bill rendered, items subsequently added or charged, in which he cannot recover without showing error. *Nicholson vs. Pelanne*, 14 Ann. 508.

A verdict should respond to the issues and always pronounce in cases of reconvention on each party's rights. 4 La. 334; 17 La. 184; 9 R. 520.

Where a verdict finds "in favor of plaintiffs for the amount called for in their petition, with interest and costs," the judgment cannot recognize a privilege and decree the sale of property to pay same—the judgment must follow the verdict.

The opinion of the Court was delivered by

POCHÉ, J. The plaintiffs sue for a judgment against the defendants in the sum of \$4,319.62, as a balance on machinery sold to defendants and put up in their sugar-house in the parish of Iberville, under a contract in writing and on an open or running account for machinery furnished outside of the contract but connected therewith; and they claim a privilege on the sugar-house and machinery therein, and on the one

Shakspeare, Smith & Co. vs. Ware.

acre of land on which said sugar-house is situated; under the provisions of Article 3249 of the Civil Code.

The defense is of a two-fold nature.

Both defendants claim larger credits than allowed by plaintiffs, and aver that the machinery furnished was so defective that it caused them damages far in excess of the amount claimed as a balance by plaintiffs; James A. Ware claims in reconvention the sum of \$57,300, and John M. Ware claims his entire release from the whole demand on the ground of the dissolution of the partnership, while the works were being put up, and the assumption of liabilities by his vendee.

The case was tried by a jury, who returned a verdict in the following words:

"Verdict in favor of Shakspeare, Smith & Co. for the amount called for in their petition, with interest and costs."

By a motion for a new trial, defendants urged numerous errors to the verdict of the jury; among others that it allows more than plaintiffs were entitled to under the face of the pleadings. That error was immediately but only partially corrected by plaintiffs entering a remittitur of the sum of \$394.18, under which the judgment was rendered for the reduced sum of \$3,925.44, with recognition of the privilege claimed by plaintiffs in their petition. The additional error will be considered hereinafter.

Defendants both appeal, and they press consideration of other errors in the verdict of the jury.

1st. That it is not responsive to the issues.

The grounds are that the jury did not specifically refer to what amount of credits were allowed to defendants. In finding in favor of plaintiffs for the amount of their claim as stated in their petition, the jury must have considered the credits allowed by plaintiffs as well as those claimed by the defendants, the amount sued for being a balance of account. The law requires no more details in a verdict. The same consideration applies to the complaint that the verdict was silent on the question of partnership *vel non*. The verdict clearly indicates that the jury found that the defendants were liable as partners. And we approve of their finding both on the law and on the facts of the case. The defendants signed the contract as partners, and they are now estopped from denying its existence. The sale by John M. to James A. Ware of the former's interest in the plantation, and the dissolution of the partnership in October, 1880, after the contract had been in a great measure executed, and when a great portion of the machinery furnished outside of the contract had already been delivered and

adapted to the main apparatus, cannot affect the former's liability under the contract. That circumstance may vest him with certain equities against his vendee, but with that plaintiffs have no concern.

2d. It is argued that the verdict did not pass on the reconventional demand, and that it did not specify what amount was found under the contract and what under the account. In rendering an absolute verdict in favor of plaintiffs, the jury must be held to have passed on and rejected the reconventional demand. The rule is that the verdict of a jury, like a judgment, forms the authority of the thing adjudged upon all matters and demands set up in the pleadings. *Edwin's Heirs vs. Bissel*, 19 La. 222; *Theriot vs. Henderson*, 6 Ann. 222; *Villars vs. Faivre*, 36 Ann. 398.

As to the omission of the jury to specifically divide their finding between the two claims, that defect, if it be one, would not justify us to remand the cause. The whole case is before us under the same evidence which had been submitted to the jury and the verdict may be corrected on this appeal if found erroneous in that or in any other particular. *Vredenberg vs. Behan*, 33 Ann. 642.

We have carefully weighed the evidence in support of the reconventional demand, and we conclude that the plea is not sustained.

Some items of the machinery were on first trial found defective, but on complaint the matter was punctually and invariably remedied by plaintiffs. The machinery was put up in October and November, 1880; it was used during the entire grinding season of that year, and of the years 1881, 1882, 1883 and 1884; the account for the same was frequently submitted to James A. Ware, several part-payments were made thereon at different times, and no claim for damages was ever urged by the defendants before the institution of this suit; the demand in reconvention having been filed on April 25, 1885.

These circumstances must be held as indicating that defendants did not consider that they had been seriously damaged by the alleged defects in the machinery. *Delambre vs. Williams*, 36 Ann. 330.

Thus far our investigation has led to conclusions which are favorable to plaintiffs, but there are two errors in the judgment which it now becomes our duty to point out.

The amount of the judgment must be further reduced. In their petition plaintiffs allege that by part-payments down to a certain date,

Shakspeare, Smith & Co. vs. Ware.

their claim in the aggregate had been reduced to \$6075.25, and that they subsequently received a remittance amounting to \$2950, by which their claim was reduced to \$3325.25, for which judgment should be rendered, instead of the amount determined by the jury and the district judge.

The judgment is also erroneous in allowing the privilege claimed by plaintiffs. The silence of the verdict on that part of the demand must be construed as a rejection of the same. This is the legitimate result of the rule which we applied hereinabove on the question of the re-conventional demand.

But as a question of law, plaintiffs are not entitled to the privilege which they claim on the sugar-house and on the acre of land on which it is situated.

On that point, the provision of the Code, paragraph 3, art. 3249, reads as follows: "Those who have supplied the owner or other person employed by the owner or his agent, or sub-contractor, with materials of any kind for the construction or repairs of an edifice or other work which has been used in the erection or repairs of such houses or other work."

Now, under the very terms of the contract sued upon in this case, it does not appear that plaintiffs were employed or furnished materials to either construct or repair the defendant's sugar-house.

Their contract was to supply the defendants with an apparatus to boil the cane juice, to granulate the latter and to dry the sugar by the process of centrifugals, and to furnish all the pumps, the tanks and other appliances necessary thereto.

All the materials and machinery which they furnished under the contract, could be detached and removed from the building without changing or impairing the nature and the use of the sugar-house.

Under the law plaintiffs were entitled to a privilege on the materials which they had sold and delivered to the defendants, but they are not entitled to the sweeping privilege which they are now seeking to enforce.

This question came up in the recent case of Scannell & Lafaye vs. R. Beauvais, not yet reported, in which we announced the same conclusions. Plaintiffs in this case did precisely what the third opponents had done in that case. "They ignored and abandoned the privilege they had, and set up and attempted to enforce a privilege they had not."

 Claycomb & McNeely vs. Bisbee et als.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be amended as follows:

1. By reducing it from \$3,925.44 to \$3,325.25.
2. By rejecting the privilege which had therein been recognized in favor of plaintiffs, without prejudice to their right of claiming such privilege as they may have in law.

And it is now ordered that, as thus amended, said judgment be affirmed at the costs of plaintiffs and appellees on appeal.

Mr. Justice Watkins takes no part in this case, which had been submitted before his appointment.

No. 9573.

CLAYCOMB & MCNEELY VS. O. W. BISBEE ET ALS.

A sold machinery to B with obligation and guarantee to erect same, and that it should possess a specified working capacity. After having made advances to A, B refused to accept the mill because not complying with conditions of sale, and claimed from A reimbursement of advances. Thereupon, A, B and C made a contract by which C agreed to be substituted as purchaser in place of B, and A agreed to accept him as such substitute and to release B, and C, with the guarantee of A, agreed to repay to B the amount of his advances to A. Held, that B was not the vendor of the machinery to C, and was not entitled to vendor's privilege for the sum agreed to be paid to him.

In a case of doubt, where the circumstances are suspicious, this Court will not reverse the conclusion decreeing the simulation of a sale of the judge *a quo*, who saw and heard the witnesses.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Blanc & Butler for Plaintiffs and Appellees:

1. Plaintiffs, as vendors, entitled to a judgment for the price, to-wit: \$1287 02, with legal interest from judicial demand and costs; and to a further decree maintaining the sequestration and recognizing their vendors' lien upon the property sequestered. C. P. Art. 275, par. 7; C. C. Art. 3227; 1 Ann. 82; 4 Ann. 453.
2. As lessors to a judgment for the accrued rent of the land on which the mill and machinery were erected; and to a further decree maintaining the provisional seizure and recognizing their lessors' privilege on the property provisionally seized. C. P. Art. 285, par. 2.
3. To a further judgment against O. W. Bisbee for \$151 50 and interest, for wood sold and money loaned him, as per exhibit F.
4. To a further decree annulling the pretended transfer of the mill and machinery in controversy by defendant, O. W. Bisbee, to defendant, E. B. Benton, of date July 25, 1883,

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as fraudulent and simulated, and condemning said defendants *in solido* for the full amount of plaintiffs' claim and costs. C. C. Arts. 1970 to 1985 inclusive, and Art. 2464; 6 Ann. 552; 29 Ann. 4; 30 Ann. 513; 36 Ann. 624.

W. S. Benedict and H. C. Cage for Defendants and Appellants:

1. The sale of a thing belonging to another person is null. C. C. 2450.
2. Things of which the buyer reserves to himself the view and trial, although the price be agreed on, are not sold until the buyer be satisfied with the trial, which is a kind of suspensive condition of the sale. C. C. 2460.
3. A vendee who has not received the thing nor paid the price, can transfer only his right to require delivery on payment of the price. 3 R. 331; 5 M. 592.
4. Privilege can be claimed only for those debts to which it is expressly granted in this Code. C. C. 3185, 3312.
5. *Privilegia sunt strictissimas interpretationis.* They cannot be extended by implication or analogy; they are never allowed but when expressly granted, and then only by virtue of an exact compliance with the legal requisites to their creation and existence. C. C. 3185, 3312; 2 L. 93; 11 L. 28; 18 L. 70; 2 R. 154; 11 R. 73, 279; 2 Ann. 549, 774, 961; 4 Ann. 310; 6 Ann. 112, 276; 10 Ann. 431; 16 Ann. 107.
6. The vendor's privilege on movables can only be enforced while the goods are in possession of the vendee. 20 Ann. 545-557.

The opinion of the Court was delivered by

FENNER, J. In September, 1882, Claycomb & McNeely, who carried on a wood-yard and were engaged in sawing and splitting wood for sale, entered into an agreement with L. W. Miller & Co., a machinery firm of this city, whereby Miller & Co. agreed, in consideration of the price and sum of \$1,269.40, to sell, erect and place in working order, machinery for a saw-mill, to be completed within thirty days and to have a guaranteed capacity to handle fifty cords of wood *per* day—the price to be paid according to stipulated terms and the property to remain in the ownership of the sellers until payment.

Under this contract, Miller & Co. (or rather Miller, who was the sole person composing the pretended firm) went to work in erecting the mill, and Claycomb & McNeely advanced him \$250 cash, and furnished him materials and labor to the further value of \$1,037.

Although these advances thus appear to exceed the entire price to be paid, yet, Miller having failed to comply with his obligations in regard to the capacity of the mill, Claycomb & McNeely refused to accept the same and held Miller responsible for the \$1,287 which had been advanced by them. Litigation had ensued between them, the exact nature of which the record does not disclose.

Under these circumstances, a mode of settlement was proposed by Miller which resulted in a contract which is the basis of the present action.

The parties thereto are Claycomb & McNeely, Miller, and O. W. Bisbee.

The contract is very long. After reciting the contract between plaintiffs and Miller for the purchase of the machinery, and the fact that they had advanced to Miller the said sum of \$1,287, it proceeds:

"Whereas, O. W. Bisbee desires, with the approval of Miller, to be *substituted in the place and stead of C. & M. as the purchaser of said machinery*, and to acquire their right, title and interest in and to said machinery and the materials used in the erection of the same, for the price and upon the terms and conditions hereinafter mentioned.

"Now, therefore, it is agreed that C. & M. hereby assign, set over and convey, without warranty, to Bisbee," their aforesaid right, title and interest.

Then follow various other stipulations of C. & M. with reference to leasing to Bisbee the land on which the mill stood, and to furnish him with wood to saw and split and the price to be paid for work, etc.

Bisbee, on his part, accepts the transfer of the right, title and interest as made; binds himself to improve the mill to a capacity of thirty cords per day; to handle, by preference, wood supplied by C. & M., at prices fixed, and to allow the latter ten per cent of all gross earnings of the mill on wood handled either for them or for other parties, until the said allowances should have repaid to them the entire amount of the advances which had been made by them to Miller, viz: \$1,287.

Miller agreed to relinquish all claims against C. & M. as purchasers, and to dismiss a certain suit which he had brought against them on that account; and "*to accept O. W. Bisbee as the purchaser of the machinery in lieu and place of Claycomb & McNeely.*"

He further bound himself to furnish Bisbee the additional machinery required to give the mill the stipulated capacity; and also guaranteed the complete performance of all the obligations assumed by Bisbee.

Bisbee took possession of the mill and Miller furnished him new machinery to the amount of \$1500, for which he took notes with vendor's privilege.

Bisbee failed utterly to comply with his obligations under the contract, and subsequently made a sale or pretended sale of the property to one E. B. Benton. Thereupon plaintiffs brought the present suit against Bisbee, Miller and Benton, in which he claims judgment for the amount agreed to be paid by Bisbee and for an amount due for rent, with vendor's and lessor's privileges accordingly on the property which he caused to be seized under writs of sequestration and provisional seizure; and also for judgment annulling the sale to Benton.

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The court *a qua* gave judgment against Bisbee for \$1,456.52, maintained the sequestration and provisional seizure, recognized the vendor's privilege for \$1,287.02, and the lessor's privilege for \$28.50, and annulled the sale to Benton as fraudulent and simulated.

In so far as the moneyed judgment against Bisbee is concerned, it is fully sustained by the evidence.

There can be no question as to the correctness of the recognition of the lessor's privilege for rent and the maintenance of the writ of provisional seizure based thereon.

But from the statement of facts heretofore made, it appears clear to our minds that Claycomb and McNeely were not the vendors of the mill and machinery to Bisbee and, therefore, have no vendor's privilege for the debt due by Miller to them and assumed by Bisbee.

Miller was the original vendor to Claycomb & McNeely by a contract of sale which was never completed because the latter refused to accept the thing sold, and claimed reimbursement of payment and advances which had been made.

In this condition of affairs it was agreed between the three parties that Bisbee should be substituted as purchaser in place of Claycomb & McNeely; that Miller should accept him as such purchaser in place of C. & M.; and that Bisbee should assume payment of the claim of C. & M., with the guaranty of Miller. We have studied the terms of the contract carefully, and it admits of no other interpretation.

Hence, the judgment erred in recognizing the vendor's privilege and in maintaining the sequestration.

We have carefully weighed the circumstances attending the sale from Bisbee to Benton and all the evidence on the subject. They are of the most suspicious character, and excite in our minds such grave doubts of the reality of the transaction, that we do not feel authorized to reverse the conclusion of the district judge, who saw and heard the witnesses.

It is therefore ordered that judgment appealed from be amended by rejecting plaintiff's claim to a vendor's privilege; by dissolving the writ of sequestration issued; by reducing the amount of plaintiff's privilege from \$1,315.52 to 528.50; and by subjecting the order directing the sale of the property seized to the condition that, upon paying the said amount of rent due, the said order shall be vacated; and that, in other respects and as thus amended, the said judgment be now affirmed.

No. 9707.

THE STATE OF LOUISIANA VS. WILLIAM WHITNEY.

Oral testimony is admissible to prove the contents of an indictment and other important documents which were lost or mislaid, and of which there existed no copy or record.

Identity of a party at the bar with the convicted accused, is a matter of fact which the district court can determine at the time of passing sentence and with which this Court cannot interfere, where the question is not presented so as to enable it to decide whether the trial judge was right or wrong.

A PPEAL from the Seventh District Court, Parish of Franklin.
Moore, Judge *ad hoc*.

M. J. Cunningham, Attorney General, for the State, Appellee:

1. A transcript of appeal purporting to be a transcript of certain parts of the trial, and not a complete record of all the judicial proceedings necessary to the determination of appellant's case, is not a complete transcript, and the appeal should be dismissed. C. P. 587; *State vs. Johnson*, 37 Ann.
2. When the record shows a bill of information was filed and a trial regularly proceeded with, and after the conviction and before sentence the prisoner escaped and was a fugitive from justice for more than two years, that after having been recaptured and before sentence was pronounced upon him it was shown the bill of information was lost and there was no copy in existence, and the contents of the information was proven by parol evidence reduced to writing, and such evidence was made part of a bill of exception, and was afterwards abstracted from the clerk's office, the defendant cannot complain that the record does not disclose the nature of the charge against him for the reason that he is estopped from claiming any benefit or advantage from irregularities, made possible by his wrongful act of escaping from legal custody.
3. Parol evidence is admissible to prove the contents of an information lost and no copy of same being in existence. Wharton Cr. Ev. § 204 *et seq*.
4. Identity is a question of fact and cannot be inquired into by the Supreme Court.
5. A convicted felon cannot defeat the just execution of the law by urging the loss of records occurring long after his conviction, and of which it is placed in his power to take advantage by means of his unlawful escape.
6. The status of a criminal prosecution should not be impaired by the culprit's escape. When he is recaptured, matters ought to be considered as in the same condition as at the time of his flight. The criminal should not be permitted to profit by his own wrong.

J. W. Willis for Defendant and Appellant:

Parol evidence is inadmissible to show the existence, loss or contents of an indictment or information; and where an indictment or information is lost, destroyed or abstracted from the clerk's office, no further proceedings in such case can be had, except from a duly certified copy of the record in such case, taken from the record book kept for the recording of such documents, after positive proof of the loss, destruction or abstraction of the same. Whar. Cr. Ev. § 153, and cases cited in note 8; *Wright vs. State*, 50 Miss. 191. This case also reported in *Hawley's Amer. Cr. Rep.* 1 vol., p. 191; 1 vol. *Bish. Cr. Pro.* §§ 1178-79-80-81, and 319; Act No. 17 of the State of La., 1878, p. 42.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The defendant claims that the sentence passed on him should be reversed and the case remanded for a new trial.

State vs. Whitney.

The transcript, which he has filed in this Court, is certified by the clerk as complete, as far as relates to the trial and conviction of the defendant. The clerk further certifies that all the other papers in the case have been lost, mislaid or abstracted from his office.

The record, however incomplete, contains the two bills of exception on which the defendant relies for a reversal of the sentence.

The first bill relates to the overruling of an objection made by his counsel to the admission of oral testimony "to prove the contents of the indictment, bond and all the papers belonging to the case which were mislaid or lost, and no record having been made thereof as required by law."

The second bill is to a kindred ruling permitting similar testimony and to the passing of sentence in the absence of the missing important documents themselves, or of others of almost equal dignity.

The bills could not stand strict legal criticism.

It may, however, be gathered from them that the objections urged, were made to rest on the following grounds:

That no foundation had been laid to justify the admission of oral testimony; that the missing information could be supplied only by an exact copy of the same from the records; that the minutes did not show any particular charge of which the defendant was convicted; that the court was without authority to sentence the defendant for a crime not shown by the record, and that the accused at bar had not been identified as the party convicted.

In answer, it suffices to say that the first bill distinctly shows that the information and other papers were mislaid or lost, and that no record of them existed.

Under such circumstances, the law allows the admission of proof of inferior dignity to supply the deficiency.

Oral testimony was then received and it is only after it had been heard that the judge, made aware of the material facts which the documentary proof would have established, had it been produced, proceeded to pass sentence.

The question of identity was one of fact on which the lower court could and did pass. It is not presented in any form to enable this Court to determine whether the lower court was right or wrong.

It appears that the appellant, after conviction, broke jail, remaining at large some two years, and that it is after his capture that these proceedings were had.

Under the circumstances, we feel no authority to disturb the condition of things.

Judgment affirmed.

State vs. Deas.

No. 9744.

THE STATE OF LOUISIANA VS. ED. DEAS.

38	581
45	1144
88	581
104	187

The Supreme Court will not consider evidence submitted by the accused in a criminal case, in support of a motion for a new trial, unless said evidence be embodied in, or otherwise made part of, a bill of exceptions reserved by the defendant to the refusal of a new trial by the judge.

This Court cannot consider a complaint of alleged misconduct of an officer in charge of jury, not previously submitted to the trial judge and suggested for the first time on appeal, and by brief or argument.

A PPEAL from the Seventeenth District Court, Parish of East Baton Rouge. *Burgess, J.*

M. J. Cunningham, Attorney General, and *L. D. Beale*, District Attorney, for the State, Appellee:

The ruling of the trial judge upon the competency of a juror who did not serve upon the jury in a case in which the peremptory challenges were not exhausted, will be reviewed on appeal.

A juror is competent who swears on his *voir dire* that, notwithstanding his previous impressions, "his opinion would readily yield to the evidence if different from what he had heard, and that he could give the accused a fair and impartial trial."

When accused is on trial for perjury committed in a former case, evidence of threats and intimidation on his part to influence or prevent evidence contrary to his own, is admissible in the instant case as tending to show that the perjury in the former case was willful and corrupt.

The action of the trial judge in overruling a motion for new trial will not be reviewed unless a regular and former bill of exceptions thereto is taken. The statement appended to the motion and signed by the judge, that counsel excepted and tenders his bill, will not suffice.

Evidence taken on the trial of a motion for new trial will not be noticed unless embodied in a regular formal bill of exceptions, actually or by reference as part thereof, although it may be in the record.

A juror will not be heard as a witness to impeach the finding of the jury of which he was a member, by showing misconduct on part of himself or fellows, or the unusual means by which they agreed to a verdict.

A juror has the right to influence the action of his fellows by all fair arguments and reasoning, and give them the benefit during their deliberations of all the information he may have bearing upon the case.

It is not a "separation," or misconduct, such as to vitiate a verdict, for the foreman to advance to the stand and ask the judge a question in open court, although it is more regular to ask all instructions from the box—particularly when the explanation of the judge shows that the question and answer were not unfavorable to the interest of the accused. 4 L. 27; 23 Ann. 148; 8 R. 590; *Thompson & Merriam on Juries*, § 362, No. 2, p. 429, § 355, p. 423.

E. W. Robertson and *K. A. Cross* for Defendant and Appellant:

Any private communication whatever between the judge and any member of the jury, after the jury had retired to consider their verdict, vitiates the finding. *Thompson & Merriam on Juries*, sec. 355, and cases cited. A judge is not authorized to give jurors separate and private instructions out of the hearing and without the knowledge of counsel on both sides. *State vs. Friaby*, 10 Ann. 144; *Thompson and Merriam*, sec. 357.

State vs. Deas

The mere presence of an officer of court at deliberations of the jury, and conversation about the case, invalidates the verdict. Thompson and Merriam, sec. 302.

The opinion of the Court was delivered by

POCHÉ, J. The record contains numerous grounds of complaint by the defendant, who was convicted of perjury, but two questions only are discussed by his counsel on appeal.

The others are very trivial and are therefore abandoned.

In a motion for a new trial, the accused urges two grounds of misconduct of the jury, one of which is not pressed on appeal.

The ground which his counsel discuss is that the district judge allowed the foreman of the jury to step out of the ranks of his fellows up to the judge's seat, and that he then asked and obtained in private an instruction touching the case in hand.

The record contains a considerable mass of testimony which was taken on that point. But it is not embodied in, legally connected with, or even referred to, a bill of exceptions to the ruling of the district judge refusing the new trial prayed for. Hence, it cannot be considered.

The only attempt made by defendant's counsel toward drafting a bill of exceptions from the judge's refusal of the new trial prayed for, is in the following words:

"To the judgment of the court overruling this motion for a new trial accused excepted, and tenders his bill for signature and approval."

The reasons of the judge on his refusal of the motion, which were given at length and in writing, are not even embodied in, attached or referred to, the purported bill. We can but express our surprise at the apparent hope of counsel that we could sanction such glaringly deficient proceedings.

Repeated adjudications of this Court should have taught them the proper and only course to pursue in the premises. In Nelson's case, 32 Ann. 842, we culled from our jurisprudence and we formulated the rule that "This Court cannot take cognizance of the evidence upon which a motion for a new trial was refused by the court *a qua*, unless that evidence is embodied in a bill of exceptions."

The doctrine was immediately thereafter applied in the case of Given, 32 Ann. 782, in which we took occasion to say:

"Evidence to show the alleged misconduct of the jury was introduced and taken down in writing, and is in the record, but it is not embodied in, or attached to, a bill of exceptions," and under the authority of the Nelson case we declined to consider the evidence.

 Heirs of Castle vs. Floyd et als.

The same rule received similar application in the following cases: *State vs. Williams*, 36 Ann. 742; *State vs. Jackson*, 36 Ann. 769; *State vs. Belden*, 36 Ann. 824.

We are therefore stripped of all power to consider or pass upon the alleged misconduct of the jury.

On appeal, and for the first time, defendant's counsel make the point that one of the deputy sheriffs in charge of the jury committed the grievous wrong of conversing with some of the jurors about the merits of the case on which they were then deliberating.

But the simple statement that the point was made only on appeal is sufficient to dispose of the matter. To pass on a point which has not been submitted to the trial judge, would be assuming original jurisdiction. This we have not the power and much less the disposition to do.

The defendant has had a fair trial.

Judgment affirmed.

 No. 9679.

HEIRS OF ALLEN CASTLE VS. MRS. E. S. FLOYD ET ALS.

1. An heir, or the transferee of an heir, acquires the right the decedent possessed, to sue for the resolution of a sale for the non-payment of the purchase price; but same is necessarily restricted to the interest of such heir or transferee.
2. A right to sue for the enforcement of a vendor's lien, is different from that to sue for the resolution of a sale; and the former is not an auxiliary of the latter. This right does not pass to the purchaser of the vendor's notes, unless there be a special contract to that effect.
3. Neither the heirs of a deceased person nor the transferee, can sue for the resolution of a sale until previous tender has been made of the outstanding purchase notes, and such part of the price as may have been paid by the purchaser.

Such a tender is a condition precedent to the institution of the suit.

A PPEAL from the Sixteenth District Court, Parish of St. Helena.
Kernan, J.

Chas. E. Lea for Plaintiffs and Appellants:

Actions to resolve the sale for non-payment of price prescribe only in ten years. And this term of prescription begins from maturity of first instalment, when the price is to be paid in instalments. 14 Ann. 340; 23 Ann. 355.

Minors cannot be prescribed against, except in cases provided by law. C. C. 3522; 33 Ann. 769.

In actions of resolution it is not necessary to put defendant in default. 28 Ann. 582, 740.

The vendor returns the portion of the price paid, and the vendee returns the thing with its revenues. 14 Ann. 340; 28 Ann. 584, 741.

Prescription against the heirs was suspended during their minority and commenced to run from the date of their respective majorities. C. C. 3522.

The resolutive condition creates a right not personal but heritable and transferable. C. C. 491, 2449.

38	583
46	480

38	583
52	1201

38	583
125	191

Heirs of Castle vs. Floyd et als.

The right to resolve the sale for non-payment of price, is a distinct and independent right from that of enforcing payment. 24 Ann. 537; 12 Ann. 701.

A party will not be permitted to shift his position to a contradictory one in order to defeat the action of the law. 5 Ann. 18; 2 Ann. 269; 18 Ann. 141; 28 Ann. 460.

Marr & Kemp on the same side:

1. If the buyer does not pay the price of sale, the seller may sue for a dissolution of the sale. R. C. C. 2591.
2. In public sales the adjudication is the completion of the sale, the purchaser becomes the owner of the article adjudged and the contract is from that time subjected to the same rules which govern the ordinary contract of sale. R. C. C. 2608.
3. Where a purchaser at a judicial sale of property of minors fails to pay the price, the minors may sue for a dissolution of the sale; Jones vs. Crocker, 1 Ann. 440.
4. The vendor of a tract of land may enforce the resolatory condition against a third purchaser from his vendee. L. Bourgeois vs. L. Bourgeois, 23 Ann. 757; R. C. C. 3301. Stevenson vs. Brown, 32 Ann. 461.
5. Non-payment of the price constitutes a resolatory condition in the contract of sale and its effect is in no manner effected by the fact that the vendor has failed to preserve his privilege or mortgage by registry. 32 Ann. 461, Stevenson vs. Brown; 12 Ann. 694, Johnson vs. Bloodworth.
6. The action in resolution of a sale is one in revendication of the thing. The accomplishment of the condition giving rise to the action has retroactive effect to the day of sale things are put in the same condition as though the sale had not been made. R. C. C. 2641; Stevenson vs. Brown, 32 Ann. 461; Johnson vs. Bloodworth, 12 Ann. 699; 11 Ann. 654, George vs. Lewis; Thompson vs. Kilcreyae, 14 Ann. 340.
7. In actions on the resolatory condition no putting in default is necessary; they are not actions for damages for violation of a contract. Aymor vs. Delman, 28 Ann. 582.
8. The resolatory condition must not be confounded with the vendor's privilege. The former is not an appendage of the latter. Johnson vs. Bloodworth, 12 Ann. 699; George vs. Lewis, 11 Ann. 654.
9. The prescription against the action of resolution of contracts is ten years, commencing from the maturity of the price in case of contracts of sale. Jones vs. Crocker, 1 Ann. 440; R. C. C. 3544; George vs. Lewis, 11 Ann. 654.
10. Minors and persons under interdiction cannot be prescribed against except in the cases prescribed by law. Hooper vs. Purse, 13 Ann. 340; 6 Ann. 109; R. C. C. 3522.
11. Prescription not completed at the ancestor's death is suspended not interrupted. Rowls vs. Rowls, 6 Ann. 695; Smith vs. Gibbons, 6 Ann. 684.
12. The right to exercise the resolatory action in cases of sale is transferable, and would pass by a sale of the vendor's right to the property by him previously sold and to which the resolatory condition was attached, this right is not personal to the vendor. R. C. C. 2449, 491, 2642; Torregano vs. Segura, 2 N. S. 159.

M. A. Strickland, T. C. W. Ellis and J. E. Wilson for Defendants and Appellees:

1. The right to dissolve a sale for the non-payment of the purchase price is strictly personal to the seller and cannot be transferred or alienated. Swan vs. Gayle, 24 Ann. 503; Chamblais vs. Miller, 15 Ann. 713.
2. The resolatory action is a personal action and prescribed by ten years from the first default in the payment of the purchase price. C. C. 3544, 11 Ann. 654, and cases cited.
3. The prescription of personal actions is not suspended by minority, 24 Ann. 211, and if it is, this suspension is personal to the minor, 6 Ann. 684, and does not pass to his transferees and cannot be pleaded by them.

Heirs of Castle vs. Floyd et als.

4. This action grows out of proceedings in the matter of the minority and tutorship of plaintiffs, and is prescribed by four years C. C. 362; 6 L. 161; 19 Ann. 149. This prescription against one of the plaintiffs runs from the date of her emancipation. C. C. 385 12 Ann. 155; Proctor vs. Hebert, 36 Ann. 250. In computing prescription against the rights of the deceased sister, the prescription which accrued against her must be added to the prescription which was run against plaintiffs. Smith vs. Gibbon, 6 Ann. 684. The defendant has the right to plead these prescriptions. C. C. 3466; 8 Ann. 504; 19 Ann. 149.
5. Good faith is always presumed. C. C. 3481, and when once commenced continues, C. C. 3482, recitals in a title will not destroy it. 7 Ann. 3. Defendant purchased from those not only whom he believed to be the true owners, but who, in point of fact, were so. He is a purchaser in good faith, C. C. 503, 3451, and can owe no rent prior to suit, C. C. 508, 3453; 16 Ann. 290, and is entitled to his improvements. 27 Ann. 398.
6. Minors' property and rights may be alienated or changed by the advice and consent of a family meeting, C. C. 229, 339, and where the formalities of law have been complied with, they are the same as persons of age. C. C. 1868, 2231; 1 Ann. 236; 9 Ann. 428; 15 Ann. 148; 28 Ann. 299; 32 Ann. 956.
7. Where one parts with his property upon the faith of judicial proceedings in matters of minority, he is protected by said proceedings. 1 H. 924, No. 13; 16 L. 120; 32 Ann. 954. Equity will regard as done what should have been done. 6 Ann. 91, 117; 28 Ann. 100.
8. Where notes, which are owing by the tutor to his ward, become due and exigible during the term of the tutorship, they are considered in law as paid, as so much cash in the hands of the tutor for which he is responsible as tutor, and which is secured by the legal mortgages resulting from tutorship. Succession of Triche, 34 Ann. 1148; Succession of Hebert, 27 Ann. 300 35 Ann. 546.

The opinion of the Court was delivered by

WATKINS, J. Allen Castle died in the parish of St. Helena in the year 1861, leaving a surviving widow and three children, viz: Florida, John Benjamin, and Nettie—all minors.

The widow qualified as their natural tutrix, and in that capacity administered the succession of her deceased husband. During the minority of the children she intermarried with W. D. Floyd, without first obtaining the consent thereto of a family meeting. Thereafter proceedings were inaugurated for the partition of certain real estate of Allen Castle's succession by licitation and public sale. W. D. Floyd became the purchaser upon the terms fixed by the order of court, viz: upon terms of credit, one, two and three years; and he executed his notes accordingly, with mortgage retained.

This partition sale occurred on the 8th of August, 1867.

The sundry notes were divided or partitioned between Mrs. Floyd and her three children according to their respective interests, and in the proportion of one half to Mrs. Floyd, and to each of the children one third of one half.

Plaintiffs claim that these notes were never paid.

In 1871, Floyd sold the land to K. K. Thompson, who is now in possession.

Heirs of Castle vs. Floyd et al.

In 1875, Florida Castle died intestate and without issue, and her mother, Mrs. Floyd, inherited one fourth of her estate, and her brother, John B., and Nettie, each one half of three fourths.

John B. Castle became of full age in 1881. In 1882, Nettie Castle married W. H. McClendon. In 1884, John B. Castle conveyed to McClendon all of his right, title, interest, claim and pretension in and to the successions of his deceased father, Allen Castle, and his deceased sister, Florida Castle.

In 1885, this suit was brought by John B. Castle and Nettie Castle, wife of W. H. McClendon, for the resolution of the *partition sale*, for the non-payment of the purchase price by W. D. Floyd; and Mrs. E. S. Floyd individually and as tutrix for the minor children of herself and W. D. Floyd, now deceased, were made defendants; and also K. K. Thompson.

Thompson excepted that John B. Castle had *no interest* in the suit, having transferred his interest in the successions of his father and sister to W. H. McClendon; and further, that the plaintiffs' petition discloses *no cause of action*.

Thereupon McClendon offered to make himself a party, in lieu of John B. Castle, and by order of the judge *a quo* he was substituted in his place and stead, and annexed his title thereto, bearing date 29th of December, 1884. To this ruling the defendants reserved a bill of exceptions, on the ground that John B. Castle was now legally and rightfully a party to this suit—he having transferred all of his rights and interests to McClendon antecedent to the institution of the suit—and, he never having been himself a party, no one could be *substituted* in his place.

In our opinion the ruling of the judge *a quo* was erroneous.

This Court had recent occasion to decide same question just the other way, in *Barron vs. Jacobs*, not yet reported.

John B. Castle had conveyed his interest to W. H. McClendon—Nettie Castle's husband—*antecedent* to institution of this suit, and no one could be called to take his place.

Nettie Castle was then the only plaintiff in the suit when it was brought, and the question presented is whether the partition discloses a cause of action for the resolution of the partition sale.

We entertain no doubt of the plaintiffs' right to sue for the resolution of the *partition sale*, quite as well as of a sale under private signature. 1 Ann. 440, *Jones vs. Crocker*.

There is no question of the fact that the *heirs* of Allen Castle, at his death, acquired his succession in the same state it was when he died.

The heirs of a deceased person are seized of his succession at the very instant of his death, and the right of possession that the deceased had, continued in them, with all of its defects and advantages; the change in the proprietor producing no change in the nature of his possession.

An interest in a succession may be disposed of at public or private sale, and the purchaser takes the place of the heir whose interest is thereby conveyed.

In either case an heir, or the transferee of an heir, would acquire the right of deceased *pro tanto* only, to sue for the resolution of a sale his ancestor had made, or of one made of his estate for the non-payment of the price.

That right would pass as any other asset of the deceased.

But we do not concede that it can be fairly deduced from that fact that the *simple indorsee* of a note evidencing a part of the purchase price would thereby acquire the *seller's* right to sue for the resolution of the sale.

We have been cited by plaintiffs' counsel only to one case in which it has been so decided, viz: *Torregano vs. Segura*, 2 N. S. 159. In that case it was the *security* who was *himself personally bound* for the payment of the debt, who discharged it, and by virtue of his legal subrogation to all of the creditors' rights, claimed the property by the resolutory action. Suffice it to say that he was not an indorser for value.

In our opinion the two remedies of the vendor—one for the enforcement of the contract and the other for the resolution of it—are diametrically opposed, in the very nature of things.

A suit to enforce the vendor's lien is an affirmation of the contract; while a suit for the resolution of it must be preceded by the *restitution of the purchase notes and such part of the price as shall have been paid to the vendee*, and same is a condition precedent to institution of the suit. 23 Ann. 354, *George vs. Knox*; 24 Ann. 537, *Templeton vs. Pegues*; 15 La. 76, *Canal Bank vs. Copeland*.

In 9 Ann. 84, *Augusta Insurance Company vs. Packwood*, it was said that "to effect a rescission of the sale, so as to replace the parties in the same position as if a sale had never been made, the parties to the sale and rescission should be the same."

In 7 Ann. 67, *Leflore vs. Carson*, the Court said: "If the sale from McDonald to Messrs. Payne is to be rescinded, this cannot be done without restoring the vendor and the vendees to their original condition. The dissolving condition, says the Code, is that which, when accomplished, operates the revocation of the obligation, placing matters in

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the *same* state as though the obligation had not existed. * * * How is Butler to replace matters in *statu quo*? He is the *mere holder of one of the notes*. He is *not the vendor*, nor anything more than one holding *partial rights of the vendor*."

R. C. C. 2561: "If the buyer does not pay the price, the *seller* may sue to rescind the sale."

C. N. 1654: "If the purchaser does not pay the price, the *seller* may demand the annulment of the contract."

C. N. 1692: "The sale or cession of a *credit* comprises the accessories of the *credit*, such as *security, privilege, and mortgage*."

The "sale of a credit"—one of the purchase notes—passes all of the securities and means of its enforcement; but the right to resolve the sale for the non-payment of the price—"credit"—is necessarily inherent in the *seller*, or his heirs.

In 12 Ann. 699, Johnson vs. Bludworth, the Court said: "But it is impossible to confound the resolatory condition with the vendor's privilege. The former is not a mere appendage of the latter."

In Swan vs. Gayle, 24 Ann. 503, the Court said: "The action for the resolution of the sale implies and presupposes the *renunciation* of the right to demand the payment of the price."

Again: "Now, a right which cannot be exercised, so long as another right exists, cannot be the accessory of the latter."

Again: "He did not by buying the notes take the place of Filhiol in the contract of sale, else the purchaser of a negotiable note, given for the price of the property, would become the *warrantor of the title* to the property. A proposition which leads to such a conclusion ought not to be sustained by a court of justice."

These conclusions appear to our minds almost irresistible.

We are of the opinion that the foregoing decisions are consistent with the object to be attained by the resolution of the contract, the *restitutio ad integrum*—the replacing of parties in the *same situation* they occupied before it was made.

While it is true this action descended to us from the Roman law, yet under that system of jurisprudence the resolution of a sale for the non-payment of the price could not be demanded, unless there was an express stipulation in the contract to that effect; and when it was thus stipulated, the contract was *void ab initio*, if not fulfilled by the payment of the price.

Under our law the resolatory condition is *implied* in every commutative contract, and the failure of the vendee to pay the price only

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renders the contract *voidable*. 6 Ann 4, Chretien vs. Richardson; 15 La. 76, Canal Bank vs. Richardson; R. C. C. 2046.

We are inclined to the opinion that the right of resolution inheres in the *seller*, and feel satisfied that it does not pass to the simple indorsee of purchase notes, like security, mortgage and privilege, which are auxiliaries, for the *enforcement* not the resolution of the contract.

Even conceding the right of McClendon to have himself substituted for John B. Castle, as a party plaintiff, the plaintiffs' petition discloses no cause of action for the resolution of the partition sale of the 8th of August, 1867, because the plaintiffs, when thus joined, only ask for the resolution of the sale as to *one undivided half interest*.

This is impracticable and cannot be done. How can the plaintiffs restore the *statu quo* or bring about the *restitutio ad integrum*?

We think they cannot.

Suppose this Court should grant plaintiffs the relief prayed for and resolve the partition sale with respect to an undivided one-half interest, would not their one-half interest thus restored to them, as the heirs of Allen Castle, become at once subjected to the vendor's lien, and mortgage securing the *remaining* purchase notes held by the defendant, Mrs. Floyd, the surviving wife of Allen Castle?

This Court so decided expressly in 23 Ann. 411, Stuart Hyde & Co. vs. Madame Suzette Buard, and we think correctly.

We prefer to follow the doctrine announced in 24 Ann. 503, Swan vs. Gayle. In our opinion, it finds support in other decisions we have cited; though in that case the question was treated as *res nova*. In so far as there may be any expression in the opinion of the court, in 1 Ann. 440, Jones vs. Crocker, indicating a contrary view, the same is overruled.

The opinion herein expressed on other questions, dispenses us from the necessity of considering the plea of prescription urged.

It is, therefore, ordered, adjudged and decreed, that the judgment of the court *a quo* be amended and that the demands of plaintiff for the rescission of the partition sale be rejected, and that all costs be taxed against the plaintiffs and appellants.

 CONCURRING IN PART.

BERMUDEZ, C. J. This is an action for the resolution of sales, on account of the non-payment of the price.

It is brought by one of the heirs of Allen Castle and by a transferee of the interest of the other.

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The averments are that two tracts of land belonging to the succession having been sold to effect a partition, the notes furnished were divided among the heirs and the widow, the property passing from the adjudicatees to Thompson & Freeman, who are made defendants; that the failure on their part to pay the purchase price justifies a rescission of the sales. *The widow is not a party plaintiff.*

The defense is a denial of the pretensions of plaintiffs; specially that, by his purchase of the interest of one of the heirs in the price of sale, the transferee, in the absence of an express stipulation, did not acquire the right to ask the resolution on the ground of non-payment of the price of sale; that even then, the right of action is barred by prescription.

The right to enforce the resolutive action in a contract of sale is peculiar to the civil law and has been so rarely exercised in this State, by others than the vendor, that only two cases directly present the interesting question: whether the right is transferred to the purchaser of the claim *without* an express assignment of it.

In Torregano vs. Segura, 2 M. N. S. 158, the plaintiff was the endorser of a note given for the price of slaves and having paid it, claimed as subrogee to the rights of the vendor, the dissolution of the sale and delivery of the property to himself. The Court say: "The subrogation is of the right of the creditor, not against the debtor only but also against the securities, and like a transfer of the debt it includes everything that is accessory thereto as securityship, privileges, mortgages. The rescission of the sale is a means of securing the payment which the vendor, the creditor of the price, has. This right is an accessory of the claim and would pass by the sale or transfer of it. The subrogation has the same effect."

Swan vs. Gayle, 24 Ann. 498, was an action by the endorsee of notes representing the unpaid price of property and the Court at first held that the action was maintainable on the authority of the Torregano case supplemented by George vs. Lewis, 11 Ann. 654, where it was said the resolutive action is a concurrent remedy with a suit to enforce the vendor's lien. But on rehearing, the ruling was reversed, and it was held by a divided court (two dissentients) that the right to dissolve the sale is not an accessory of the notes for the unpaid price, and does not pass to a third party by the transfer of them. And in this last opinion was cited Citizens' Bank v. Cuny, 12 Rob. 279, where the Court said, the vendor's privilege gives the seller a right to the rescission of the sale on the non-payment of the price, and he by transferring the notes parted with the accessory rights which vested in the plaintiffs as

the holders of the notes. This was cited only to observe that it, as well as the passage quoted already from the Torregano case, was said only *arguendo* and was not authoritative.

The expressions in both cases are pertinent and necessary to the decisions, with such contrariety of opinion it is obvious that the question cannot be considered as settled by our own jurisprudence. As art. 2645 of our Revised Civil Code is identical with art. 1692 of the Code Napoleon, it is natural to turn to the French commentators for light and guidance.

They are found differing as much as this Court.

Duranton holds that the resolutive action is not comprehended in a general cession, but only passes by a special cession of it and cites Sirey, Delvincourt and Dalloz. *Code Civil Annoté*, art. 1692, p. 749. However Dalloz does not support that *dictum*. On the contrary he affirms that, if the cession is general, without any restriction, it will comprehend the action in resolution unless it appears that the intention of the parties is to exclude it. This is his language;—"Si le vendeur a cédé en termes généraux tous ses droits et actions contre l'acquéreur sans rien spécifier mais sans faire non plus aucune restriction, la cession comprend les actions en nullité et en rescision ou résolution, à moins qu'il n'apparaisse, d'après les circonstances, que l'intention commune des contractants a été d'exclure ces actions de la cession. Paris Ed. 1874. Com. art. 1692 C. H.

Marcadé argues with his usual dogmatic energy that the right to dissolve the sale for non-payment is not even an accessory of the right to demand payment of the price and of course does not pass by a transfer of the notes that represent the price. Laurent opens his discussion with the statement that the question is very much controverted and there is some doubt about the true solution of it, but he adopts the opinion that the right to dissolve the sale is not comprised in the cession of the obligation for the price. Authors are divided, he says, as well as jurisprudence and the question is not settled. *Droit Civil*, to. 24, p. 529 § 535.

On the other hand, Toullier says when the terms of the cession are general and absolute it is impossible to admit any exception and all rights are transmitted to the cessionary, and as an example he adds that the right of a seller to demand the resolution of the sale on default of the payment of the price is ceded to him to whom he sells the credit. *Droit Civil Français*, to. 2 § 222, pp. 274-5.

So also Rogron concludes with reason that a cession of the credit that represents the unpaid price of an immovable includes the right

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to demand the resolution of the sale. Com. art. 1692 C. N., and Solon is of the same opinion. Sur la nullité, to. 1. § 450, p. 311. Gilbert in his *Codes Annotés*, p. 809, art. 1692 C. N. says a general cession comprehends the rescinding and rescissory actions, and besides Solon, cites as sustaining that opinion Duvergier, Troplong, and Persil.

If the French commentators are equal in authority on both sides and resort is had to independent reasoning, it is not perceptible why the right to dissolve the sale for non-payment of the price should not pass to the buyer of the credit, as well as the right to enforce the payment of the price, through the vendor's lien, for why should the one be deemed to pass by a general transfer of the credit and not the other? Both are means of compelling the buyer to perform his obligation. The buyer's obligation is to pay the price or restore the property. The action to enforce the vendor's lien compels the payment of the price, or failing that, the sale of the property, in order that the price may be realized. The action to dissolve the sale for non-payment of the price compels the restitution of the property without the intervention or medium of a forced sale of it. If the one is transferred by the transfer of the credit that represents the price (and all authorities agree that it is) what reason in logic or in law can there be for holding that the right to dissolve the sale must be specially transferred or it will not pass by the transfer of the credit that represents the price. The French commentators, so acute in discerning refined distinctions and sometimes pushing them to the verge of metaphysical subtlety, divide on the question as each holds the right to be an accessory or not of the principal obligation, but where the vendor has two remedies or rights, it appears inconsistent and technical to require a special transfer of one while the other passes by a general transfer.

It may be said that the right to dissolve the sale for non-payment of the price ought to be exercised by the seller and by no one else, for if he sells the credit that represents the price he has received the price of his property in the sum he gets for the credit. But this is an argument for the non-transferability of the resolutory action. Now all the writers hold that the action is transferable. The difference between them is that some hold the transfer must be special and others that it need not be.

Again, if the transferor of the claim for the price does not transfer the right of resolution of the sale because of non-payment of it among his other vendor's rights, the buyer of the property might be exposed to two actions by two parties—one by the transferee for the price, the

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other by the seller for the dissolution of the sale for non-payment and thus two suits might go on *pari passu*. Must judgment be rendered in each, or will one exclude the other? And will in the latter case the transferee or the seller be compelled to give way?

While I consider that the right to sue for the resolution of the sale passes *without* special mention, I believe that it does not pass, where the entire claim for the price is not transferred and that it cannot be exercised, unless by the person or persons who represent the whole claim.

As the entire claim is not represented in this suit, I think that plaintiffs' demand must be dismissed.

No. 9668.

BRITISH AND AMERICAN MORTGAGE COMPANY VS. MRS. E. J. RALSTON
AND HUSBAND,

AND

MRS. E. J. RALSTON AND HUSBAND VS. BRITISH AND AMERICAN MORT-
GAGE COMPANY.

(Consolidated).

Paragraph 4 of art. 739 of the Code of Practice, which empowers a seized debtor to arrest an executory process for the reason "that time has been granted him for paying the debt, although this circumstance be not mentioned in the contract" has reference to, and contemplates only, an agreement made since the execution of the contract and not before. It may be enforced if made part of the contract as a suspensive condition depending upon the happening of an uncertain future event; but not when claimed to have been made before the contract.

Such a previous stipulation, when not included in the contract, will be deemed as having been formally abandoned by the contracting parties.

A PPEAL from the Ninth District Court, Parish of Tensas.
Levis, J.

Steele & Garrett for the British and American Mortgage Company,
Appellant:

That portion of art. 739. C. P., which provides that the debtor can arrest the sale "when time has been granted to him for paying the debt, although this circumstance be not mentioned in the contract," has no reference to time granted before, but can only mean time granted after the date of the contract. It contemplates an agreement extending the time made subsequent to the contract. *Vail vs. Moll et al.*, 37 Ann. 203; C. P. 739, part 4.

An authentic act makes full proof of what it contains as between the parties; so, without a special averment of fraud, error, ambiguity or the like, the correspondence or negotiations between the parties previous to the date of the contract is inadmissible, for the purpose of contradicting, varying or extending the terms of the authentic act. C. C. 2236; Succession of Tete, 7 Ann. 95.

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Letters or statements by third persons, not parties to the contract in writing, are inadmissible for the purpose of affecting the written contract, particularly where the agency or authority of such third person is not shown.

Where an amended petition, claiming damages, (being a matter of substance and materially changing the character of plaintiff's action), was never served on defendants, or its allegations put at issue by default or answer, it will not be considered as forming any part of the pleadings. *Levy et al. vs. Webber et al.*, 8 Ann. 439; *Brown vs. Brown*, 21 Ann. 461; 12 Ann. 60; 4 La. 13; 2 La. 130-392.

An amended petition, containing matters of substance not served or put at issue, will not authorize the introduction of evidence; and there being no *contestatio lites*, a judgment based upon such amended petition is null. *Levy et al. vs. Webber et al.* 8 Ann. 439; *Brown vs. Brown*, 21 Ann. 461; 12 Ann. 60; 4 La. 13; 2 La. 130-392.

Wm. F. & D. C. Mellen on the same side:

1. In the case of a writ of seizure and sale there is no authority of law for coupling petitions for damages for the wrongful issue of such writs with the petition for injunction without bond, based on art. 739, C. P. Such petitions cannot be coupled with a motion to dissolve the sequestration. Calling such petitions amended petitions or amended oppositions does not change their nature. They set up nothing in opposition.
2. Without first converting the proceedings *via executiva* into proceedings *via ordinaria*, such petitions cannot be treated as demands in reconvention. Where a writ of seizure and sale has been obtained *via executiva* and the defendant obtains an injunction against the execution of such a writ on the ground that the time of payment had been extended, under C. P. art. 739, and the original plaintiff files his answer to the petition of defendant for the injunction, the petitioner for injunction cannot set up a claim to damages by an amended petition or a demand in reconvention, even though the original plaintiff be a non-resident of the parish and State.
3. Nor can such amended petition be considered as a demand in reconvention against the petition for the writ of sequestration. There is no law authorizing a judgment for damages on the dissolution of a sequestration. A new action is required on the sequestration bond. A petition for damages is not in support of a motion to dissolve a sequestration. *Nuzum vs. Gore*, 24 Ann. 208.
4. That number of art. 739, C. P., which provides for an injunction without bond, in case of the extension of a debt, refers to an extension granted after the maturity of the debt, and not to that which may have been promised beforehand and is not embraced in the contract when signed. *Vial vs. Moll*, 37 Ann. 203.
5. B makes a loan to R. B promises R that in case of overflow or other great disaster, R will receive kind treatment at his hands, and the notes will be extended. Subsequently an overflow occurs, an extension is granted a first and again a second time. The extension being granted once by reason of overflow the promise has been fulfilled, and is no longer obligatory.
6. After two extensions granted by the creditor, and the second term granted having lapsed, the creditor was under no legal obligation to withhold proceedings. If the debtor believed she had a right to an additional extension by reason of overflow, it was her duty to ask for such extension and inform the creditor of the overflow. The seizing creditor cannot be held to have been premature or to have rendered himself liable for damages under such circumstances in the absence of such request from the debtor.
7. The application of the money borrowed by the wife to the purchase of mules in the name of the husband for work stock on the plantation mortgaged, the giving of a bill of sale by the husband on these same mules, to secure his own debt for borrowed money or supplies were, under the other circumstances of this case, sufficient to arouse the suspicions of the creditor, and taken in connection with his right to sequester all property mortgaged to him on the maturity of the debt (*Gest Atkinson vs. N. O. St. Louis*

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and Chicago Railroad, 30 Ann. 28 and 29) there was sufficient warrant for the sequestration, and it should have been maintained.

8. The record shows no proof of actual damages. The only evidence is of prospective, hypothetical, imaginary damages. The writ of seizure and sale was never served. It was enjoined as soon as issued. The writ of sequestration was served on six mules and several articles of movable property; but the seizure was only nominal. The property was on the instant turned over to the husband of the plaintiff living on the plantation, and by him turned over to the manager of the plantation. The plantation was never for a moment without the use of the articles seized. *Bonner vs. Copley*, 15 Ann. 504.
9. • The judgment allows interest from judicial demand. This is error. 1 Ann. 392; 15 Ann. 504; 37 Ann. 497.

Wade R. Young for Mrs. E. J. Ralston and husband, Appellees.

The opinion of the Court was delivered by
POCHÉ, J. Holding past due mortgage notes executed by Mrs. Ralston, plaintiffs sued out executory process on the property subjected thereto, and on the same day, they obtained, in aid of their executory proceedings, a writ of sequestration of several mules and other movable property attached to the mortgaged plantation.

Mrs. Ralston obtained an injunction on the executory process, before seizure, and without bond, on the ground that time had been granted her for paying the debt; and she filed a motion to dissolve the writ of sequestration on the ground that it had wrongfully issued, on allegations that were false and entirely unfounded.

In amended pleadings, which her counsel calls oppositions, and which the district judge treated as amounting together to an answer to the petition for the writ of seizure and sale, she alleged great injury to result to her property, to her credit and to her probable future earnings, amounting to \$10,000, from each of the writs which had been wrongfully obtained against her, and she prayed for a judgment in damages therefor.

On motion of her counsel, the two cases, the motion to dissolve the writ of sequestration and all the pleadings and demands were consolidated by order of the district court, and all were tried together, in an incongruous undefinable mass, resulting in a judgment which dissolved the writ of sequestration, perpetuated the preliminary injunction, and condemned the seizing creditors to pay to their former debtor the sum of \$3,175 and interests, as damages for their wrongful acts in their unlawful attempt to enforce payment of their claims against Mrs. Ralston.

The seizing creditors have appealed and the seized debtor has prayed for an amendment with a view to the increase of damages to the sum of ten thousand dollars.

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The amount of the seizure was for four thousand dollars.

The mortgage on which the suit is based, was executed on the 23d of December, 1881, and was intended to secure a loan of \$6,000 represented by three notes of \$2,000 each, maturing respectively on the first days of January, 1883, 1884 and 1885.

The two writs were issued on the 17th of November, 1884, a short time previous to the maturity of the last note, hence the latter note was not in suit.

The agreement to grant time for paying the debt is alleged to result from the following letter written by the alleged agents of the plaintiff company :

NEW ORLEANS, November 9, 1881.

Col. George Ralston, Waterproof, Tensas Parish, Louisiana :

DEAR SIR—In case of overflow or any other great disaster, Mrs. Ralston may feel sure that she will receive kind and honorable treatment at our hands, and that the time of the notes will be extended.

You will oblige us by filling up and returning our regular form of application, one of which we sent you in our last.

Yours truly,

SHATTUCK & HOFFMAN.

The contention on the part of Mrs. Ralston is that Shattuck and Hoffman had full and unlimited power and authority to bind the plaintiffs in all contracts and stipulations, and that their consent to extend the payment of her notes in the event of an overflow was the condition precedent on which she had agreed to accept the proffered loan with mortgage on her plantation, and that by reason of overflows which occurred in 1882, 1883 and 1884, the anticipated suspensive condition went into full effect, and that therefore payment of the notes was not exigible when this suit was brought.

It appears, from a comparison of dates, that the letter relied on was written more than one month previous to the execution of the mortgage, and the record shows that it formed a part of the negotiations which led to the contract as adopted on the 23rd of December, 1881. If the condition mentioned had been adopted as a part of the contract, it would doubtless have been included in the act of mortgage.

The maturity of each note is evidenced by the tenor of the same, and is authenticated in the act of mortgage which contains no suspensive condition whatever, and the authentic act must be held as containing the true and real agreement of the parties thereto. The fact that a previous project of a stipulation is not contained in the authentic act which evidences the final contract entered into by the parties is of

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itself, and must be held in law, as a conclusive indication of its abandonment by mutual consent.

If the stipulation had been included in each of the notes or recited in the act of mortgage, the case would be entirely different and it would then fall under the authority of the case of *Marsh vs. Foster*, 11 Ann. 182, so confidently invoked by appellee's counsel.

In that case, the clause providing for a suspensive condition depending upon the happening of a future event, was included in each of the mortgage notes, and the Court held that proof of the happening of the stipulated event would operate as a suspensive condition.

But, in this case, we are asked to hold that the maturity of notes determined at a fixed time by the contract, must be controlled by an agreement which forms no part of the contract, but which is of anterior date, and that under the 4th paragraph of art. 739 of the Code of Practice, an executory proceeding can be enjoined on a sworn allegation of some indefinite understanding between the parties previous to and making no part of the contract sought to be enforced.

Under such a construction authentic acts would be stripped of all the certainty and binding effect with which the law contemplates to surround them, when it declares that "the authentic act is full proof of the agreement contained in it, against the contracting parties and their heirs or assigns," "unless it be declared and proved a forgery."

The agreement by which time has been granted for paying the debt held out by the Code to a seized debtor as a ground of injunction, refers unmistakably to a subsequent event, and not to an agreement which antedates the creation of the debt. How could anyone agree to grant time for the payment of a debt, before the maturity of the debt had been fixed or determined upon? Hence, in the case of *Vail vs. Moll*, 37 Ann. 205, this Court said: "The portion of the article of the Code of Practice (739) which provides that the debtor can arrest the sale, where time has been granted to him, although this circumstance be not mentioned in the contract, can have no reference to time granted *before*, and can only mean time granted *after* the date of the contract." On that point the Court was unanimous, the difference of opinion being only as to the status of the debt at the time that the alleged agreement to grant time had been made.

We are clear in our conviction that the ground of injunction advanced by the defendant in execution could find no sanction under the provisions of art. 739 of the Code of Practice.

But, in justice to plaintiffs, it must be observed, as it appears from the record, that they did not lack in indulgence towards their debtor,

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whose notes were allowed to run from January, 1883, and January, 1884, to November, 1884, and who did not proceed until it appeared conclusive that their debtor had no means to pay the taxes on her property, or the arrearred interests on her notes, or to defray the necessary expenses of cultivation.

In considering this point, we have assumed *arguendo* that Shattuck and Hoffman had the legal authority to contract in the name of plaintiffs, but we must not be understood as passing on that question, which is seriously controverted by plaintiffs, and which remains undecided. We yielded the benefit of the argument to the defendant in execution with the result as above announced.

The ground on which plaintiffs rested their claim for a sequestration of the mules and other movables attached to the mortgaged plantation, was the fear that the same would be removed beyond the jurisdiction of the court during the pendency of their suit, and that fear rested on a bill of sale, (known as a chattel mortgage at common law), which had been made of these mules, to residents of the State of Mississippi by the defendant's husband since the date of the mortgage, and for a debt which had not yet been satisfied when the executory process was begun.

That circumstance was more than sufficient to legally justify the fear which Article 275 of the Code of Practice contemplates; and no creditor could in reason or in law be expected or required to procrastinate until the mules had been removed to Mississippi, which could be accomplished in a few minutes, by merely crossing the river with them.

In this connection we note that in her testimony Mrs. Ralston states that the mules which were sequestered herein, were the lawful property of her husband.

If such be the case, her motion to dissolve that writ must fall because she is without interest in the proceedings, and hence she can recover no damages whether the sequestration was wrongfully obtained or not; and if they are part of the mortgaged plantation, the writ is good because it was based on sufficient grounds to justify the fear and belief that plaintiffs would otherwise have lost their recourse on them.

Having thus reached the conclusion that plaintiffs were legally entitled to both the writs which they sued out in this case, we are not concerned with the injury which their proceedings may have caused to their unfortunate debtor, who is, therefore, in no worse legal condition than all other debtors who cannot meet their just and past due liabilities, and whose property is in consequence subjected by law to the action of their creditors.

Hill vs. Railroad Company.

Under these views of the controversy we eliminate from discussion several important questions of practice involving the right of a defendant in execution to cumulate with an injunction under art. 739, Code of Practice, a demand in damages for a wrongful seizure; as well as the legal definition and classification of the amended pleadings interposed by the defendant in execution under executory process.

It is therefore ordered, that the judgment appealed from be annulled, avoided and reversed. It is now ordered that the injunction herein granted to Mrs. Ralston, the defendant, be dissolved, that the writ of sequestration herein sued out by plaintiffs be sustained, and the motion to dissolve it, overruled and dismissed, and the demand of defendant for damages be rejected, and that she be condemned to pay all costs in both courts.

No. 9546.

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ALEXANDER HILL VS. CHICAGO, ST. LOUIS AND NEW ORLEANS RAILROAD COMPANY.

The legislature of the State has veated the city of New Orleans with authority to regulate the use of her streets and to authorize the establishment thereon of railroads operated by steam. The ordinance of 1871, No. 1031 A. S., authorising the N. O. Jackson and G. N. R. R. Co. to use steam on its track on St. Joseph street, was a valid exercise of that power.

The act of the General Assembly, No. 78 of 1870, never went into effect by reason of non-compliance with the terms of its concluding section; and even if it had gone into effect the proper construction of it would be that it was a mere negative of authority to use steam on St. Joseph street, under said act, but that it did not prohibit the city from granting such authority.

In absence of any allegation or proof that defendant's railroad is improperly constructed or conducted, or uses defective machinery, or, in any way, occasions injury not incident to the prudent and lawful exercise of its right, plaintiff is not entitled to the injunction or damages claimed.

An action of damages will not lie for merely consequential injuries resulting from the pursuit of a business and exercise of rights, lawful in themselves, when they are exercised with prudence and caution and in a manner to cause no unnecessary injury. Such inconveniences or injuries must be borne as the tribute of individual inconvenience to the general good.

Article 156 of the present Constitution is not applicable to this case.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

James D. Hill and W. B. Sommerville for Plaintiff and Appellee:

1. The council of the city of New Orleans has the authority to grant to railroad companies the privileges of using the streets. *Tilton vs. R. R. Co.*, 35 Ann. 1069; 27 Pa. 354.
2. Act No. 78 of the extra session of 1870 provides that the defendant company shall have the right of way for the purposes of its railway—provided, steam shall not be used as a motive power on Delord or St. Joseph street from Rampart street to the levee.

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3. The grant of power in the city charter is, by operation of this statute (Act No. 78) withdrawn from the municipal authority and exercised directly by the State. 19 Pa. 299; 27 Pa. 354.
4. Act No. 78 did not require the express assent of the defendant company to make it operative. The exercise of corporate powers under it is an acceptance of the same in all of its parts. 32 Md. 27; 37 Md. 556; 11 Ind 104; 20 Ill. 601.
5. The express assent of the defendant company to accept and be subject to the constitution of the State under which it lived is not required to make an act operative.
6. The acquisition of the railroad by defendant from the late New Orleans, Jackson and Great Northern Railroad, after the railroad within the designated limits was in full operation, without objection from plaintiff, who stood by, cannot under the facts of this case, operate an estoppel against him. There could have been no preclusion, and no estoppel can be pleaded against a legislative prohibition. 27 Pa. 354.
7. Acts of an individual or corporation, which are outside of legislative authority, may be enjoined by one injured thereby: much more when said act is in violation of a legislative prohibition.
8. The damages herein claimed are predicated on continuous wrongful acts, to which prescription has no application. *Werges vs. Railroad*, 35 Ann. 643; 7 Otto, 668.

Farrar & Simonds and James Fentress for Defendant and Appellant:

1. Our authority to lay down railroad track: Act of La. 1852, page 129, Charter Contract: Ordinance 1621, approved December 11, 1869; and No. 1468, N. S., May 22, 1869. To use steam: Ordinance 1031, Administration Series, August 16, 1871: Ordinance 8127, Administration Series, November 9, 1882.
- 2 The city had power to pass above ordinances.
 - (a) By all the charters of New Orleans, prior to 1870, it is authorized to "regulate," etc. the streets. This necessarily implies the power to say what vehicles shall be allowed and under what regulations. *Brown & Co. vs. Duplessis*, 14 Ann. 853.
 - (b) The Act of 1870, granting new charter to city, expressly mentions locomotives in the streets and makes plain the powers of city. Sec. 12, and Sub-Secs. 2 and 11, Sec. 34.
 - (c) The legislature, by general Act of 1852, authorizes railroad companies to organize and build railroads anywhere in the State, with only two exceptions:
 1. Not to run over dwelling houses, etc. *Voorhies' Revised Statutes*, Sec. 705.
 2. Nor through streets of municipality without the consent of Council, which once granted shall not be withdrawn. *Ibid*, Sec. 689; Act approved March 12, 1852, Sec. 7.

Here two things are manifest:

- (a) That the State grants them power to run anywhere in the State with the above conditions.
 - (b) That the State expressly leaves municipal corporations the right to say, whether or not railroads shall be allowed in their streets.
- The N. O. J. and G. N. R. R. was organized under this general law. See Act of La., approved April 22, 1853.
- The City Ordinance 1031, Administration Series, gives consent of city, and so the right and power is complete, both from State and city to the New Orleans, Jackson and Great Northern Railroad. And defendant derives its rights by purchase under mortgage and decree of U. S. Courts. See Act of La. 89 of 1878.

The opinion of the Court was delivered by

FENNER, J. Plaintiff, an extensive property holder on St. Joseph street in this city, averring that the defendant, "without any warrant of law or color of lawful authority," is and has been engaged in run-

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ning steam locomotives and heavy trains of freight cars along railroad track operated by it on said street, thereby obstructing the ordinary use of the street, polluting the atmosphere with clouds of smoke, soot and dust, shaking and cracking the walls and ceiling of his houses, thus injuring the same and impairing the value of his property, and establishing a nuisance, brings this action for an injunction to restrain defendant from running freight trains and steam engines along said street, and also to recover five thousand dollars as damages for injury sustained.

Defendant, for answer, pleads the general issue, and further specially denies the damage and avers that it was "duly authorized by acts of the legislature and by city ordinances to use and operate its trains on the said railroad track on St. Joseph street."

From a judgment perpetuating the injunction and awarding \$1,500 damages, the defendant has appealed.

The substantive ground of the relief sought by plaintiff lies in the allegation that defendant is acting "without any warrant of law or color of lawful authority."

We have recently very considerably determined that "the legislature has the power to authorize the building of a railroad on a street of a city, and may directly exercise this power or devolve it upon the local or municipal authorities." *Harrison vs. R. R. Co.*, 34 Ann. 462; *Werges vs. R. R. Co.*, 35 Ann. 641; *Tilton vs. R. R. Co.*, Id. 1062.

If, therefore, the defendant had, as alleged in its answer, lawful authority derived directly or indirectly from the legislature, to construct and operate the road complained of, the broad injunction applied for by plaintiff necessarily falls.

The petition contains no allegations tending to show that the railroad is improperly constructed, or improperly conducted, or uses defective machinery or in any way occasions injury which, by the use of proper means and care, might be avoided.

Such allegations might sustain a partial injunction tending to remedy the particular faults or defects complained of, but could not support the injunction prayed for, which could rest only on the ground that defendant was without lawful right to operate its steam railway at all, on said street.

As this is the most important question we shall first determine it, as conclusive of the right to the injunction.

The defendant sets up, as its authority for using steam on its railroad on St. Joseph street, an ordinance of the city of New Orleans, No. 1081, A. S., approved August 16, 1871, which expressly grants such

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authority, and under which defendant and its authors have continuously operated its steam trains from the year 1871.

Plaintiff claims that this ordinance was *ultra vires* and of no effect, by reason of its contravention of the terms of a law of the State, being Act No. 78 of 1870, entitled "an Act relative to the New Orleans, Jackson and Great Northern Railroad Company" in the following terms:

"Whereas, it is essential to the commercial prosperity of the State of Louisiana that the cost of transportation of freight should be reduced to the lowest point practicable; and

"Whereas, there now exists an almost impossible break of about a mile between the Mississippi river * * and the depot and present terminus of the road * * ; therefore,

"SECTION 1. Be it enacted, etc., That it shall be the duty of the board of directors of the N. O., J. and G. N. R. R. Co., within two years from the approval of this Act, to extend their track by the shortest and most practicable streets, from their present depot to the Mississippi river, along said river from the Pontchartrain railroad depot, by the shortest or most practicable streets, to the elevator; thence to Louisiana avenue and back again, by the shortest or most practicable streets, to the N. O., J. and G. N. track, and to that end power and authority is hereby granted and conferred on them to construct and maintain such a line of track and use the same for conveyance of freight and passengers; provided, that steam shall not be used as motive power on Delord or St. Joseph streets, from Rampart to the levee.

"SEC. 2. Be it further enacted, etc., That this Act shall take effect as soon as the directors of said corporation so amend their rules and regulations relative to passengers as to comply with the requirements of the 13th article of the Constitution of this State; a certificate to that effect to be filed in the office of the Secretary of State."

To the results claimed by plaintiff as flowing from this Act, defendant opposes two objections, viz:

1st. That under the terms of the concluding section, the Act never went into effect, because the amendment of the rules therein required was never made and the certificate to that effect was never filed in the office of the Secretary of State.

2d. That, in any event, the proper construction of the Act is a mere negation of any authority, *under said Act*, to use steam as a motive power on St. Joseph street, and that it does not and was not intended to prohibit the city of New Orleans from granting such power.

There can be no question that the general legislation of the State,

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prevailing from an ancient date, had vested the city of New Orleans with power to authorize the laying of railroad tracks in her streets and to authorize the use of steam conveyances thereon.

This results from the language of her various charters, even prior to that of 1870, which authorized the corporation to regulate "vehicles of every description" and "to determine through what streets the same shall pass;" from the Act of 1852, providing "no railroad, plank road or canal shall be constructed through the streets of any incorporated city or town, without the consent of the municipal council thereof;" and, to place the legislative meaning beyond doubt, from the city charter of 1870, adopted a few days before the Act 78 above referred to, which expressly mentions locomotives as among the subjects of regulation. *Brown vs. Duplessis*, 14 Ann. 842; *Harrison vs. R. R.*, 34 Ann. 462; *Werges vs. R. R.*, 35 Ann. 641; *Tilton vs. R. R. Co.*, Id. 1062, in all of which cases this power of the city was expressly recognized.

It follows that, unless the legislative act referred to restrained the exercise of this power with reference to St. Joseph street, the city ordinance of 1871, conferred upon defendant full warrant of law to operate its road on that street by steam.

Now, by ordinances Nos. 1468 and 1621 of 1869, the city had already authorized the defendant to lay its track on St. Joseph street, but those ordinances contained the *proviso* that steam should not be used on that street or on Delord street.

This prohibition was, no doubt, the cause of the application to the General Assembly for further legislation which resulted in the Act of 1870. Doubtless, the General Assembly, being informed that the city had refused permission to use steam on St. Joseph and Delord street^s and being unwilling to interfere with the discretion of the city authorities in regard to this subject, saw fit to impose the same restriction upon its own grant.

This *proviso* robbed the act of all benefit to the defendant's author, the New Orleans, Jackson and Great Northern Railroad Company, and hence no steps were taken to carry it into effect, and it never went into effect for any purpose.

The company never amended its rules or filed a certificate to that effect in the office of the Secretary of State, which, by the terms of the act, were conditions precedent to the laws taking effect.

The law, therefore, remained a dead letter. The company never acted under it in any respect. The tracks required to be built, within two years, from the Pontchartrain depot to the elevator, and thence to

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Louisiana avenue and back to its depot, were never constructed and nobody ever complained of their non-construction. The company, the city and the State seem to have concurred in considering the act as of none effect. In 1871, the company again applied to the city for permission to use steam on St. Joseph street and it was granted by ordinance No. 1031, A. S. Thereupon, the company commenced operating its road by steam, and has so continued ever since without interference from any public authority; and it was only in June, 1880, nine years afterwards, that the plaintiff, though he had been all the time a property owner on said street, bethought himself of judicially questioning defendant's authority by filing this suit. In the meantime the road, with all its franchises, had been transferred from the New Orleans, Jackson and Great Northern Railroad Company to the purchasers, under a public judicial sale in foreclosure of a mortgage. These purchasers were organized into a corporation under the title of the New Orleans, Jackson and Northern Railroad Company by an act of the General Assembly, approved March 8, 1877.

This latter corporation was subsequently consolidated with the Mississippi Central Railroad Company; and by act of the General Assembly No. 89 of 1878, these consolidated companies were organized into the Chicago, St. Louis and New Orleans Railroad Company, the present defendant, with full recognition of its succession to the rights, privileges and franchises of the former corporation.

Now, during all this period the various companies were publicly and without dispute, operating steam on St. Joseph street, and yet the General Assembly in dealing with them in these several acts, raised no question as to their right.

We consider it thus fully established that all parties considered the *proviso* of the Act of 1870 as inoperative.

Indeed, we do not see how a different conclusion could be reached.

The Constitution or general laws provide for the time when legislative acts shall take effect, in absence of special provisions on that subject in the acts themselves. But no one has ever questioned the legislative power to fix the time at which, and the conditions under which, a statute shall go into effect, by provision in the act itself; and when it has exercised this authority, it must be respected, and the act does not take effect until such time has arrived or such conditions have been complied with.

Thus it has been decided that a statute passed to take effect only on a future fixed day, has no force whatever for any purpose until such day arrives. Price vs. Hopkins, 13 Mich. 318.

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Here, the legislature provided, in unambiguous terms that the Act of 1870 should only take effect on the happening of certain explicit conditions which have never happened. How can it be said that the law has ever gone into effect? If the company were claiming a privilege by virtue of such law, would it not be denied on showing that the condition had not been complied with? And must not the same rule apply when, by virtue of such law, an obligation or restraint is asserted against the company?

It is no answer to say that the assent of the company to accept and abide by the Constitution of the State is superfluous and unnecessary.

If it were a mere question of acceptance by the company, the answer might have force. But it is more than this; it is a question whether the law has ever taken effect. Acceptance by the company, however explicit, would entitle it to no rights and subject it to no obligations under the act, unless the act had gone into effect, because it requires two to make a bargain and the State's assent is wanting so long as the conditions to which she chose to subject it have not happened.

This we think conclusive in itself.

But, on broader grounds, we are fully satisfied that defendant's construction of the law is correct, even if the act had taken effect.

Considering the general policy of the State with reference to leaving the control of her streets to the city of New Orleans, and especially the charter of 1870, passed almost contemporaneously; considering the motives and purposes of the act and the conditions existing at the date of its passage; and considering the manifest interpretation of the act adopted by all parties, immediately after its passage and ever since, we are perfectly satisfied that the sole motive for the insertion of the *proviso* was the fact that the city had refused permission to use steam on the streets referred to; and that its sole meaning was to deny to the company the right to claim such privilege under the act and without consent of the city.

To hold otherwise would lead to the absurd consequences: 1st. That while leaving the city full power to permit the use of steam on any other street, the legislature had exempted these particular obscure streets therefrom; 2d. That, even on these streets, the city might grant the right to use steam to any person or corporation other than this company, to which alone the restriction applies.

On every ground, we are satisfied that the Act of 1870 operated no restriction on the power of the city to authorize defendant to use steam on St. Joseph street; and that the ordinance of 1871 constituted defendant's full warrant of law for that purpose.

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On the question of damages, we have already noted the entire absence of any allegations in plaintiff's petition laying any other legal basis of defendant's liability for damages except the charge that it was operating its road without lawful authority.

The evidence is equally deficient of proof that the defendant is guilty of any fault in the construction or operation of its road or in the machinery used, or occasions any injury which could be avoided or which is not necessarily incident to the prudent exercise of its right.

That some inconvenience is occasioned to plaintiff by the noise of the trains and by the smoke and soot of the engines (which, however, are shown to be as nearly smokeless as any suited to the purpose) and by the jarring of the houses, cannot be questioned. So it may be possible that the price of property on the street may have been somewhat impaired by the establishment of this railroad thereon, though it is evident that plaintiff's witnesses exaggerate the influence of this cause and ignore other causes which account in great measure for the depression.

But these are merely consequential injuries for which defendant, who is merely "doing a lawful act in a lawful manner," cannot be held responsible.

In England, the doctrine is unqualified, that "an action will not lie on behalf of a plaintiff who has sustained injury from the execution of powers and authorities given by an act of parliament, those powers being exercised with judgment and caution." 2d Addison on Torts, sec. 1040, and authorities there cited.

In those States of this Union whose constitutions contain restrictions on the power of taking property without compensation, the doctrine is subject to corresponding restriction, and where property is taken even with legislative authority, the party is entitled to compensation. What constitutes the "taking of property" is well discussed and authorities reviewed in the works of Cooley and Wood. See Cooley Const Lim. 4th ed., p. 676 *et seq.*; Wood, Nuisance, secs. 752, 753 *et seq.*

The best authorities agree that mere consequential injuries, not occasioned by fault or neglect but incident to the prudent exercise of the right conferred, are not included.

We have hitherto recognized the rule, saying: The defendant company, having established its lawful authority, "is entitled to the protection of the rule which exonerates a party from responsibility in damages for injury done to another in the pursuit of a legal right or in the performance of a lawful act, when such injury is not traced to or

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caused by his negligence or culpable carelessness." *Werges vs. R. R. Co.*, 35 Ann. 646.

In the language of another Court: "Every great public improvement must, almost of necessity, more or less affect individual convenience and property; and when the injury sustained is remote and consequential, it is *damnum absque injuria*, and is to be borne as part of the price to be paid for the advantages of the social condition." *Lansing vs. Smith*, 8 Cow, 149.

The injuries established by plaintiff are of this character and must submit to this rule.

The article 156 of the present Constitution of this State, has no application to the present case, and its construction is not involved.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, and it is now decreed that there be judgment dismissing plaintiff's demand with costs in both courts.

Watkins, J., not having heard the argument, takes no part.

C A S E S
 ARGUED AND DETERMINED IN THE
 SUPREME COURT OF LOUISIANA,
 AT MONROE,
 IN
 J U N E . 1 8 8 6 .

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ,* *Chief Justice.*

Hon. FÉLIX P. POCHÉ,

Hon. ROBERT B. TODD,

Hon. CHARLES E. FENNER,

Hon. LYNN B. WATKINS,†

} *Associate Justices.*

No. 1189.

THE STATE OF LOUISIANA VS. WESTLEY GAUTHREUX ET ALS.

An accused is not entitled to compulsory process for obtaining witnesses in his favor, in support of a motion for a new trial.

The provision of the Constitution (Art. 8) touching witnesses in criminal cases, applies to witnesses on the question of the guilt or innocence of the accused, and has no reference to motions for new trials or other proceedings connected with a criminal cause.

The Supreme Court will not disturb the rulings of trial judges, in their manner of fixing and hearing motions for new trials or similar proceedings unless the same appear on their face arbitrary or glaringly unjust.

Evidence intended to impeach the testimony of witnesses on the trial is not a legal ground for a motion for a new trial on the ground of newly discovered evidence.

A PPEAL from the Twenty-second District Court, Parish of Ascension. *Duffel, J.*

M. J. Cunningham, Attorney General, and *J. L. Gaudet*, District Attorney, for the State, Appellee:

ON MOTION TO DISMISS.

Appeals in criminal cases will be dismissed unless the record is filed in the Supreme Court within ten days from the granting of the order of appeal.

*Absent during the whole of this term on account of illness.
 †Appointed on the 19th of April, 1886.

38	608
44	980
38	608
45	490
38	608
49	353
38	608
107	621
38	608
109	351

State vs. Gauthreaux et als.

ON MERITS.

A motion for a new trial on the ground of newly discovered evidence must be refused when the affidavit of the accused shows that the evidence, so far from being newly discovered, was known to him all the while. Such motion must be supported by other testimony in addition to the affidavit of the accused. His alone will not suffice. State vs. J. J. Cotton, 36 Ann. 986.

Newly discovered evidence tending to impeach or discredit a witness who has testified in the case affords no legal ground for setting aside the verdict and granting a new trial. State vs. Lou Young and Joseph E. Barbo, 34 Ann. 346; State vs. Henderson, 35 Ann. 45.

E. N. Pugh for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. Westley Gauthreaux seeks relief from a sentence for murder without capital punishment, on the ground that he was improperly denied a new trial.

He also complains of the judge's refusal to fix a day for the hearing of his motion for a new trial, which was predicated on alleged newly discovered evidence, and of his refusal to issue process intended to secure the attendance at that hearing of the witnesses whose evidence he claimed to have discovered since the trial.

The record shows that the verdict of the jury was rendered on May the 13th, and the motion for a new trial was presented on the 19th of the same month. The judge ordered the motion to be taken up *instanter*, and after hearing he overruled it.

It is charged that the ruling was erroneous and injurious to the accused, and the rules of the court are in the record to show that the judge violated his own rules. But the very rule invoked by the accused authorizes the judge to fix certain motions for trial *instanter*.

But the method of hearing motions for new trials is a matter which must be left to the sound discretion of the trial judge, and surely this Court cannot be expected to review every movement of a district court in the disposition of its business.

If the mere reading of a motion for a new trial imparts to the judge, who has followed up and directed the whole trial, sufficient knowledge to intelligently dispose of the matters suggested in the motion, he cannot be arbitrarily required to delay his ruling for the purpose of further hearing in the premises.

In Boasso's case recently decided in New Orleans, this Court upheld the trial judge in his refusal to hear argument of counsel in support of a motion for a new trial, the judge stating that he was

State vs. Gauthreaux et als.

already familiar with and ready to dispose of the questions submitted in the motion.

There is no merit in defendant's contention that he had the constitutional right to "compulsory process for obtaining witnesses in his favor," in support of a motion for a new trial. That provision (Constitution, art. 8) has reference to witnesses for the trial of the guilt or innocence of the accused, and surely does not cover the hearing of every motion or other proceeding incidental to or connected with the main trial.

Under the interpretation suggested by defendant, accused parties would soon monopolize the time of the court and form a constant procession of witnesses to the court-house, whose presence and whose hearing would indefinitely procrastinate and eventually paralyze the administration of justice.

His contention finds no support in Hyland's case, 36 Ann. 88, on which he relies. The ruling in that case was that the trial judge should hear the witnesses whom the accused produces in support of the averments of his motion for a new trial, and his refusal in that case to hear them was discountenanced. But nothing in the opinion justifies the inference that in such a proceeding the accused is entitled to process for witnesses. The substance of the ruling is that the judge must either hear the witnesses if produced or receive and consider their affidavits in corroboration of that of the accused.

But in the instant case the defendant did not present or annex the affidavit of the witnesses referred to in his motion, or of any other person in support of his motion.

And his reasons for his failure to comply with that rule of law are not satisfactory.

The fact that he was in prison and that he had been taken by surprise by the nature of the testimony produced against him at the trial could with as much reason be urged by all convicted parties, and yet the rule is absolute and has always been enforced in criminal jurisprudence. *State vs. Cotton*, 36 Ann. 980; *State vs. Jung & Britto*, 34 Ann. 346.

But notwithstanding this material omission of the defendant in the matter of his motion, we have considered the nature of the alleged newly discovered evidence which he therein sets up.

Its intended effect was double in its scope.

By one set of witnesses he proposed to show justification for the homicide with which he was charged, and by another set he proposed

Succession of Myrick.

to impeach the testimony of witnesses who had sworn to certain admissions made by him in connection with the crime for which he was prosecuted.

The witnesses whom he desired to produce in support of his alleged justification were in the same house with him at the time of the homicide, and their alleged version of the deed must have been known to him at the time as the truth of the facts which he holds out, and hence their testimony cannot be considered as newly discovered evidence.

If it be true, as he contends, that the deceased was about to break into the house of the person who is represented as having called on the accused for assistance, he must have known these things not only at the time of his trial, but at the very moment of the homicide; and the credulity of courts cannot be strained to the point of believing that such evidence was discovered only since the trial.

The intention to impeach the testimony of witnesses as given at the trial is not a legal ground for a new trial. The rule has been too long in force and is too firmly settled in jurisprudence to require any argument in its support at this time. *Waterman's Criminal Digest*, p. 459, sec. 208; *State vs. Fahey*, 35 Ann. 9; *State vs. Diskin*, 35 Ann. 46.

From the record it appears that the accused had six days within which to prepare his motion for a new trial and to secure either the presence or the affidavits of witnesses whose testimony he pretends to have discovered since his trial, and his failure to present them or their corroborating affidavits must be attributed to his own laches, and cannot be traced to the rulings of the trial judge, who has committed no errors under the law.

Judgment affirmed.

No. 1140.

SUCCESSION OF MRS. MARY A. MYRICK.

PROVISIONAL ACCOUNT AND OPPOSITIONS THERETO.

38	611
125	11

An administrator is not compelled to sell the working animals to pay the debts apart from the plantation. They are immovable by destination, and if they die during the term of the administration the administrator is not to be charged with their value in the absence of fault or negligence on his part.

Nor should an administrator be charged with the annual rents of the plantation, where, after the proper efforts, he has been unable to lease the plantation to a suitable tenant, and has been compelled to work the place on account of the succession. In such case he is subject to no charge for rents or for failure to make adequate crops where it is not shown that such failure is attributable to his fault.

A PPEAL from the Twenty-seventh District Court, Parish of Richland. *Montgomery, J. ad hoc.*

Succession of Myrick.

R. G. Cobb for the Administrator, Appellant.

Wells & Toler for Opponent Watson.

Potts & Hudson for Tutor, Myrick :

1. The administrator should, within ten days after his appointment, advertise and sell all the personal property of the succession. C. C. 1163, 1049, 1051.
2. If he fail to sell when required by law to do so and the property wastes or perishes, he must account or pay for the property.
3. He should lease the real estate if not necessary to sell it and account for the revenues. If he made no effort to lease and use the property himself, he must pay customary rents.
4. The wife cannot bind herself nor her property for the debts of her husband. C. C. 2398; 33 Ann. 1009 and case.
5. The law forbidding such contracts is prohibitory. 14 Ann. 9 L. 590.
6. Married women are never estopped when sought to be made liable for the debts of their husbands, and many show the true nature of the contract. 14 Ann. 168; 16 Ann. 11; 13 Ann. 152; 12 R. 84; 1 Ann. 439; 2 Ann. 756; 14 Ann. 169; 4 R. 508; 33 Ann. 1009.
7. The heirs have all the rights of the deceased. C. C. 945; 7 R. 183; 15 Ann. 528; 19 Ann. 75; 33 Ann. 1009.
8. Neither can the wife indulge in wild and ruinous speculations and bind her property therefor. 34 Ann. 976; 16 Ann. 214; 29 Ann. 75.

M. J. Liddell for Opponent Slayden :

1. The doctrine of estoppel is applicable to married women whenever they seek to perpetrate deliberate frauds. 33 Ann. 626; 37 Ann. 327.
2. An estoppel which binds the deceased married woman, will bind her legal heirs. 1 Green, § 523.
3. Where a married woman has compromised a pending litigation, and confessed judgment in favor of one who is a solidary mortgage creditor of herself and unmarried brother whereby she obtains the reduction of her debt and the surrender of the mortgage notes, which she uses in purchasing her brother's entire landed estate; her nephew and niece claiming as her heirs at law will be estopped from denying the consideration of the confession of judgment.
4. Wherever a person by declarations and acts induces another to believe in a certain condition of things, or to change or alter his position for the worse, neither that person or his heirs will be heard to deny his acts or declarations so acted on. 26 Ann. 289; 2 Ann. 500; 26 Ann. 298; 28 Ann. 138; 30 Ann. 53; 32 Ann. 1103; 33 Ann. 624; 33 Ann. 408; 38 Ann. 324; Big on Stoppel, 473, 477.
5. A married woman with her husband's consent may become surety for any other person. 2 Ann. 903.
6. A married woman may become surety with her husband's consent for a person with whom he is engaged in a partnership. 33 Ann. 924; 4 Ann. 377; 19 Ann. 48; 2 Ann. 903.
7. The right to annul a confession of judgment on the part of the wife, given with the husband's consent, for the reason that the judgment confessed was for a community debt is a right personal to the wife or her forced heirs, and cannot be exercised by those whom the law calls to the inheritance in default of ascendants or descendants. 5 Ann. 369; 3 Ann. 426.

The opinion of the Court was delivered by

TODD, J. Mrs. Mary A. Myrick died in the parish of Richland in 1880, and her surviving husband, Benj. Myrick, was appointed administrator of her succession the same year.

Succession of Myrick.

On the 26th of November 1884, the administrator filed a provisional account of his administration. This was opposed by the legal heirs of the deceased—minors acting through their tutor, Ed. Myrick—also by two creditors, Slayden and Watson.

I.

There were certain grounds of opposition urged by both heirs and creditors.

They were: 1st. Charging the administrator with the loss of a number of working animals that had died during the term of his administration and valued at \$470, and also for 25 head of cattle that likewise died; and 2d. With five years' rentals of the plantation at \$1500 per annum.

It is not charged that the mules and cattle died from neglect of the administrator—and such was not the case; but that he was liable for their value because he had failed to sell them seasonably to pay the debts of the succession.

The administrator took charge of the plantation stocked and ready for cultivation. There was little or no movable property, strictly speaking, belonging to the succession. The mules, which it is contended he should have sold in ten days after his appointment, were the working animals of the plantation, and therefore immovable by destination—in legal contemplation, a part of the plantation. It was no more the administrator's duty to have sold these working animals and small stock of cattle than it was to have disposed of the farming implements, mill, gin stand, machinery, and thus denude the plantation of everything required for its successful cultivation.

It was his duty to have leased the plantation if he could, but we are satisfied from the testimony of the administrator and of Ed. Myrick, the tutor of the opposing heirs, that this was impossible. The plantation contained at least 400 acres of open land—a large plantation for that section of the country, inhabited principally by men of small means, who, as a general rule, had more land than they could cultivate themselves.

The situation was such that the administrator was compelled to cultivate the plantation himself or abandon it to waste and ruin. He adopted the former and doubtless wise alternative to cultivate it himself on account of the succession, which he did; and though it resulted unfavorably and produced no revenue for the succession, yet it preserved this valuable in good condition and saved it from great injury, if not the total ruin that might have resulted from its abandonment.

Succession of Myrick.

Besides, it was entirely within the power of the heirs, who were present and represented by their tutor, and the creditors, who are now making their complaint for the first time, to have had this property sold had they desired it, by making application therefor and procuring the required order for its sale; but they were silent all those years, uttering no disapproval and evidently acquiescing in the course pursued by the administrator.

We find no reason and know of no law, *under these circumstances*, that would compel the administrator to pay for the mules and cattle that died, or for the rent of the plantation; and the judgment of the lower court, so far as it imposes the former liabilities upon him, must be reversed.

II.

The administrator asked credit in his account for certain privileged debts and necessary charges paid by him. They consist mainly of the expenses of last illness, of funeral expenses, law charges, taxes, blacksmith's account for repairing machinery, etc., amounting in the aggregate to \$1086.28. These items were not opposed and were accompanied by proper vouchers, and their correctness proved by direct testimony, and yet they were rejected. This error must be corrected and the proper credit given for these items.

III.

The administrator has placed in his account as a just claim against the succession a judgment against the deceased, rendered on her confession for \$3,600, subject to a credit for \$1,950, in favor of Beaumont, Fakes & Co., and then held by W. J. Slayden under assignment from them.

For several years after his marriage, the plantation in question was cultivated by Myrick on his own account. That was before his wife had obtained a judgment separating her in property from him. By an examination of the record of the proceedings in the suit wherein Slayden's judgment was rendered, it will appear that the consideration of the judgment was a debt of her husband's. It was an account for advances made to the husband of plantation supplies, etc., whilst a community existed between the spouses and when Myrick was cultivating the plantation on his own account. Mrs. Myrick, according to this record, owed no part of the debt for which she confessed judgment. It further appears, however, from the evidence in the record that in 1871, Myrick, who had been cultivating the plantation on his own account, formed a planting partnership with his brother-in-law John F. Raines, under the firm name of Myrick & Raines, who continued planting together for

Succession of Myrick.

several years. As collateral security for debts owing by this firm, Mr. Myrick and John F. Raines executed their note *in solido* for \$4,000 in favor of Beaumont, Fakes & Co., the factors of the planting partnership of Myrick & Raines, secured by mortgage.

The account for supplies for which Mrs. Myrick confessed judgment was in part the consideration for which this mortgage note was given. At the date of this judgment, Jno. F. Raines was dead, and his succession was under administration, and his one-half interest in the plantation was to be offered for sale. The creditors of the firm mentioned, Beaumont, Fakes & Co., agreed that if Mrs. Myrick would confess the judgment in their favor above mentioned, that they would surrender to her the mortgage note of \$4,000 of herself and brother they held, and also a like one of \$500. This was done, and with these Mrs. Myrick purchased the one-half interest of her deceased brother in the plantation.

Under these facts, a special plea of estoppel is urged against the right of Mrs. Myrick or her heirs repudiating the judgment confessed by her or questioning her liability under it.

It is true that Mrs. Myrick by confessing judgment for this debt, though a debt she did not owe, obtained the means by which she acquired half interest of her brother in the plantation—in other words she exchanged her confessed judgment for the notes which proved available in her hands to secure for her property of value surpassing the amount of the judgment she had confessed, thus realizing full and complete consideration for it. We are convinced that the heirs of Mrs. Myrick cannot now consistently deny that the judgment should be recognized as valid and binding against her; and that the same was properly reported in the administrator's account as a valid debt against her succession subject to the credit stated. 34 Ann. 1171; 37 Ann. 679. This credit we see no reason to reduce as asked to do in the motion to amend.

IV.

There is a claim allowed by the account in favor of R. U. L. Watson. It was for a number of mules and wagon bought of Huson by Mrs. Myrick, for which she executed her obligation to deliver ten bales of cotton after she was separate in property from her husband. The debt is a just one and the deceased was clearly liable for it.

There was also a claim for \$860, in favor of Thomas Jones, recognized in the account as a just debt against the succession. We are satisfied that the debt is a just one. The creditor, however, moves an amendment to the judgment because the same allowed only the prin-

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cial. He is entitled to the amendment sought, allowing legal interest from 1st of January, 1880.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be annulled, avoided and reversed :

1. In so far as it rejects the credit claimed by the administrator for the working animals and the cattle that died during the term of his administration, \$470.

2. In so far as it rejects the credit claimed for the privilege debts and necessary charges aggregating \$1,186.28.

In so far as it fails to allow interest on the claim of Thomas Jones for \$860, on which legal interest is now allowed from the 1st of January, 1880.

4. In so far as it charges the administrator with the depreciation in the value of the mules on hand, \$114; and that in all other respects the judgment appealed from be affirmed, opponents to pay costs of their respective oppositions in both courts.

ON REHEARING.

POCHÉ, J. After a second hearing of this case and a second examination of the record, we reach the conclusion that we had committed no error in our previous opinion.

It is, therefore, ordered that our decree remain undisturbed.

No. 1141.

JAMES A. LUSK, FOR USE OF A. DONAN, vs. THOMAS J. POWELL.

When the legal mortgage of a minor on the property of his tutor was originally inscribed after the majority of the former, failure to reinscribe within ten years operates the peremption of the mortgage, which cannot thereafter be enforced against property formerly belonging to the tutor, in the hands of a third possessor.

A PPEAL from the Twenty-seventh District Court, Parish of West Carroll. *Williams, J.*

C. T. Dunn for Plaintiff and Appellant :

1. In selling land at tax sale all the requirements fixed by law must be rigidly complied with on pain of nullity. The necessary proceedings step by step must appear in the tax deed. *Louque*, p. 715, 5, 716, 16; 19 Ann. 185.
2. Mortgages perempt. They do not prescribe. The doctrine of prescription is stricti juris. The mode of cancelling a perempted mortgage being fixed by law, this mode is exclusive. Prescription against a perempted mortgage can only be urged in the manner pointed out by law. The party must have the recorder to cancel it. R. S. 450.
3. Mortgage is an accessory obligation made to secure the performance of the principal obligation. It takes its vitality from the principal debt and continues to exist as long

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as the principal debt is kept alive. 37 Ann. 88, 809; 25 Ann. 644; 23 Ann. 244; 33 Ann. 1453; 30 Ann. 404, 853; 31 Ann. 284.

4. Minor's mortgage against his tutor is specially exempted from reinscription. As long as it preserves its character of a minor's mortgage against the tutor on account of the tutorship, reinscription is not required by law. It is only when settlement is made contradictory between the minor and tutor and the claim is merged in a judgment that reinscription becomes necessary.

The minor's mortgage against his tutor is exempted from reinscription on grounds of public policy. The minor's mortgage is exempted from reinscription for the same reason that other mortgages are exempted under the law. The Poydras Legacy, the Mortgages of Stock Banks, etc. R. S. 2399, 2340, 2341; 5 Ann. 590.

Newman & Gray and H. P. Wells for Defendant and Appellee:

Where a mortgage once recorded is not reinscribed within the ten years prescribed by law, it perempt and ceases to have effect against third persons. The pendency of a suit to enforce a mortgage does not obviate the necessity of its reinscription. 30 Ann. 11; 25 Ann. 148; 20 Ann. 506; 23 Ann. 587.

When a person reaches the age of majority, the laws of prescription which provide for his protection during his minority cease to govern his actions and rights, and he is subject to the same laws of prescription as other persons. The law dispensing with the registry of the tacit mortgage of minors ceases to protect them the moment they reach their majority. 34 Ann. p. 1042; 35 Ann. p. 945.

The action of the minor against his tutor is prescribed by four years to begin from the day of his majority, and the tacit mortgage given by law against the property of the tutor is extinguished by the same length of time. R. C. C. 362; 20 Ann. p. 510; 4 Ann. 488; 9 Ann. 43.

A mortgage resting on property sold for taxes cannot be enforced. If the formalities of law were observed for the tax sales, the effect of such a sale is to extinguish the mortgage. 28 Ann. 352; 35 Ann. 506; dissenting opinion of Judge Wyly, 29 Ann. 112.

The opinion of the Court was delivered by

FENNER, J. This is an action to enforce a minor's mortgage on property in the hands of a third possessor.

The mortgage was inscribed in 1869, after the plaintiff had attained the age of majority, and was not reinscribed within ten years. By this failure to reinscribe, the mortgage perempted and the effect of the original registry ceased. C. C. 3369.

The exception in favor of minors, married women and interdicted persons, made in the concluding paragraph of the article, has no application to a case like the present, where the disability had ceased when the original registry was made. This has been deliberately and repeatedly decided. Lemle vs. Thompson, 34 Ann. 1041; Smith vs. Thompson, 35 Ann. 943; Watson vs. Boudurant, 30 Ann. 11.

While we listened with interest and attention to the argument of plaintiff's counsel in favor of a reversal of the jurisprudence of this Court on this and other points, we are not convinced of the propriety of doing so, and prefer to hold our course *in antiquas vias*.

Judgment affirmed.

State vs. Robertson.

No. 1146.

THE STATE OF LOUISIANA vs. CHARLES ROBERTSON *alias* LEWIS
ROBERTSON.

38	618
45	1179
88	618
109	690

A person to whom complaint has been made by the victim of a rape, when placed on the witness stand, cannot be permitted to repeat all the details of the outrage and the name of the ravisher as reported to her, but can only testify as to the fact of the complaint being made and as to the condition of the victim when making the complaint. Such testimony is not to be regarded as independent and original evidence to establish the guilt of the accused, but its purpose is to support the testimony of the person outraged. The counsel for one accused of such crime, who seeks to impeach the testimony of the principal witness by showing contradictions between the statements of such witness made on the preliminary examination and those made on the trial, should be permitted to read parts of the previous deposition and ask the witness if she had so testified, and should not be compelled first to read to her the entire deposition out of the presence of the court and jury.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, for the State, Appellee.

J. J. Foley for Defendant and Appellant.

The opinion of the Court was delivered by
TODD, J. The defendant appeals from a sentence of imprisonment
at hard labor for life on conviction for rape.

The grounds of his appeal appear in two bills of exception found in
the record.

I.

One is to the following effect:

The only direct testimony against the accused touching the commis-
sion of the offense charged was that of the alleged victim of the out-
rage.

Another witness was called by the State, who stated that the prose-
cutrix made complaint to her of the commission of the offense soon
after its alleged occurrence, and was proceeding to repeat the details
of the affair and to give the name of the offender as told her by the
prosecutrix, when objection was made to such disclosures by the wit-
ness, on the ground that the matters about which the witness was pro-
ceeding to testify were not a part of the *res gesta* and were therefore
inadmissible. The objection was overruled and the witness permitted
to state that the prosecutrix said that the accused was the perpetrator
of the outrage upon her.

This was error.

The object of calling this witness was not to furnish original or inde-
pendent proof to support the charge itself, but the sole purpose and:

effect of such evidence was to sustain the testimony of the prosecutrix—the principal witness.

We find in Bishop on Criminal Procedure the following expression on this point:

“The principal witness therefore in these cases stands in a particularly delicate situation before the jury; and the law has defined by what methods and within what limits her testimony may be supported or impeached. * * * After this principal witness has testified against the accused, the government may introduce witnesses to sustain her evidence of complaint made by her recently after the occurrence of the alleged outrage, together with evidence, if there is such, of marks of violence seen on her person. But according to the general doctrine, the particulars of the offense, as she stated them, and the name of the person charged by her with committing the crime, cannot thus be produced.” And this doctrine is supported by frequent adjudications.

II.

The prosecutrix or principal witness had testified before the recorder at the preliminary trial, and her testimony had been reduced to writing. On the trial before the district court, and on the cross-examination of this witness, the attorney for the accused produced this previous testimony of the witness given before the recorder, and with a view of laying a foundation for impeaching the testimony of the witness just taken on the trial, by showing discrepancies or contradictions between it and that of the preliminary examination, read to the witness parts of said previous testimony, to be followed by the inquiry whether she had so testified, when objection was made to this mode of proceeding—on what ground it does not appear—and the objection was sustained.

It appears from the bill of exceptions that the trial judge required the counsel to let the witness read the whole of her said previous testimony, if she could read, and if not (such was the case in this instance) then to take the witness into another room, with the district attorney, under charge of a deputy sheriff, and there to read to the witness the whole of her testimony—and then return to the court-room and in presence of the jury and ask the witness if the testimony read to her was correct or not; and then if it appeared that the testimony had been read over to the witness by the recorder before she signed it, and had been signed by her, and had been duly certified as correct by the recorder, and having been admitted to be correct by the witness, that then the whole of said testimony might be read to the jury, but that

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he would not allow counsel to read a part of the testimony or even the whole of it before the witness had thus been given an opportunity to say whether that was the evidence given by her before the recorder. To such ruling of the judge the counsel reserved his bill.

We have no hesitation in saying that the counsel was proceeding regularly and properly when thus summarily stopped. We know of no law and have referred to none which requires all this circumlocution and circuitry of action imposed by the trial judge as a condition precedent to the accomplishment of the purpose had in view by the counsel of the accused. He was, in our opinion, strictly in line when these requirements were made upon him, and he was entirely justifiable in declining to accede to them.

We are satisfied that the accused was seriously prejudiced by these erroneous rulings, and by reason of the same the case must be remanded.

It is therefore ordered, adjudged and decreed that the verdict of the jury in the lower court be set aside, and the sentence of the court be avoided and reversed, and the case remanded to be proceeded with according to law and the views herein expressed.

No. 1142.

LUCINDA AND A. MCGUIRE WILLIAMS AND HUSBANDS VS. THE WESTERN STAR LODGE NO. 24, OF FREE AND ACCEPTED MASONS OF MONROE.

1. Private corporations must be authorized by the legislature or established according to law. When legally established, they may hold real estate, and receive legacies and donations.

They may enact statutes and by laws for their government.

The right of succession is inherent to their nature, and they transmit their successions and their rights of property.

2. A corporation cannot fulfill another office of public or personal trust.

A corporation legally established may be dissolved by an act of the legislature, if they deem it necessary for the public interest.

3. The Grand Lodge was incorporated by an act of the legislature in 1816, and given full powers to hold real estate and to receive donations and legacies. It also chartered all such subordinate lodges as the Grand Lodge had at that time created, and conferred upon them equal powers.

By the act of 1819, all lodges that had been organized in the interim, were likewise incorporated, and those which might be subsequently organized also.

4. As a general rule the question as to the forfeiture, or dissolution of charters and acts of incorporation is one which concerns the public order, and the corporation is presumed to exist for all purposes of justice until the forfeiture is declared by the judgment of a competent court in some proceeding to which the State is a party.

5. New legislation cannot be engrafted upon different and distinct subject matter by way of amendment without mention being made of the object in the title; but any subject

38	620
44	620
78	620
48	1044
38	620
52	89
38	620
119	191

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matter that is germane to the original text may be incorporated without being amenable to this objection, if it be stated in the title what particular law is to be thereby amended or reversed.

6. Every disposition by which the donee or the legatee is charged to preserve for or to return to a third person is null; though a disposition by which a third person is called to take the gift in case the donee does not take it is valid; and so is a disposition by which the usufruct is given to one and the naked property to another.
7. The intention of the testator must principally be endeavored to be ascertained without departing from the proper signification of the terms of the testament, and same must be understood in the sense in which it can have effect rather than that in which it can have none. The intention of the testator must prevail over the grammatical meaning of the words employed in the testament, if from other dispositions contained therein or other words employed, it is manifest that he had another thought than that the terms employed in a particular disposition would otherwise convey
8. "Legacies to pious uses" are those which are destined to some work of piety, or object of charity, and are highly favored by the law, on account of their motives for sacred uses and their advantage to the public weal.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Young, J.

Ludeling & Stillman for Plaintiffs and Appellants.

Potts & Hudson; Stubbs & Russell and *Boatner & Boatner* for Defendants and Appellees.

The opinion of the Court was delivered by

WATKINS, J. The plaintiffs, alleging themselves to be universal legatees under the last will of Louisa L. McGuire, deceased, seek to have item third of said testament declared null and of no effect, on the following grounds, viz:

1st. Because the testatrix gave and bequeathed to the Western Star Lodge No. 24 of Free and Accepted Masons, of Monroe, La., her plantation on Bayou de Suard, requesting among other things, "that the net revenues of said property be used by said lodge for the support and education of the necessitous widows and orphans of deceased Masons," and that said clause or item of the testament was incorporated into it through undue influence and contrary to her real wishes.

2d. That same is null and void because it contains substitutions and *fidei commissa*, and invests said defendant lodge with a title stripped forever of use and *right of disposal*; creating a tenure which has no warrant in the laws of Louisiana;" takes the plantation out of the reach of commerce; changes the nature of the title she transmits, and creates a perpetuity unauthorized by law and against the intent and policy of the State, and at variance with its settled jurisprudence thereof.

3d. The Western Star Lodge No. 24, F. and A. Masons, of Monroe,

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is not an incorporated institution or corporation organized under the laws of this State, and had not the capacity to take or receive a legacy or bequest of the testatrix, and same lapsed—if otherwise valid—for the want of a donee with capacity to receive; and if same was incorporated, it was and is only authorized “to manage its own affairs,” and “cannot fulfill any office of personal trust;” and that the item complained of constitutes said lodge a trustee for the necessitous widows of deceased Masons, and for whom said lodge is required to manage and control the plantation bequeathed, contrary to law, and the purposes for which said Lodge was organized.

They complain of the act of the testamentary executors in surrendering the property to the Lodge, and allege that they, in addition, surrendered lots 4, 5 and 6 of sec. 10, township 18, range 4, containing 128 acres, which is not a part of the McGuire plantation, and was not embraced in the clause or item three of the testament.

All of the members of the Western Star Lodge are enumerated in petition, and their prayer is “that the Western Star Lodge No. 24 of F. and A. Masons, of Mouroe, and the several members thereof, as well as the testamentary executors and lessee, be cited; and they as universal legatees under said will, be declared the *owners* of said plantation and revenues, with legal interest, and that the executors render an account.

The defendants join in an exception of no cause of action, which was referred to the merits, and they thereafter file separate answers.

The answer on the part of the lodge is that it was organized and instituted on the authority of the Grand Lodge of the State, duly chartered by the legislature thereof, and whereby it was vested with full power, authority and capacity to receive, take and apply bequests and donations, for the uses and purposes intended by the institution of the Masonic order.

It admits the receipt of the plantation in controversy from the executors of the will of Mrs. McGuire, and the lots mentioned as separate therefrom, though insisting that same formed a part of the plantation and were anciently purchased for the purpose of timber use, and which is frequently overflowed and of little value otherwise.

It specially denies that the item of the testament complained of contains either a substitution or *fidei commissum*, and “averts that said donation was made to it (said Lodge) simply, directly and unconditionally, without any restraint as to its future disposition, and that it now *owns* and *holds* the same in fee simple and in its own right and in *absolute and unconditional ownership*,” and a prayer is made for the

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rejection of all of the plaintiffs' demand; and in the event of judgment against the Lodge that there be an allowance in its favor of the sum of \$2200, for the reimbursement of expenditures, betterments, taxes and repairs.

The executors, in substance, adopt the answer of the Lodge and insist upon their exception.

I.

The question first to be considered is whether in 1882, when the testatrix died, the Western Star Lodge No. 24, F. and A. M., was an incorporated institution, possessing the capacity to take and receive this bequest. It is argued that this question is vital; and if the defendant Lodge cannot show its incorporation and capacity to take and receive the bequest in question the controversy is at an end.

Private corporations must "be authorized by the Legislature, or established according to law." R. C. C. 432.

Corporations legally established "may possess an estate," and "are capable of receiving legacies and donations;" and "may enact statutes and regulations for their own government." R. C. C. 433.

The right of succession is inherent to the nature of corporations, and they transmit to their successions their rights and property. R. C. C. 434.

A corporation cannot fulfill another office of personal trust. R. C. C. 441.

A corporation legally established may be dissolved by an act of the Legislature, if they deem it necessary or convenient to the public interest. R. C. C. 447.

From the record it appears that on the 18th of March, 1816, the Legislature of the State incorporated the Grand Lodge of the State of Louisiana, upon the petition of certain members thereof, for the purposes of the promotion of the good of the craft, and the dissemination of charity and benevolence; and which declared "that the several persons hereinbefore named, and others who are or may become members of the said Grand Lodge, and their succession, shall be and *they are hereby deemed to be a body corporate and politic* in name and deed, by the style of the Grand Lodge of the State of Louisiana, and by the said name and style shall have perpetual succession * * * and shall have full power to make, alter, amend and change such by-laws as may be agreed on by the members of same."

It was further enacted that said Grand Lodge shall have full power "to take, hold and enjoy real and personal property * * * and to receive, take and apply any bequest or donation as may be made to and for the uses and purposes intended by the said institution."

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It further provided "that all the regular lodges *already* constituted, under the power and jurisdiction of the Grand Lodge, *are hereby declared* to be bodies corporate and politic in name and deed * * * with *equal powers* to those which are hereby given to the said Grand Lodge, so long as said Lodges remain under the power and jurisdiction of said Grand Lodge," etc.

The record further discloses that on the 11th of February, 1819, the legislature enacted an act supplemental to the act of 1816, the provisions of which are "that all the regular lodges *which have been* constituted by the Grand Lodge of the State of Louisiana *since* the passage of the act to which this is a supplement, as well as all the regular lodges which *shall be hereafter constituted* by the same, are hereby declared to be bodies corporate and politic * * with equal powers, to those which are given to the said Grand Lodge by the said act, etc."

The record also discloses that on the 20th of April, 1872, the act of March 18, 1816, was further amended and supplemented by the legislature by conferring upon the *Grand Lodge* of the State power to *sell, mortgage* or otherwise *encumber* any species of property; to borrow money upon mortgage of real estate, or pledge of personal property; to issue bonds, etc., "and that these powers shall attach to *all* the regular lodges which have *heretofore been* or shall hereafter be constituted by the said Grand Lodge, etc."

It is obvious that these statutes confer full and plenary power upon the Grand Lodge and upon all other lodges which have been constituted by the Grand Lodge *since* their enactment, to take and receive; to use and dispose of such property as is designated in the testamentary bequest under consideration.

But it is earnestly argued by plaintiffs' counsel that the laws of 1816 and 1819 were repealed by the provisions of art. 123 of the Constitution of 1845, which forbade the *creation* of corporations by the legislature, coupled with the provisions of art. 142 of the same instrument which contains the usual repealing clause.

A similar provision is contained in the Constitution of 1879; but we consider that same did not have the effect claimed for the quoted provision of the Constitution of 1845. It was not an express repeal, and cannot be fairly construed into a repeal by implication.

The object the framers of those two instruments evidently had in view was to remedy the existing evil, of permitting the legislature to create an *unlimited* number of *private* corporations to the great detriment of the public interest. It certainly was not their purpose to thereby annihilate all the private corporations in the State, and with-

out regard to the disastrous results such a sweeping repeal might produce.

This Court's predecessors have, in at least one well considered case, maintained a contrary view to the one that is pressed upon our attention by plaintiffs' counsel. We refer to the case of Polar Star Lodge No. 1 vs. Polar Star Lodge No. 1, 16 Ann. 53 *et seq.* In that case the Court said: "In 1816, the legislature, by a *general law*, incorporated the Grand Lodge of Louisiana, and all other lodges under its jurisdiction, so long as said lodges should remain under the power and jurisdiction of said Grand Lodge."

"In 1819, the power conferred by the legislature upon the Grand Lodge to *create masonic corporations* under its jurisdiction is in these words, viz: *Be it enacted, etc.,* That all the regular lodges, which *have been* constituted by the Grand Lodge of the State of Louisiana since the passage of the act to which this is a supplement (1816) as well as all the regular lodges which shall be *hereafter constituted* by the same, are hereby declared to be bodies corporate and politic, in name and deed * * with *equal powers* to those given to said Grand Lodge by said act, etc. * * * In February, 1855, the Grand Lodge granted a charter to the Polar Star Lodge No. 1. This Lodge, being the only masonic body of that name, continued to act under the jurisdiction of the Grand Lodge until 1868."

Again: "As a general rule, the question as to the forfeiture or dissolution of *charters* and *acts* of incorporation is one which concerns the public order, and *the corporation is presumed to exist for all purposes of justice* until the forfeiture is declared by *the judgment of the court* in some proceeding in which the State is a party. No provision has been made, which we recollect, for the surrender of *charters*, except those in 1812, in relation to banks. Whether the Grand Lodge has the power to declare the forfeiture of Masonic charters granted by itself, or to receive the surrender of the same, is not now necessary to determine; for it does not appear that it has accepted the surrender of the charter of 1855, nor declared the forfeiture of the same. It must, therefore, be assumed that it still exists."

The authority of that case is seriously questioned by plaintiffs' counsel; but, in our opinion, without avail. That suit was brought to annul a donation of real property. It was made a question therein whether the plaintiff was the same corporation as that formed in 1855, or one having its origin since the donation was made in 1858.

It is obvious that this question was a *vital* one in that case; and if

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the plaintiff could not trace back its origin to a time, *anterior* to the date of the act of *donation*, that the controversy therein was ended. The Court in that case used this argument, and we think with propriety:

"It is further argued by the plaintiffs' counsel that the Western Star Lodge No. 24 is only an *auxiliary* corporation and possessed, as such, only such *corporate* powers as have been delegated to it by the Grand Lodge. This is an error. The acts of the Legislature, above quoted, not only declares that the Grand Lodge is a body corporate and politic, but it likewise declares that all the regular lodges which have been constituted by the Grand Lodge, as well as all the regular lodges which shall be hereafter constituted by the same, 'are hereby declared to be bodies politic and corporate,' etc. While some may be subordinate Masonic bodies, they are at the same time independent corporations—each one deriving its charter from the State by and through acts of the Legislature."

It is also insisted that Act No. 72 of 1872, amending act of 1816, is unconstitutional, because same does not express its "object or objects in its title." Art. 114 of Const. 1868; and strong reliance is placed on 5 Ann. 93 and 11 Ann. 723, as bearing out the contention. In our view that act was not essential to the existence or perpetuity of the Western Star Lodge No. 24.

While it is true that new legislation upon a *distinct and different subject matter* cannot be incorporated into an existing statute by way of *amendment*, without mention being made of its object in the title, it is equally true that any subject matter that is germane to the original text may be thus incorporated without being open to objection.

The title of Act No. 72 of 1872 is as follows, viz: "An act to amend the *second* section of an act entitled an act incorporating the Grand Lodge of the State of Louisiana, etc." The section thus amended confers upon the Grand Lodge the power to take, hold and enjoy real and personal property, and to receive, take and apply any bequest or donation; and its amendment consists solely in the *enlargement* of the powers thereby conferred, by authorizing it to sell, mortgage, encumber or pledge such property, and to borrow money on the faith of it, and to issue bonds or other obligations to pay money. This amendment was clearly indicated in the title of the act, and the act itself is not amenable to the objection urged against it.

We are therefore of the opinion that the Western Star Lodge No. 24, F. and A. M., was, at the date of the probate of Mrs. McGuire's will, a private corporation, chartered by the legislature and possessing at the time full power and capacity to take and receive the bequest therein contained. We are also of the opinion that no formal acceptance by the lodge of the *charter* conferred by a legislative enactment was at all necessary; the fact that the lodge acted under its charter from the Grand Lodge furnishes conclusive proof of such acceptance;

and the record furnishes abundant evidence that said lodge has so acted through a long series of years, and is so acting at this time. It has also accepted the bequest in express terms and is now in the enjoyment of the property.

II.

The plaintiffs are universal and residuary legatees or testamentary heirs, and are themselves recipients of the bounty of the decedent. They occupy the same position as creditors or simple heirs of the deceased and have no right to sue for the reduction of any donation made by the deceased, unless it be of such dispositions as are reprobated by law. R. C. C. 1504, 1519.

The clause or item of the testament complained of as null and void reads as follows, viz: "I give and bequeath to Western Star Lodge No. 24, F. and A. Masons of Monroe, my plantation on bayou de Suard in the parish of Ouachita, *desiring and requesting* that after the payment of the first year's revenues, after my death, to Annaretta Williams, as directed in item one, and the securing of a home for Eliza Vinson to the value of five hundred dollars *the net revenues of said property be used* by said lodge for the support and education of the necessitous widows and orphans of deceased Masons, within the jurisdiction of said lodge.

"I further give and bequeath to Western Star Lodge No. 24 the diamond pin given by the late Mr. Pargoud to my husband, R. F. McGuire, the lodge to make such disposition of it as they shall see proper."

The plaintiffs allege that this item is null and void, because it contains substitutions and *fidei commissa* and invests said lodge with a title that is stripped forever of use and the right of disposing of same, thereby creating a trust or tenure which has no warrant in law and takes the property bequeathed out of commerce.

On the other hand, the lodge contends that said item three contains neither a substitution nor a *fidei commissum*, but that it conveys to the lodge an absolute, unqualified and indefeasable title in fee simple to the property bequeathed for the purposes and objects of that institution.

The lodge announces that the objects of Masonry are charity to all mankind, and especially to members of the order and their families; assistance to the distressed and unfortunate and the poor and needful, and aid to the widows and orphans of deceased members of the craft, within their own jurisdiction and beyond it; in so far as they are able.

Let us see whether the item of the testament under consideration is amenable to the charge preferred against it.

The code provides that: "Substitutions and *fidei commissa* are and

Williams vs. Western Star Lodge.

remain prohibited. Every disposition by which the donee, the heir or the legatee is *charged to preserve for or to return a thing to a third person is null*, even with regard to the donee, the instituted heir or the legatee." R. C. C. 1520.

The disposition by which a third person is called to take the gift in case the donee does not take it, is not a substitution. R. C. C. 1521.

The same is true of a disposition by which the usufruct is given to one, and the naked ownership to another. R. C. C. 1522.

To which class does this disposition belong, if either?

The Code has provided a rule for the interpretation of acts of last will. It declares that the "intention of the testator must principally be endeavored to be ascertained without departing from the proper signification of the terms of the testament." R. C. C. 1712.

"A disposition must be understood in the sense in which it can have effect rather than that in which it can have none." R. C. C. 1713.

In 8 Ann. 172, *The State of Louisiana vs. The Executors of John McDonogh* the Court said: "The intention of the testator must prevail over the grammatical meaning of the words which he has used; provided his intention is ascertained by dispositions contained, and words used in the will, and it is manifest that he had another object, and another thought than that which the terms used in a particular disposition would otherwise convey.

"When the sense of a particular disposition, resulting from the entire instrument has been ascertained, courts may go further in cases of testaments than in cases of contracts, in *disregarding the grammatical meaning of the words used, so far indeed as to supply words omitted*, which may be done whenever the obvious meaning and the other parts of the will restore these words naturally."

Applying these simple rules to the interpretation of this disposition in question, and what is the result?

Can we ascertain the intention of the testatrix without departing from the terms of the will?

Can such a construction be adopted and give this disposition effect? If the true intention of the testatrix prevails over the grammatical signification of the words used in the will, is the idea of it containing a trust, a substitution, or *fidei commissum*, forfeited or overcome?

Does it show that Western Star Lodge No. 24, F. and A. M., "is charged to *preserve for* or to return the thing—the plantation bequeathed—to a third person?" If so, for what third person is it to be so preserved, or to what person is it to be returned? To whom did this testament pass the title at the testatrix's death? The words employed

are: "I *give and bequeath* to Western Star Lodge No. 24, F. and A. Masons, of Monroe, Louisiana, *my plantation* on bayou de Suard in the parish of Ouachita, *desiring and requesting* that * * * the net revenues of said property be *used* by said lodge for the support and education of necessitous widows and orphans of deceased Masons, etc."

Is there any difficulty in giving effect to this disposition?

It most unequivocally and undeniably gives and bequeaths the plantation to the Lodge. It does not direct or require it to *preserve* this plantation for any one named or designated. It does not direct or require it to *return* said plantation to any one named or designated. The testatrix expresses a desire, and accompanies same with the request of the donee that the net revenues of the plantation shall be used and employed in dispensing certain charities enumerated. This request is made of the Western Star Lodge as a charitable institution.

This request was in the direction of the objects and purposes of the order. The gift is made to the *same person* of whom the request is made. There is no *third person* involved in the matter.

In our opinion the will creates neither a substitution nor a *fidei commissum*.

It does not create a prohibited *trust*, or remove the property from the theatre of commerce.

"This legacy clearly belongs to a class known to the civil law from the foundation of Christianity by the name of legacies to *pious uses*. They are an element in the polity of municipal administrations in all countries, which have preserved the features and jurisprudence of Roman civilization." 8 Ann. 246, McDonogh's will.

"Legacies to pious uses are those which are destined to some work of piety, or object of charity, and have their motive independent of the consideration which the *merit* of the legatees might procure to them. In this motive consists the distinction between this and ordinary legacies." Domat, lib. ix, vol. iv, sec. 6, par. 2.

Legacies to pious uses are highly favored by the law, on account of their motives for sacred usages and their advantage to the public weal; and the great consideration which the law attaches to these legacies controls tribunals in their interpretation of them, and has secured for their support a doctrine of approximation which is coeval with their existence. 8 Ann. 246.

It is far better that the good lady, who honestly desired to make a munificent donation to the defendant for "pious uses," should have that intention carried into effect, and that the wants of widows and orphans be supplied, than that they should be forced to

Police Jury of Ouachita vs. City Council of Monroe et al.

rely upon the meagre charities of the world, and be a tax upon the people of the parish of Ouachita.

We find it unnecessary to digest and collate the various authorities cited in the briefs of counsel, and which have received due consideration.

Our conclusion is that item three of Mrs. McGuire's will was a legacy to Western Star Lodge No. 24, F. and A. Masons, of Monroe, in *full ownership*, with a destination thereof to charitable and pious uses; and that the same does not create a trust, contain a substitution, or *fidei commissum*, or remove the property bequeathed from the arena of commerce. We are of the opinion that the several small lots alleged to be separate, and detached from the plantation bequeathed, were considered by the ancient owner, as well as the testatrix, as a part of same, and that same were intended to form a reserve for timber uses as an accessory of the plantation; and that such a fact may be proved by parol and by general reputation.

Judgment affirmed.

No. 1143.

POLICE JURY, PARISH OF OUACHITA, VS. MAYOR AND CITY COUNCIL OF MONROE, ET AL.

Police juries, like all other corporations created under the laws of Louisiana, are artificial beings, who can act only in the mode prescribed by the law creating them.

No officer of a police jury can legally bind or stand in judgment for the corporation without special authorization.

Parol testimony is inadmissible in proof of such authorization, as police juries can act only by ordinances or resolutions.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Potts & Hudson for Plaintiff and Appellee.

Talbot Stillman for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. This suit is brought by the president, on behalf of the police jury, for the purpose of enjoining the city council of Monroe, and other parties designated as "The Business Men's Association," from usurping the exclusive power and privilege of the police jury of establishing and regulating public ferries within the parish, and for damages occasioned by the defendants by means of a free public ferry which they have established on the Ouachita river opposite Monroe.

38	630
112	902
38	630
118	827

After filing a peremptory exception of no cause of action, which was overruled, the defendants set up a general denial, followed by several special defences.

The judgment appealed from was in favor of the city council of Monroe, and against the other defendants, perpetuating the injunction and condemning them to damages in the sum of two hundred and fifty dollars.

On appeal the defendants composing the "Business Men's Association" assign as error that the president of the police jury is without right or warrant in law to stand in judgment for the parish of Ouachita. His counsel replies that the defence comes too late and that it should have been pleaded *in limine*.

The objection is not levelled at the capacity of the president, but at the latter's authority to stand in judgment for the police jury.

The general denial put at issue the allegation in plaintiff's petition that he was specially authorized to institute this suit in the name and on behalf of the police jury, hence there was no cause for an exception *in limine*, but if on trial the alleged authority was not proved it is clear on reason as well as authority that the omission can be invoked as a defence by an assignment of errors on appeal. *Flower vs. O'Connor*, 7 La. 196; *Notrebe vs. McKinney*, 6 Rob. 13; *Hyde et al. vs. Brashear*, 19 La. 402; *Brunette vs. New Orleans*, 14 Ann. 120.

Police juries, like all other corporations created under our laws, are artificial beings or persons, who can act only in the mode prescribed by the law creating them, or in the manner specified in their organic law or character. *Bright vs. Metairie Cemetery Association*, 33 Ann. 58, and authorities therein cited.

We know of no law, and we have been referred to none, which vests the general power in the president of the police jury to act for, to bind or represent the body in any contract or judicial proceedings without special authority thereto from the corporation.

But the contrary doctrine flows from the very nature of the powers and duties conferred on and required of such corporations by the laws creating them.

No officer of such corporations can, without special authority, legally represent the body before the courts or stand in judgment for the same. *Helluin vs. Maurin*, 8 La. 111; *Capmartin vs. Police Jury*, 19 Ann. 448.

A suit instituted by the president, in behalf of the police jury, without special authority thereto, could create no legal effects binding

State vs. Oliver.

on the corporation, and the judgment rendered therein could not be set as *res judicata* against the corporation.

It follows, therefore, that in the instant case, in the absence of proof of legal authority in the president to stand in judgment for the police jury, the judgment rendered below against these defendants would be no bar to a future action by the parish against the same parties and for the same cause of action.

This conclusion seems to be conceded by plaintiff's counsel, for in his petition he distinctly alleges that the president of the police jury "is specially authorized to institute this suit;" but the record discloses that he failed to make even an attempt to prove the authorization.

In his oral argument he referred as proof of such authorization, to the affidavit of plaintiff in support of the injunction prayed for, but he could not have been serious in such a contention.

Police juries act only by ordinances or resolutions, and no parol testimony would be admissible in proof of either.

These considerations lead to a judgment of non-suit against plaintiff.

It is, therefore, ordered, that the judgment appealed from be annulled, avoided and reversed, and it is now ordered that plaintiff's demand be rejected and the action dismissed as in case of non-suit at his costs in both courts.

No. 1145.

THE STATE OF LOUISIANA VS. TOBE OLIVER.

The judgment appealed from sustained a motion in arrest on the ground of defect in the verdict, and remanded the prisoner to custody to await a new trial. The accused, contending that the legal effect of sustaining the motion in arrest, on the ground stated, was to terminate the case and to entitle him to a discharge, and thus to make it a final judgment, prosecutes this appeal to correct the alleged error in remanding him to custody.

He is entitled to have the question passed on.

There was no error in the action of the judge *a quo*. The defect in the verdict was that, being special, it found accused guilty of no crime denounced by law, and it thus falls under the authority of Foster's case, 36 Ann. 857, and Burdon's case, 38 Ann., in both of which the verdict was set aside and prisoner remanded for new trial.

The case is different from those of Day, 37 Ann. 785, and Murdock, 35 Ann. 729, where the verdicts were not defective in form or substance, but were only set aside because not warranted by the indictment.

Reasons given for the distinction.

A PPEAL from the Second District Court, Parish of Webster.
Drew, J.

38	632
48	1011
48	1018
38	632
50	375
38	632
114	415

State vs. Oliver.

M. J. Cunningham, Attorney General, for the State, Appelles.

Watkins & Watkins for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Defendant was tried under an indictment charging that he did "wilfully, feloniously and of malice aforethought shoot Frank Key, with intent him, then and there to kill and murder," etc.

The indictment is, in every respect, properly framed, as a charge of the offense denounced by Sec. 791 of the Revised Statutes.

After due trial, the jury rendered the following verdict: "We the jury find the prisoner guilty of shooting with *attempt* to kill and ask for him the mercy of the court."

Defendant moved for a new trial on several grounds, and also filed a motion in arrest of judgment on the ground that "the verdict is not responsive to the indictment, and the variance between the two is fatal and the accused should be finally discharged as in effect acquitted."

The two motions were tried together, and judgment was rendered as follows: "By reason of the law and the failure of the jury to find a legal verdict, it is ordered, adjudged and decreed that judgment be arrested, the verdict of the jury set aside, and the defendant remanded to the custody of the sheriff for a new trial."

From this judgment the defendant appeals, claiming that the effect of the judgment sustaining the motion in arrest of judgment was to terminate the prosecution and to require the discharge of the accused; and the qualification thereof remanding him to custody for a new trial was erroneous and illegal.

The attorney for the State moves to dismiss the appeal on the ground that, in criminal cases, appeals only lie from final judgments, and that this is not such a judgment. He cites Rev. Stat. sec. 1001; 37 Ann. 62; 33 Ann. 1228; 15 Ann. 347; 12 Ann. 390; 9 Ann. 69, 157; 8 Rob. 583.

Undoubtedly it is true that criminal appeals only lie from final judgments; but the contention of defendant is that this judgment is, in its nature and legal effect, final; and that the judge has committed error in qualifying it and thereby denying its effect as a final judgment.

Under the peculiar circumstances we think the appeal should be maintained and the question passed upon; since, if the nature of the judgment rendered be such as to terminate the prosecution and require the discharge of the prisoner, it is intolerable that he should be held in custody and subjected to a new trial and judgment therein, before such an error could be corrected.

On the merits, however, we think the judge did not err in his ruling.

Glover vs. Taylor.

The defect of the verdict is that it finds the prisoner guilty of no crime denounced by law. It falls directly under the authority of *State vs. Foster*, 36 Ann. 857, and *State vs. Burdon*, 38 Ann.—not yet reported—in both of which cases, after setting aside the verdict, we remanded them for new trial.

This course is in strict accord with the authorities. Thus Mr. Bishop says: "There ought never to be a defective verdict. If the jury bring in a defective verdict, it is in the power equally of the prisoner and of the prosecuting attorney to have it set right; and suppose the prisoner chooses not to interfere, and suffers a defective verdict to be entered, as his interest would always prompt him to do, in preference to a verdict of guilty in due form, he, by thus failing to interpose, waives his objection to being put a second time in jeopardy for the same offense. In all such cases, therefore, the verdict is simply set aside as a nullity, and a new trial is ordered." 1 Bishop Cr. Proc. § 1016, and numerous cases there cited.

The cases of *Day*, 37 Ann. 785, *Murdock*, 35 Ann. 729, and *Pratt*, 10 Ann. 191, were of a different character. In those cases the verdicts were not defective in form or substance. They were sufficient verdicts for crimes denounced by law; and were only set aside because not warranted by the indictments. The defendants could not have objected to the recordation of such verdicts and the implied waiver of second jeopardy did not arise. Their only recourse was by motion in arrest after verdict.

We think the judge *a quo* acted in full accordance with law.

Judgment affirmed.

No. 1144.

I. N. GLOVER vs. J. H. M. TAYLOR.

1. A suspensive appeal bond reciting in substance that it is given as surety that appellant shall prosecute his appeal, and pay such judgment as may be rendered against him is good.
2. A devolutive appeal bond filed in the clerk's office before the expiration of the return day fixed in the order of appeal, is in time.
3. An agreement entered into between two rival candidates for a public office, whereby each one of them undertakes and binds himself to pay the other, in case of his own election, one-half of the net profits of the office, for the term, is in violation of good order and public policy, subversive of the best interests of society, has a tendency to destroy the safe-guards of the ballot-box and cannot be enforced by the courts.

A PPEAL from the Third District Court, Parish of Claiborne.
Young, J.

38 634
45 488
45 1090

38 634
51 1386
51 1489

38 634
117 978

Glover vs. Taylor.

Allen Barksdale, John A. Richardson and John R. Phipps for Plaintiff and Appellee.

Egan & Pierson and J. W. Holbert for Defendant and Appellant:

The opinion of the Court was delivered by

WATKINS, J. Plaintiff moves to dismiss this appeal on the following grounds, viz:

1st. That the suspensive appeal bond is not conditioned that appellant *shall* prosecute his appeal; nor that he shall pay and satisfy "whatever judgment may be rendered against him if he be cast in his appeal; nor that he shall pay the cost of both the Supreme Court and inferior court if he be cast in his appeal."

2d. That there is no order of appeal to support the bond last filed on June 3, 1886.

The judge *a quo* in his order, granted in open court appeals *suspensive and devolutive* returnable to this Court according to law on the return day, and suspensive appeal bond was fixed according to law and the ~~devolutive~~ appeal bond at \$175.

Appellant furnished a suspensive appeal bond in the sum of \$1,300, but the technical sufficiency of same is complained of and may be open to objection—but with reference to which we find it unnecessary to express an opinion, inasmuch as the appellant filed a devolutive appeal bond before the return day had expired. This bond is not objected to as to form. The quotation from the order of appeal above given was ample authority for it.

The fact that the transcript had been previously prepared and certificate signed makes no difference.

It was submitted to and filed by the clerk in time, as same was done prior to the return day fixed in the order of appeal, granting both a *devolutive* and suspensive appeal. 35 Ann. 937, *Thomas vs. Bienvenu*.

Motion refused.

ON THE MERITS.

Plaintiff and appellee has filed in this Court an answer to the appeal and prays that the judgment of the lower court should be increased to \$1,458.33.

This suit arises under the following agreement, viz:

STATE OF LOUISIANA, PARISH OF CLAIBORNE, }
 April 23, 1884. }

Articles of agreement made and entered into this day by and between I. N. Glover and J. H. M. Taylor, is as follows, to-wit: That in

Glover vs. Taylor.

case I. N. Glover is elected sheriff of the above parish and State, or J. H. M. Taylor, that we do both agree that the sheriff elect shall divide equally between each other the profits of the sheriff's office during the four years; and also agree to pay John M. Brown the sum of two hundred dollars per year for the above term mentioned, and the unsuccessful candidate shall be deputy sheriff.

(Signed)

J. H. M. TAYLOR,
I. N. GLOVER.

Plaintiff further alleges that J. H. M. Taylor was duly elected sheriff of the said parish at said election; that the said office pays \$4,200 per year, and claims judgment against defendant for \$2,450, one-half, for fourteen months.

Defendant answered, admitting his signature to the original agreement, but denying the existence of the contract as set up by plaintiff in his petition, and urged various special defenses against the legality of the agreement.

The case was tried by a jury, verdict and judgment for plaintiff, and defendant appeals.

Before issue was joined, either by default or answer, defendant filed the following peremptory exceptions to plaintiff's petition and cause of action:

IN DISTRICT COURT—JULY TERM, 1885.

No. 657.]

Now comes defendant in this suit for the sole purpose of excepting to plaintiff's petition and cause of action on the following grounds, to wit:

1st. Petition discloses no cause of action, in this: that the contract or agreement upon which plaintiff bases his cause of action, is prohibited by law, *contra bonos mores*, against good order and public policy, null and void, and cannot be enforced by law.

2d. Defendant specially pleads that if the court should hold that the first ground set up in this exception not good, and should hold that said contract can be enforced by law, then defendant pleads prematurity of plaintiff's action.

3d. If the court overrules the first grounds, then defendant pleads that plaintiff cannot sue for a specific amount, involving a settlement to ascertain said amount, before he alleges and proves a settlement, and that said amount is due after said final settlement.

Wherefore, defendant begs that this exception be sustained, and plaintiff's suit be dismissed with all costs.

J. W. HOLBERT,
Attorney.

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After this exception was filed, and before the trial of same, defendant filed his answer and then called up his exception for trial. The plaintiff, here, objected to the trial of the exception and urged that defendant had waived the same by subsequently filing his answer. The court heard the peremptory exceptions and overruled the same.

The first exception propounds the serious question in this case. Has plaintiff an actionable interest on such a contract?

This is not an action for services performed, in pursuance of his employment as deputy sheriff, and to which he had been appointed according to law, by reason of his peculiar fitness and competency for the discharge of the responsible duties thereof. C. P. 764.

The agreement was entered into *before* the result of the election was known, and at a time when neither was an occupant of the office, nor had any title to it.

In *Davis vs. Holbrook*, 1 Ann. 176, plaintiff brought suit on an agreement couched in these words, viz:

"If the vote of Louisiana is cast for Henry Clay, the endorsed certificate of deposit for \$1,000 00, payable to our joint order endorsed thereon, is to be delivered to E. A. Davis, one of the undersigned. Should the vote of Louisiana be cast for James K. Polk, then the certificate is to be delivered to A. H. Hayes, whose name is also hereunto subscribed.

"(Signed:)

"E. A. DAVIS,

"A. H. HAYES."

In that case the Court say:

"The safety and success of our institutions depend upon the purity of the elective franchise, and the substitution of a desire for gain, to the exercise of that free and unbiassed judgment which an elector is bound to exercise in the choice of those to whom political power is to be entrusted, is so fraught with disastrous consequences that they cannot be considered without alarm.

"The addition of a spirit of rapacity to the already too ardent excitement growing out of the struggles for ascendancy between parties, tends to produce consequences which must result in putting an end to this great experiment of self-government which our republic offers to the world."

"Our elections, if such proceedings are tolerated, would cease to be the choice of the people, of those who are to administer their affairs, but become a disreputable game of desperate chance, and profligacy."

In 12 Ann. 154, *Fox vs. City*, the Court held that "no action can be maintained upon a contract made in violation of law."

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Our Code declares that "an obligation without a cause, or with a false or unlawful cause, can have no effect." R. C. C. 1893.

From the letter of the instrument sued on the only consideration on which it rests is the illegal condition on which he was *to obtain* one-half of "the profits of the sheriff's office during four years"—an office to which he was not elected by the votes of the people.

Offices are to be granted absolutely *without any condition*. It is not in the power of the grantor to lessen the emoluments which the law has affixed to the discharge of official duties; *it matters not to what use the share of emoluments thus carved out is applied*. The public will be all ill-served if the circle within which an officer is to be selected, is *narrowed* by a reduction of the legal emoluments. If these are withdrawn from the incumbent, he may be placed under the temptation of compensating himself by speculation, extortion and fraud." 4 O. S. 49, *Faurie vs. Morin, Syndic*.

It is the duty of the sheriff, under the law, to make the best appointment in his power, according to his judgment, at the time of making the appointment; and it is against public policy and adverse to the efficient performance of the duties of his office, that he has entered into a binding agreement *beforehand* to appoint a *certain* person without any regard to his qualifications, and to deprive himself of the power of making the appointment of others if needed, and of removing the appointee if, in his judgment, his removal became necessary.

This contract is for four years—the entire term of defendant's office. Not only does it provide for the *equal* division of the profits of the sheriff's office *during the four years*, but it contains a further specific agreement "to pay John M. Brown the sum of *two hundred dollars per year* for the above time mentioned," etc.

Defendant, in an amended answer, tendered and refused, directly charges that the plaintiff procured, *unduly and illegally* and by means of a valuable consideration, the support of John M. Brown, and his relations and friends, and his and their votes, at the polls and at the election whereat the plaintiff was a candidate, and whereby the result of said election was unduly influenced against defendant, and that said consideration entered into and formed a part of the agreement sued on, and was evidenced in writing.

While this averment furnishes no proof, even the charge, under the circumstances stated, gives color to the complaint.

In 101 U. S. 112, *McGuire vs. Corwin*, the Court said:

"While recognizing the validity of an honest claim for services honestly rendered, but which are blinded and confused with those which

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are forbidden, the whole is a unit and indivisible. That which is bad destroys that which is good, and they perish together.

"When the taint exists, it affects fatally, in all its parts, the entire body of the contract. * * * When there is turpitude the law helps neither party."

Public offices cannot be the object of a contract of sale or a cession.

Our conclusion is that the agreement sought to be enforced is one entered into in open violation of good order and public policy, and the enforcement of which would lead to consequences subversive of the best interests of society, and have a direct tendency to destroy the safeguards of the ballot-box.

The defendant's first exception was well taken, and should have been maintained.

It is therefore ordered, adjudged and decreed that the verdict of the jury and the judgment appealed from be avoided, annulled and reversed, and that the defendant's first peremptory exception be sustained, and plaintiff's demands be rejected and that he be taxed with the costs of both courts.

No. 1153.

JANIE S. RICHARDSON ET AL. VS. ROBERT RICHARDSON.

In case of conflict between provisions of the Civil Code and those of the Code of Practice on questions of practice the provisions of the latter Code must prevail.

Under art 958, Code of Practice, the office or function of curator *ad litem* has no longer any existence in law.

When laws in *pari materia* are to be interpreted, that construction is to be preferred which will give effect to all their provisions.

Hence art. 958, C. P., in abolishing the function of *curator ad litem*, does not abrogate any of the rights vested in emancipated minors by sec. 2, chapter 2 of the Civil Code on the subject of emancipation.

Their right to appear in courts in order to enforce such rights, without assistance, is therefore maintained.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Potts & Hudson for Plaintiffs and Appellees.

T. O. Benton for Defendant.

C. J. & J. S. Boatner for Intervenor and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. The cause of action and the relief sought in this suit are

38	639
48	593
38	639
115	370
38	639
116	816

Richardson et al. vs. Richardson.

identical with the matters at issue in the case of Robert G. Richardson et al vs. Robert Richardson just decided, with the exception of a question of practice which distinguishes the one from the other to that extent only.

In this case the plaintiffs, minors, above the age of fifteen and unmarried, have been emancipated by the notarial declaration of the defendant, their father, under the provisions of art. 366 of the Civil Code, and thus are joined and assisted in their suit by a curator *ad litem*, specially appointed and qualified for the purposes of this controversy.

Intervenor excepts to their capacity on the ground that the office or function of curator *ad litem* has been abolished by art. 958 of the Code of Practice.

Plaintiffs resist the right of an intervenor to urge exceptions or other matters of pleading which are personal to the defendant.

We are rather inclined to adopt these views, and we entertain very serious doubts of the right of intervenor herein to set up this special defense, but premitting a discussion of that question we have concluded to consider the plea.

Article 375 of the Civil Code, which is incorporated in chapter the second under the title of minors and forms part of the second section, which treats of the "emancipation conferring the power of administration," reads as follows :

"The minor who is emancipated otherwise than by marriage cannot appear in courts of justice without the assistance of a curator *ad litem*, who is to be appointed for him specially by the judge for that purpose."

Article 958 of the Code of Practice provides as follows :

"There shall hereafter be no curator *ad bona* or curator *ad litem* appointed in any case; the persons and estates of minors shall in all cases be placed under the power of tutors and under tutors; and the powers, duties and responsibilities of tutors and under tutors, as well as their liability to be removed from office, shall continue until the minor or minors attain the age of majority, or are otherwise emancipated."

Intervenor argues, and it must be conceded, that in questions of practice, in case of conflict between the Civil Code and the Code of Practice, the provisions of the latter Code must prevail.

It follows that the office of curator *ad litem* has ceased to exist under our laws.

But from those premises, intervenor's counsel conclude that minors

emancipated otherwise than by marriage are stripped of the capacity to appear at all in their own rights in any judicial proceedings.

We cannot sanction their conclusion.

As a guide to courts in interpreting laws of a doubtful meaning, the Civil Code, art. 17, contains the following provision :

"Laws *in pari materia*, or upon the same subject matter, must be construed together with a reference to each other; what is clear in one statute may be called in aid to explain what is doubtful in another."

And from that proposition, jurisprudence has extracted the following corollary which embodies a judicious rule of construction.

"When laws *in pari materia* are to be interpreted, that construction is to be preferred which will give effect to all their provisions." Succession of Hebert, 5 Ann. 122; Desban vs. Pickett, 16 Ann. 350; Staes vs. Gastinel, 21 Ann. 407.

The evident and clear intention of the law-maker in enacting the various articles from 366 to 378 of the Civil Code, forming sec. 2 of chapter 2, treating of the emancipation conferring the power of administration, was to relieve that class of persons of certain disabilities which otherwise attach to minors. Hence art. 370 reads :

"The minor who is emancipated has the full administration of his estate, and may pass all acts which are confined to such administration, grant leases, receive his revenues and moneys which may be due to him and give receipts for the same."

To be effective, the right to administer an estate, to receive revenues, etc., must include the right to judicially demand either the estate which may be withheld or the revenues which are due and payment of which is refused or neglected. Of what avail would be the right to receive revenues, if the same could be arbitrarily retained by the debtor ?

The question is practically answered by art. 375, which confers the right to the minor to appear in courts ; but the article imposes a condition in certain cases, and that is the assistance of a curator *ad litem*.

Now, in abolishing that function by the act which is now embodied in art. 958, C. P., did the law maker intend to strip that class of emancipated minors of the right of appearing in courts altogether ?

To have done so would carry with it the denial of almost all the rights conferred to them by the provisions of the Civil Code above referred to, and thus the law giver would leave them at the mercy of those who would choose to invade their rights, as no other means are provided for to empower them to appear in courts.

Such a construction is repulsed by the rules of interpretation which we have hereinabove quoted.

State vs. Major.

But in terms, the art. 958 limits the disability of minors to the time of their emancipation.

Intervenor's counsel are in error in contending that the emancipation referred to is that provided for in the Code for minors who are over the age of eighteen years and are by that emancipation relieved of all their disabilities.

In our opinion, the article refers to all minors who are thus or otherwise emancipated.

Hence we conclude that the class of emancipated minors with which we are now dealing, have the legal power to appear in courts in their own rights for the purpose of enforcing the rights which are vested in them by art. 375 of the Civil Code and other articles on the same subject matter.

We, therefore, hold that the plaintiffs in this case have the capacity to stand in judgment in this suit, and that their pleadings are not vitiated by the unnecessary joinder of a curator *ad litem*.

All other questions which are presented in the case are fully covered by our opinion in the case of R. G. Richardson et al vs. R. Richardson, No. 1152, hereinabove referred to, and hence these plaintiffs are entitled to the same relief which was granted in the other case.

Judgment affirmed.

No. 1148.

THE STATE OF LOUISIANA VS. WHITE MAJOR.

The complaint of an accused that he was refused further time to prepare a motion for new trial five days after conviction, cannot be entertained.

Such matters are within and must be left to the sound discretion of the trial judge.

It is not only the right but the duty of the trial judge to order the correction of the minutes of his court so as to make them conform with the true facts as they occurred.

A PPEAL from the Twentieth District Court, Parish of Lafourche.
Beattie, J.

M. J. Cunningham, Attorney General, and *E. A. O'Sullivan*, District Attorney, for the State, Appellee:

Every court has the power to correct its minutes so as to conform to the facts, and such corrections can be made after appeal taken. 31 Ann. 386, 407, 567; 32 Ann. 1229; 33 Ann. 135; 34 Ann. 370; 35 Ann. 862.

A party who is brought up for sentence five days after conviction, is not entitled to further delay to prepare and file a motion for new trial.

Applications for such delays are addressed to the sound discretion of the trial judge, and his action thereon is not to be reviewed unless manifestly unjust. If any time intervened between verdict and sentence, appellant must show special reason why more was needed.

J. S. Billiu for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. This appeal is from a conviction of breaking and entering in the night time a dwelling house with intent to kill, and from a sentence of imprisonment at hard labor for life; it presents two complaints by bills of exceptions.

1. The defendant complains that he was refused a reasonable extension of time to prepare and present a motion for a new trial.

The facts are that he was convicted on the 12th of April, on which day the judge announced that he would pass sentence on the 17th of that month.

On that day the defendant moved for further time for his motion, and his request was, in our opinion, very properly refused.

There is no merit in the complaint; and members of the bar may rest assured that all attempts to induce this Court to interfere with trial judges in the exercise of their legal discretion, can prove of no avail to their clients.

2. The defendant next complains of an order of the judge on motion of the district attorney, directing the clerk to amend the minutes of the court after the order of appeal had been granted.

In the light of our jurisprudence, the mere statement of the complaint is its best answer.

The minutes of his court are absolutely under the control of the judge, and corrections of the same, so as to make them conform with the facts as they occurred, is not only permissible but it is imperative when the attention of the court is called thereto. *State vs. Mason*, 32 Ann. 1018; *State vs. Teissier*, 32 Ann. 1227; *State vs. Cox*, 33 Ann. 1056.

The trivial character of the grounds supporting this appeal justifies the conclusion that the accused has had a remarkably fair and impartial trial.

Judgment affirmed.

No. 1158.

GODSHAW & PLANT VS. THE JUDGES OF THE SECOND CIRCUIT
COURT OF APPEALS.

28	643
45	1118
38	643
113	264
38	643
116	600

In an action by a judgment creditor to have the purchase of property declared simulated and to be in reality for account of the debtor, the value of the property, and not the amount of the judgment, is the matter in dispute. 27 Ann 138.

A PPLICATION for Certiorari and Mandamus.

Millsaps & Sholars for the Relators.

The opinion of the Court was delivered by

TODD, J. The relators, as judgment creditors of Joshua Lemle for \$600, brought suit to have declared simulated, null and void, a sheriff's sale of a stock of goods belonging to their debtor, and also a subsequent conveyance of said property by Winchester Hall, the adjudicatee at said sheriff's sale, to one Julius Lemle. From an adverse decision of the district court in said case, they appealed to the Second Circuit Court of Appeals, holding sessions in city of Monroe, parish of Ouachita, and by this court the appeal was dismissed, the judges thereof holding that the court was without jurisdiction to entertain the appeal *ratione materiae*.

The plaintiffs in said suit then applied to this Court for a writ of certiorari, through which the record of proceedings in the case have been brought before us, and also for a writ of mandamus directed against the judges of said court to compel them to take jurisdiction of said appeal.

The judges of said court, in answer to the preliminary rule, state substantially that they have declined jurisdiction of the appeal because the real issue involved in the case is the title to property estimated to be worth thirty thousand dollars, this being the alleged value of the stock of goods in possession of Julius Lemle, one of the defendants in said case, the sale of which to him is sought to be declared a simulation.

The question presented is simply whether the jurisdiction is to be determined by the amount of the pecuniary demand or the value of the property, the title to which is assailed. This has been the subject of several adjudications of late, and can scarcely be considered a matter for further discussion. *State ex rel. Bloss vs. Judges Court of Appeals*, 33 Ann. 1351; *John Chaffe & Sons vs. D. D. DeMoss and wife*, 37 Ann. 186. This last case cited is a parallel case with the present one. There a judgment creditor of the husband, for less than \$2000, sought to have declared the purchase of a plantation in the name of the wife a simulation and as really made for the husband. It was held that the case was properly appealable to the Supreme Court, because the property was worth \$6000.

But the relator urges that, inasmuch as he has prayed that the title to the property be declared null only so far as it affects his claim, this limitation or restriction in his demand invests the court with jurisdiction.

There is no force in this contention. The sale was of one stock of

 Heirs of Barrow vs. Barrow.

goods. The title under this sale is attacked. The matter of title is clearly indivisible; it cannot be good as to a part and bad as to a part. It is charged that the pretended purchaser at such sale was not the real purchaser, but that he was a person interposed—interposed for his debtor, the real purchaser. The sale was a sale in block. How could a person be interposed for another as to an undefined part of said sale and not interposed—not acting for another but for himself, as to residue? Such an idea of course is an absurdity.

The court of appeals had no jurisdiction over this appeal, and it was properly dismissed by that court.

It is therefore ordered, adjudged and decreed that the alternative writ of mandamus be set aside, and the writ now discharged at the costs of plaintiff and relator.

 No. 1149.

38	645
110	1086

HEIRS OF JOSEPHUS S. BARROW VS. A. W. BARROW.

The will of the decedent was probated after due notice to the major heirs and to the legal representatives of the minor heirs; the executor was duly qualified and fully administered the estate; he filed his final account, assigning to the several heirs their special legacies, and fixing the distributive share of the residue falling to each heir, and prayed for its homologation, service of the petition having been accepted by the major heirs and the legal representatives of the minors; while said account was pending, said heirs and representatives received and receipted for their said legacies and shares, and granted full acquittance to the executor; and thereupon judgment was rendered homologating the account and granting final discharge to the executor.

After such proceedings, the heirs cannot be heard eight years afterwards to attack the validity of the will and the settlement of the executor. Such an action will not be sustained upon a bare allegation of error and fraud without the slightest suggestion of the nature and ground of such charge.

The plea of estoppel to such a suit was properly sustained as to all the plaintiffs except John W. Barrow, who was a minor unrepresented at the time, and was no party to the proceedings or settlement.

As to him, however, the prescription of five years from his majority applies and his action is barred.

A PPEAL from the Third District Court, Parish of Claiborne.
 Young, J.

James Dormon, McClendon & Seals and J. W. Holbert for Plaintiffs and Appellants:

1. Heirs who sue for the nullity of a testament and the reduction of an excessive donation, are not required to make a tender of what they had received before bringing their suit. 33 Ann. 749; 36 Ann. 236; 33 Ann. 773; 34 Ann. 1017; Suc. E. Commagere, No. 9532.
2. A judgment attacked cannot be pleaded as *res judicata* and estoppel against the action of nullity. 32 Ann. 13; 29 Ann. 589; 32 Ann. 1006; 34 Ann. 808; 15 Ann. 209; 33 Ann. 719 and 1198; C. P. 928-43.

Heirs of Barrow vs. Barrow.

3. A judgment probating and ordering a will executed, is not binding on the heirs present or duly cited. 18 Ann. 444; 10 Ann. 78; 6 Ann. 104; 2 Ann. 724; 13 Ann. 575; 15 Ann. 509.
4. Minors can never be estopped. 16 Ann. 248; 16 Ann. 98; 13 Ann. 508; 1 R. 10.
5. A minor can only be represented in judicial proceedings by a tutor acting for and in the name of the minor. C. P. 108-9; 6 L. 377; 11 R. 693.
6. An executor cannot represent the minor heirs in the settlement of the estate he administers. C. P. 117; 13 Ann. 97; 10 Ann. 224; 21 Ann. 712.
7. Personal citation is necessary to render a judgment homologating a final account binding on the heirs. 15 Ann. 676; 16 Ann. 258; 11 Ann. 412; 6 L. 222; 11 R. 169; 6 L. 354; 7 R. 46; 10 Ann. 674; 8 L. 321; 5 R. 453.
8. A citation must be addressed to the defendant. The defendant only or his attorney of record can waive citation. C. P. 173, 177 and 178.
9. The husband cannot waive citation on his wife when she is principal defendant, and the husband not a party to the suit. 19 Ann. 208 and 360; C. P. 178 and 192; C. C. 1317.
10. A waiver of citation must be clearly shown; a court cannot presume anything with respect to a party being cited. 19 Ann. 212; H. p. 245-4; L. p. 113-4.
11. In an exception of no cause of action, the allegations of the petition are taken as true, no evidence can be received. 30 Ann. 1148 and 14 Ann. 137 and 295.
12. Substitutions and *fidei commissa* are prohibited. C. C. 1519 and 1520.
13. An heir has a right of action against his co-heir for collation and of reduction. C. C. 1242 to 1250, and 1502 to 1518.
14. A disposition of property reprobated by law cannot be ratified. 29 Ann. 120; 15 Ann. 700; 3 Ann. 328; 21 Ann. 600; 15 Ann. 154.
15. A party cannot be held to ratify a settlement when they were ignorant of the facts on which the settlement was made. The party must know the defect he is waiving. C. C. 2272, 1786; C. N. 1338; 23 Ann. 538; 15 Ann. 569; Bigelow on Estoppel, p. 489, *et seq.*
16. Receipts given by heirs to an executor "in full settlement of their interest" in an estate, are not conclusive. 12 Ann. 775; 4 Howard, 561; 21 Ann. 539; 29 Ann. 446; C. C. 1312 and 1317.
17. A substitution and *fidei commissa* cannot be cured by time—no prescription applies. 13 Ann. 575; 11 R. 312; 3 Ann. 329; 29 Ann. 120; 15 Ann. 702.
18. A judgment absolutely null can be the basis of prescription. 24 Ann. 253; 1 N. S. 9.
19. In case of error and fraud, prescription runs from its discovery. C. P. 613; H. 1213-1-4; L. p. 566-2-6.
20. The prescription of five years applies to an action to annul a testament, donations, etc., and in case of minors this prescription begins to run after majority. C. C. 3542.

John A. Richardson and Watkins & Watkins for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. Josephus S. Barrow died in 1878, leaving the following testament:

STATE OF LOUISIANA, }
PARISH OF CLAIBORNE. }

Know all men by these presents, that I, Josephus S. Barrow, of the State and parish aforesaid, knowing the uncertainty of life and the certainty of death, being in feeble and bad health, but possessed of a sound and disposing mind, have this day, the sixth of February, A. D. 1875, feeling it to be a duty I owe to my family, have this day made and

Heirs of Barrow vs. Barrow

written with my own hand this my last will and testament. In the name of God, amen, hereby revoking all those by me at any previous time made.

First—It is my will and desire that all my just debts, which are but few, together with my burial expenses, to be paid by my executors as soon as they may obtain funds sufficient to do the same from my estate.

Second—I hereby will and bequeath unto my beloved wife, Rebecca E. Barrow the following property, viz: A settlement of land on Middle Fork bayou, in the above State and parish, including my old homestead, containing 1000 acres more or less, including all the improvements thereon, together with all my household and kitchen furniture, together with all my real estate in Homer, except the store house and grocery occupied by Otts & Barrow, together with forty acres of land lying south of Homer, known as the Turner forty; also my two-horse buggy and harness, two sorrel mares, two cows and calves of her own choosing from my stock; also my two-horse wagon and harness.

Third—I also will and bequeath unto my daughter, Joanna, two thousand dollars in money, for which she holds my note; also my daughters, Dolly P., Ida Exar, and my sons, James L. and Charles E. the same amount, together with one horse, bridle and saddle each, one cow and calf each, to equalize them with all my other children that have left me heretofore.

Fourth—I also will and bequeath unto my son, A. W. Barrow, the brick store house and grocery in the town of Homer, upon condition that the said A. W. Barrow pay to the sons of J. W. Barrow five hundred dollars each when they become twenty-one years of age. If one of the sons of J. W. Barrow should die before arriving to be twenty-one, then the surviving brother should be entitled to the thousand dollars. If neither of them should live to be twenty-one, and the said sum not paid over to one or both of them, then said thousand dollars to be the property of A. W. Barrow, who has it in trust.

Fifth—Should my son, W. H. Barrow present himself within the time limited by the statute of this State, he shall be entitled to an interest of two thousand dollars in said store house and lot, to be held in trust by A. W. Barrow for the benefit of Wm. H. Barrow or his legal heirs. He or they receiving and receipting for the profits from said house as it may accumulate.

Sixth—I hereby appoint and ordain A. W. Barrow and W. P. Otts, Sr., my executors to effectually carry out and accomplish this my will, without giving bond, and to take full possession of all my estate

 Heirs of Barrow vs. Barrow.

which has not been disposed in this will, and sell and dispose of the same to the best of their judgment for the benefit of my wife, R. E. Barrow, A. W. Barrow, M. R. S. Nicholas, Joanna Barrow, Dolly P., Ida Exar, James L. and Charles Edwin Barrow.

(Signed)

J. S. BARROW.

Attested by six witnesses.

CODICIL.

STATE OF LOUISIANA, }
PARISH OF CLAIBORNE. }

I, Josephus S. Barrow, of the State and parish aforesaid, being greatly afflicted, but possessed of a sound and disposing mind, have this day added this codicil to the above will, which is my own will, written with my own hand, and I also write this codicil owing to the great depreciation in real estate. I do hereby will and ordain when my estate is wound up and my executors, if the store house and grocery occupied by A. W. Barrow and Otts is not worth \$5,000, then my son, A. W. Barrow, my executor, shall not pay W. H. Barrow or his heirs but half the amount specified in the above will to him, and also J. W. Barrow's two sons half the amount willed to them in the above will. Signed, sealed and delivered in the presence of the following witnesses January 1, 1876.

(Signed)

J. S. BARROW.

The clauses attached give to A. W. Barrow a lot and brick store upon it, charged with the condition that A. W. Barrow shall pay to his absent brother, W. H. Barrow, when he presents himself and claims it, interest on \$2,000, out of A. W. Barrow's own means.

This is not a *fidei commissum* or substitution.

Succession of Cochrane, 29 Ann. 232. The clause of a will by which the testator gives a sum of money to a minor and directs that the same shall be invested so as to yield a revenue until the legatee's majority does not involve a substitution.

The devise of a certain sum to a minor, and in the event of her death to another, is not a prohibited substitution.

The doubtful clauses should be so construed as to give the will effect. A naked trust, to be executed immediately as where furniture is devised to a mother for the benefit of her minor child, is not a *fidei commissum*.

The will was presented for probate to the proper court of his domicile, and a judgment was rendered declaring the same proved and ordering its execution. A. W. Barrow, one of the executors appointed by the will, was duly qualified and confirmed.

An inventory was taken. The estate was administered, and in May,

Heirs of Barrow vs. Barrow.

1878, the executor filed his final account, in which, after delivering the special legacies and paying the money legacies, he distributed the remainder amongst the heirs. This account was duly advertised. The service of the petition for its homologation, was accepted by the major heirs and by the legal representatives of the minors.

All the heirs received and gave receipts for their legacies, and also for the distributive shares coming to them under the account.

After due proceedings, judgment was rendered homologating the account and finally discharging the executor, which was signed on June 24, 1878.

The present suit was instituted by the petitioning heirs in 1886, nearly eight years afterwards.

The petition propounds the following grounds of action :

1st. That the entire will is a nullity for want of compliance with the forms of law in its execution.

2. That clauses four and five of the will are null, as containing prohibited substitutions and *fidei commissa*.

3d. That "for the abovementioned reasons" (to-wit: the alleged nullities in the will) "the pretended testament and the judgment homologating the same are absolute nullities."

4th. That A. W. Barrow had received large advantages from the decedent, which he was bound to collate.

5th. It pleads "error and fraud in the settlement of the estate of J. S. Barrow, deceased, by A. W. Barrow," without the slightest specification of the nature or grounds of such error or fraud.

Upon these grounds, plaintiffs ask a judgment decreeing the nullity of the will and especially the clauses four and five thereof; decreeing the nullity of the judgment probating the will and of the judgment homologating the executor's final account; decreeing that plaintiffs recover of defendant their interest as heirs in the brick store house and lot bequeathed to him by said clause four of the will; and finally condemning defendant to account for and collate to plaintiffs a large amount which he had received in excess of his interest as heir.

To this petition defendant filed several peremptory exceptions and pleas, amongst which may be mentioned :

1st. No cause of action.

2d. Estoppel resulting from the judgments probating the will and homologating the executor's final account and discharging him, and from the settlement and receipts in accordance with said account.

3d. Prescription.

Heirs of Barrow vs. Barrow.

From a judgment sustaining the exceptions and pleas generally, and dismissing the suit, the plaintiffs prosecute the present appeal.

We think all the heirs, with the exception of J. W. Barrow, are conclusively estopped from prosecuting the present suit by the probate proceedings and the settlements effected thereunder.

Those proceedings and the settlement are to be considered together.

Without nicely discussing the technical validity of the citations and acceptance of service of petitions, it is apparent that the major heirs and the legal representatives of the minor heirs were fully notified of all the proceedings therein and took cognizance thereof; that they fully confirmed and ratified them; that they accepted and receipted for their legacies under the will, and also for their distributive shares as heirs in the residue as ascertained by the final account; and that, upon the faith of their said acceptance and receipts, the judgment was rendered homologating the account and finally discharging the executor.

As was said in another case, "the heirs ratified and confirmed the will; they were recognized and put in possession of their respective shares; his succession has been fully administered and his executors have been discharged.

After all these proceedings and in the face of their solemn acts, the heirs cannot be heard when they seek to annul the will in any of its parts." *Heirs of Johnson vs. Johnson*, 26 Ann. 572; see also *Suc. McCloskey*, 29 Ann. 406.

The minority of some of plaintiffs cannot protect them from this estoppel. They are bound by the acts of their legal representatives, acting within the scope of the powers conferred upon them by law. *Heroman vs. Institute*, 34 Ann. 813.

Neither is the estoppel defeated by the vague allegation of error and fraud contained in the petition. We have quoted heretofore the sole allegation contained in the petition on that subject, and one so vague and indefinite goes for naught. Besides, so far as the validity of the will was concerned, it is apparent there was no room for error or fraud.

The will being thus protected from attack, its terms are sufficient to cut off any claim for collation of advantages previously received by heirs; for the third clause of the will shows conclusively that the legacies therein made to certain heirs were intended "to equalize them with all my other children," which, under art. 1233, C. C., is a sufficient indication of the testator's intention to exclude all question of collation of previous advantages.

These views dispose of the case of all the plaintiffs except John W. Barrow. He was a minor without any legal representative, and he is

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not bound by any of the proceedings in the succession of J. S. Barrow, nor has he, in any manner shown by this record, been settled with, or ratified or confirmed the proceedings.

Unless he is concluded by the plea of prescription, we see nothing to prevent his prosecuting the present action.

The action is prescribed by five years. C. C. 3542; Heirs of Miller vs. Ober, 34 Ann. 592.

The prescription commences to run only from his majority. The evidence shows that he was four or five years old in 1863. Hence he must have attained his majority at least in 1880, and as this suit was filed only in 1886, the prescriptive term had expired.

On the whole, we think the judgment appealed from has done justice.

Judgment affirmed.

 No. 1156.

MRS. G. J. DAVIE AND HUSBAND VS. MRS. BETTIE SCRIBER ET AL.

1. Under the Act of April, 1853, and the Constitution of 1864, the clerk had no authority to grant an order of seizure and sale.
2. Article 990, Code of Practice, does not contemplate sales of property of estates made at the instance of succession representatives, but such as are applied for by creditors only.
3. Under the provisions of the Constitutions of 1845, 1852 and 1864, and statutes enforcing them, clerks had jurisdiction and authority to grant orders for the sale of succession property. 12 Ann. 56, Succession of Boyd; 21 Ann. 505, Wood vs. Lee.
4. The clerk having been possessed of jurisdiction to grant the order, same protects the adjudicatee and subsequent purchasers.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

C. J. & J. S. Boatner for Plaintiff and Appellant.

Franklin Garrett for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. Plaintiff, as forced heir of Francis Sheppard, whose intestate succession was opened in the parish of Ouachita in 1863, and of which his surviving widow qualified as the administratrix, sues for the revocation of a judicial sale of certain real estate of which the decedent died possessed, and which is alleged to consist of an undivided one half interest in a certain plantation situated on Bayou de Siard, of four hundred acres, and which is alleged to have been appraised in the inventory at \$8 per acre, or \$3,200.

She alleges that she was a minor at her father's death. That on the

Davie vs. Scriber et al.

28th of September, 1867, upon the application of the attorneys of Samuel L. Sheppard—an alleged creditor of the said succession—the clerk of the Twelfth District Court for the Parish of Ouachita rendered an order directing the sheriff to sell all the property of said estate, or so much thereof as should be necessary to satisfy his claims. The property was adjudicated to R. G. Cobb, on the 4th of January, 1868, from whom, by several mesne conveyances, defendant acquired title, under which she now holds. Plaintiff alleges that the adjudication was an absolute nullity, and conveyed no title, because, among other reasons assigned, “the clerk of the court who granted the order prayed for, was *absolutely without* authority or jurisdiction to entertain the same, or to make any order thereon,” and she prays judgment accordingly.

The different defendants and warrantors respectively tendered various exceptions, and answers subsequently and calls in warranty, in which they substantially assert the legality of the order of sale complained of and the consequent legality of the adjudication to R. G. Cobb.

The decision of this case must depend upon the legality, or the illegality, of the order of sale, as it, in our opinion, is the only question propounded by the plaintiffs that can seriously affect defendant's title.

Plaintiff's counsel relies upon 12 Ann. 68, *Mason's ex'rs vs. Fuller*, as authority for the position he has assumed. In that case plaintiff enjoined what the Court considered as an order of seizure and sale. The Court say: “In pursuance of the Article of our present Constitution (1852), the Act of April, 1853, empowered the clerks of courts, amongst other things, “to grant orders for the sale of succession property. We interpret this to mean *such orders as* are required, or are asked for by curators, administrators and executors in the regular course of their administration; *such orders as* they ask for the sale of so much property as may be necessary to pay the debts in general, which are exigible; orders which are therefore properly granted *ex parte*.

“Here the applicant for the order is not an executor, but a creditor acting *adversely* to the executor; that is, he seeks to compel a sale of the property under the administration of the executor * * * and, finally, the order is *not* to sell *property* of the succession to pay debts in general, but to sell a *specific piece* of property on which a vendor's privilege is claimed, to pay by preference a specific debt, held by the creditor who seeks to procure the order, in a petition drawn up nearly in the form of a petition for a seizure and sale.

“The creditor should have resorted to the district court either to

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procure an order of seizure and sale, or a rule on the executor to show cause why the property should not be sold according to Articles 991 and 992 of the Code of Practice."

Article of Code of Practice 990 provides that it shall be the duty of the several *judges* of probate, "upon the *application of the creditors, or any creditor*, of a vacant estate, to cause * * * so much of the property of the said estate as may be necessary to pay the debts of the same *that may be due*, to be offered for sale," etc.

This article does not contemplate sales of succession property made at the instance of succession representatives. They are governed by provisions of the Civil Code. The sales contemplated in said articles are such *only* as may be provoked by creditors. 33 Ann. 471, Succession of Hood; 16 Ann. 420.

Under the provisions of the Constitutions of 1845, 1852 and 1864, the Legislature had power to vest in clerks of courts authority to grant such orders, and do such acts as they should deem necessary for the furtherance of the administration of justice.

Act 56 of 1855, conferred upon the clerks of the several district courts the power "*to grant orders for the sale of succession property.*"

In 12 Ann. 611, Succession of Boyd, the Court said: "The Constitution has authorized the Legislature to confer the power upon clerks to make certain *judicial orders*. These orders, when rendered by the clerk in the special cases authorized, have *precisely the same* effect as they would have if rendered by the judge himself under the same circumstances."

Under the Constitution of 1845, Act 141 of 1850 declared "that the clerks of the several district courts shall have power to grant orders for the sale of property of successions."

This statute was examined and passed upon by this Court's predecessor in Woods vs. Lee, 21 Ann. 505, in which they say: "This is an action by the heirs of E. E. Wood to annul the probate sale of a tract of land * * * made on the 28th of February, 1851, to one Joseph D. Lee, from whom the defendants acquired, on the following grounds, viz:

"*First. The order of sale is insufficient, and void because the clerk had no authority to make it.*"

Again: "The order of sale in this case was made by the clerk who was specially authorized thereto by the Act of 1850, p. 100, and it had the same effect as if made by the judge."

That case is precisely in point. As the clerk had jurisdiction, his order protects the adjudicatee and all subsequent purchasers. 14 Ann. 622, Succession of Guiney; 21 Ann. 507, Woods vs. Lee.

Judgment affirmed.

Friedman Brothers vs. Lemle.

No. 1155.

FRIEDMAN BROTHERS VS. JOSHUA LEMLE—J. LEMLE, INTERVENOR.

Where a third person appeals suspensively from a judgment making peremptory a mandamus directing the sheriff to accept a bond which has been tendered for release of property attached and to release the attachments, and where the condition of the appeal bond is "to satisfy whatever judgment may be rendered against the *appellant*," the obligations of the bond are restricted to the condition so expressed and, on failure to prosecute the appeal, cannot be extended to embrace an obligation to satisfy the judgment which had been rendered against the sheriff, or to pay general damages occasioned by the appeal.

Nor can the principal be held for damages outside of the terms of the bond, without proof of malice and want of probable cause. His position is similar to that of the original prosecutor of a civil suit, except in so far as the law has made a distinction between them in the requirement of bond.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Millsaps & Sholars and *A. Golthwaite* for Plaintiffs and Appellees:

C. J. & J. S. Boatner for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Plaintiffs, as creditors of Joshua Lemle individually, sued him and attached his stock of goods. Various other creditors levied similar attachments.

A firm, styling itself J. Lemle, and alleging itself to be composed of Joshua and Julius Lemle, intervened in the proceedings and claiming ownership of the goods, applied for and obtained an order of court permitting it to release the same on bond. The firm thereupon tendered to the sheriff a bond in the sum of \$19,974.50 conditioned according to law and with sureties which, however, the sheriff refused to accept. The firm then applied to the court for a writ of mandamus on the sheriff to compel him to accept the bond and release the property. After due proceedings, the mandamus was made peremptory.

The plaintiffs, together with several other attaching creditors, thereupon presented a joint petition representing that, though not parties to the mandamus proceeding, they had an appealable interest therein, and praying to be allowed a suspensive appeal from said judgment which was granted, returnable to this Court in June, 1885, upon their executing a bond for a suspensive appeal conditioned according to law, in the sum of twenty thousand dollars. The bond was executed in January, 1885.

It appears that *prior* to the application of J. Lemle to bond, certain of the creditors, *not including plaintiffs*, had applied for and obtained an order for the sale of the goods as being perishable, and J. Lemle hav-

ing failed to release on bond owing to the suspensive appeal in the mandamus proceeding, said order went to execution and the goods were sold. It does not appear that J. Lemle made the slightest opposition to the execution of this order though, under the peculiar circumstances, they might, perhaps, have successfully done so, until their timely application to release on bond had been finally determined.

However, the goods having been sold long prior to the return day of the appeal from the mandamus judgment, of course the marrow was taken out of that controversy and the appeal was abandoned.

Although plaintiffs' suit was filed on December 12, 1884, it was not put at issue by answer until September, 1885, when defendant pleaded a general denial to the claim of plaintiffs; and then assuming the character of plaintiff in reconvention, and claiming to be liquidator of the firm of J. Lemle, dissolution of which was alleged, he sets forth the facts heretofore recited touching the suspensive appeal from the mandamus judgment, and the failure of plaintiffs to prosecute the same; avers that the sale of his goods was the consequence of said appeal; that it resulted in a sacrifice of said goods at a price far below their value in his hands had he not been prevented from releasing the same on bond, occasioning him a loss on that account of \$10,100; sets forth other damage to his business, his credit, etc., to a large amount; prays for citation of Sigmund and Herman Meyer, sureties on the suspensive appeal bond; and for judgment against plaintiffs and said sureties *in solido* in the sum of \$20,000, the full amount of the bond, and against plaintiffs in the further sum of forty-nine hundred dollars.

Waiving objections to the mode of proceeding, which are serious, we prefer to consider the merits of the reconventional demand, which we shall do under two aspects, viz:

1st. Whether plaintiffs and their sureties are liable for the damages claimed, contractually, under the terms of the bond.

2d. Whether plaintiffs are liable otherwise.

We solve the first question in the negative on two grounds.

1. The condition of the bond is in the following terms:

"Now, therefore, if the said Friedman Brothers (and others, naming them), shall well and truly prosecute their said appeal with effect, and shall satisfy whatever judgment may be rendered against them, or that the same shall be satisfied out of the proceeds of the sale of their estate, real and personal, if they be cast in their said appeal, then this obligation to be null and void, otherwise to be and remain in full force and effect against principal and security."

The failure of plaintiffs to prosecute this appeal placed them in the same position which they would have occupied had their appeal been

Friedman Brothers vs. Lemle.

prosecuted and resulted in a decree of this Court affirming the judgment. As that judgment was not against them, but was solely against the sheriff, and as the bond did not bind the parties to satisfy any judgment against the sheriff, and as the only judgment which could have been rendered against Friedman Bros., would have been for costs of appeal, it is manifest that, under the terms of this bond, the parties were not bound to satisfy the judgment against the sheriff.

It is possible that, under a reasonable construction of articles 571 and 579 of the Code of Practice, the third person appealing suspensively from a judgment against a defendant might be required to condition the bond "to satisfy whatever judgment may be rendered against" the *defendant*. But such was not the bond furnished in this case.

As was said in one case, "we must take the bond as it is, not as it might have been or as the court might have ordered it to be made." Cartwright vs. McMillan, 3 Ann. 685.

And in another: "We are not permitted to extend the obligation of the surety beyond what is contained in the bond itself and what the law has declared to be the legal obligation of the surety in such a case, which is to satisfy whatever judgment may be rendered against the appellant." Parham vs. Cobb, 9 Ann. 426.

(See *erratum* at beginning of volume showing that the opinion above quoted from, though styled a dissenting opinion was, on that point, the opinion of the Court.)

A very pertinent and weighty opinion by the Supreme Court of Maryland in a case very analogous is quoted, where the same view is taken. It is there said: "The appellants contend that, by the failure to prosecute the appeal, the condition was broken, the right of action thereupon accrued and that the measure of damages is the loss occasioned by the appeal. If we were at liberty to decide this case according to principles of equity, etc., we should have little hesitation in assenting to the appellant's views; but the obligation is defined and limited by the terms of the bond and cannot be extended beyond their legal import and effect. * * By the terms of the bond the obligors bound themselves to prosecute the appeal with effect, and in the event of failure to do so, the condition expressly declares what the obligors shall pay." Fullerton vs. Miller, 22 Md. 1.

2. The foregoing might be sufficient on this point; but we may express, in addition, our serious doubt whether, even if the bond had bound the obligors to satisfy the judgment against the sheriff, the action of the Court in ordering the sale of the property at the demand

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of parties other than plaintiff, in the exercise of jurisdictional power and without objection by defendant, would not have been a *vis major* relieving plaintiffs and their sureties from their obligations under such a bond.

Now on the question of the extra-contractual liability of Friedman Bros., the foregoing suggestion is entitled to great weight. But in addition thereto, the attempt of defendant to assimilate the liability of an unsuccessful appellant to that of a plaintiff in a wrongful attachment or other proceeding by conservatory process, cannot be sustained. The differences between them are too marked to escape notice or to need enumeration.

The right of appeal is, as has been frequently said, a constitutional right. Its object is to submit to the appellate tribunal the final determination of controverted rights. The position of the appellant cannot be distinguished from that of the plaintiff in the original suit who seeks to submit the same rights to primary judicial determination. No distinction can be made between the two, except such as the law has expressly made in the bonds required. Outside of those bonds, their cases are identical, and the same conditions must exist in order to subject them to any liability outside of such bonds, viz: malice and want of probable cause.

Those conditions have no existence in this case.

We are satisfied the judgment appealed from enforced the law and awarded justice.

Judgment affirmed.

No. 1152.

ROBERT G. RICHARDSON ET AL. VS. ROBERT RICHARDSON,—MRS. S. F. HEAD, INTERVENOR.

The forced heirs of a married woman have a legal right to sue the surviving husband for a specific amount of paraphernal funds of their deceased mother received by the father, if the latter has not been confirmed and qualified as their tutor during their minority. In such a case the father is their debtor under the rights of the mother, and they can enforce all her rights without recourse to an action for an account.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

Potts & Hudson for Plaintiffs and Appellees:

First—Intervenors must take the case as they find it, and cannot object to the manner in which the suit is brought. 20 Ann. 174; 19 L. 155; 4 N. S. 487; 8 R. 123; 21 Ann. 118; 27 Ann. 239.

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Second—To enforce a claim for paraphernal funds against the father, inherited by a child from a deceased mother, neither a tutorship nor settlement of tutorship is necessary. 28 Ann. 830; 31 Ann. 533.

Third—A suit brought by an emancipated son and daughter against their father on account of a claim derived as heirs of their deceased mother is not a suit growing out of a tutorship, and where they thus sue as heirs no tutorship nor settlement of tutorship is necessary. 31 Ann. 533; 28 Ann. 830.

Fourth—The payment or receipt of an amount over \$500 may be proven by one witness. Art. 2277 (2257) C. C. applies only to contracts. 1 N. S. 416. 8 Ann. 307; 18 Ann. 210; 21 Ann. 54; 20 Ann.

T. O. Benton for Defendant.

C. J. & J. S. Boatner for Intervenor and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs are emancipated minors, issue of the defendant's marriage with their deceased mother, and they seek as her heirs at law to enforce the claims of their mother for the restitution of her paraphernal funds received by the husband and converted to his own use and benefit, with a recognition of a legal mortgage on his immovable property.

He pleaded the general denial, but he makes no serious defence.

The real contest is between the plaintiff and the intervenor, who is a judgment creditor of the defendant and who resists the claim of the former, in so far as it may outrank her mortgage on the only remaining immovable property owned by the defendant.

She appeals from an adverse judgment; and she urges three grounds of resistance to plaintiffs pretensions.

1. That their action against their father should have been for an account, and not for a specific amount.

2. That the testimony offered by plaintiffs is not sufficient to make legal proof of their claim.

3. That the burden of proof was on plaintiffs to show that the funds alleged to have been received for account of his wife constituted her separate assets as being due to her before marriage.

I.

Conceding *arguendo* the right of intervenor to make this point, we find that plaintiffs urge no claim against their father as tutor; the record shows that he has never been confirmed or qualified as their natural tutor.

They are only claiming the rights which they have inherited from their mother, hence they are entitled to the same remedy which she could invoke, if living, for the restitution of her paraphernal funds received by her husband and converted to his own use.

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At her death plaintiffs became the creditors of the surviving husband to the extent of their virile shares in the rights of their mother against the husband, and nothing has since occurred to alter or modify the relations which they have occupied towards their father, and *quoad* their claim and to the extent of their respective shares therein, their position was precisely that which their mother held before and at the time of her death.

Now we know of no law or rule of jurisprudence which would restrict the action of the wife seeking the restitution of her paraphernal funds from her husband, to a demand for an account.

The books show that in such cases the demand has always been for a specific amount; and the right of enforcing such a demand has been inherited by these plaintiffs directly from their mother.

The exercise of the precise remedy herein sought has been sanctioned by this Court, and is derived from our code. C. C. Art. 945; *Bridger vs. Simonton*, 28 Ann. 830; *Cambre vs. Grobert et al.*, 31 Ann. 533.

II.

As to the insufficiency of the evidence, intervenor contends that the only direct evidence of the amounts alleged to have been received by the defendant, of the time, of the mode of payment, and of the sources consists of the uncorroborated testimony of the defendant himself, who is testifying in behalf of his children.

It is perhaps unfortunate that many of the witnesses, such as the former tutor of the wife and several of her debtors, who could have thrown abundant light on the subject, are now dead.

But nevertheless we find in the record sufficient evidence, both documentary and parol, which leaves no doubt in our minds that the defendant did at various times and in sundry amounts receive after his marriage with Fanny Gurton, in good currency, a sum aggregating \$11,500, and that the whole amount was used by him as his own funds.

It would serve no useful purpose in jurisprudence to encumber this opinion with a recital in detail of the evidence which has led us to this conclusion.

III.

But the intervenor contends that the bulk of the moneys received for account of his wife by the defendant consisted of fruits of her paraphernal assets, principally the hire of slaves, of which he had the administration, and which therefore fell in the community.

On this point the record shows substantially:

That when the marriage took place in December, 1862, the wife was a minor, and that her property, consisting mainly of money and

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slaves, was under the control of her tutor, and that very soon thereafter the husband took service in the Confederate army and did not return to his home permanently until the end of the war, in 1865; and that portions of his wife's paraphernal assets were paid to him during the war, but that no final account of tutorship was presented before the month of November, 1865.

In the mean time the wife's estate remained under the management and control of her former tutor, who was also her uncle, and no attempt has even been made to show that the husband ever interfered with his wife's chosen agent, either in the hire of her slaves or in the investment of her funds.

Hence we conclude that the husband did not assume the administration of the separate estate of his wife before the year 1865, at which time he had already received the funds which form the basis of plaintiff's demand, and that therefore these sums were paraphernal assets of the wife. The legal mortgage securing these funds has been preserved by proper and timely inscription, and it is entitled to the rank provided for it by law.

Considering the source of intervenor's claim, and the sacred character of defendant's indebtedness to her, we deeply regret the loss to which our judgment will subject her, but at the imperative command of law the voice of equity is hushed, and judges must perform their duty without regard to consequences.

The amounts allowed plaintiffs by the district judge are correct under the evidence, and his conclusions are sustained.

Judgment affirmed.

No. 1147.

THE STATE OF LOUISIANA VS. JOHN KEENAN.

The rule is that dying declarations are admissible if made under a sense of impending dissolution, which soon thereafter transpires. 1 Glf. sec. 158; 30 Ann. 365; 31 Ann. 95; 32 Ann. 1086; 30 Ann. 920, *State vs. Mollas*.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee:

1. A dying declaration made under an immediate sense of impending dissolution is admissible in evidence. 30 Ann. 365; 31 Ann. 95; 32 Ann. 1086; Wharton Cr. Ev. § 281.
2. There is no law making it necessary for the dying man to say that he believes he will immediately die, as a condition precedent to the validity of his declaration as evidence;

38	660
45	1144
38	660
47	1528
38	660
48	535
38	660
51	1413

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it is sufficient if such belief is established by his actions and the surrounding circumstances. Wharton Cr. Ev. §§ 282, 284.

Wm. R. Whitaker for Defendant and Appellant:

Declarations by the person whose death is the subject of investigation concerning the cause of death or its attendant circumstances, are admissible; provided, the court be satisfied that such declarations were made in solemn contemplation of immediately approaching death. Best Ev. § 505, n. 1; 1 Greenl. Ev. § 156, et seq.; Whar. Hom. §§ 742-775; State vs. Cornish, 5 Harr. (Del.) 502; Bull vs. Com., 14 Grat. 613; Hill vs. State, 41 Geo. 484; Dixon vs. State, 13 Fla. 636; State vs. Simon, 50 Mo. 370; People vs. Hogdon, 55 Cal. 72; Sullivan vs. Com., 93 Pa. St. 284, 296; State vs. Patterson, 45 Vt. 308; West vs. State, 7 Tex. Ct. App. 150.

While it rests with the court to decide on the admissibility of a statement offered as a dying declaration, a strictly legal discretion must be exercised; and if it decide for the admission of the declaration, it must be for one, or both, of two reasons:

First. That the declarant had expressly stated his own sense of his immediately approaching death; or,

Second. That from the testimony it is apparent that declarant must have been assured of such impending dissolution.

1 Greenl. Ev. § 156; 1 East P. C. 354. 1 Denis C. C. 1; Rex vs. Van Butchell, 3 Carr. & P. 493; 2 Parker C. R. 235; Rex vs. Pike, 3 Carr. & P. 598; Rex vs. Hucks, 1 Stark N. P. C. 523; 1 Phill. Ev. 235, 85; Carr. Supp. 232, 1 Arch. 449; Whar. Cr. Ev. §§ 276-281, 284; Best Ev. p. 485; Com. vs. Cooper, 5 All. 495; Montgomery vs. State, 11 Ohio, 424; Morgan vs. State, 31 Ind. 193; People vs. Grunzig, 1 Parker C. C. 299; Brakefield vs. State, 1 Sued. 215; People vs. Perry, 8 Abb (N. Y.) Prac. N. S. 27, 34; Lewis vs. State, 9 Sm. & M. (Miss.) 115; State vs. Trivas, 32 Ann. 1086; State vs. Spencer, 30 Ann. 362; State vs. Mellase, 36 Ann. 920.

The decision of the trial court on the matter of the admission of a statement offered as a dying declaration is proper subject for review. Whar. Cr. Ev. § 298, Com. vs. Dunau, 128 Mass. 422; Sullivan vs. Com., 93 Pa. St. 284; Donnelly vs. State, 2 Dutch. 463, 601; State vs. Trivas, 32 Ann. 1086.

The opinion of the Court was delivered by

WATKINS, J. The accused was indicted with another for the murder of one John J. Madden, separately tried, and from a verdict of "guilty without capital punishment," and sentence, he has appealed.

This appeal rests upon a single bill of exceptions reserved for the accused to the admission, as evidence, of the dying declarations of the deceased. He complains that it had not been shown, either by oral testimony of witnesses, or by the language of the declaration itself, or in any other way, that the deceased was, before making said declaration, or at the time of making same, in contemplation of approaching or impending death.

The declaration of deceased was dictated by himself, and was reduced to writing by T. J. Mooney, recorder.

From the declaration itself we gather the following statement of facts, viz: That on the 25th of June, 1884, at the hour of 2 A. M., he was shot by one of two men who were strangers to him. He was a police-

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man at the time, and had previously arrested them and they were in his custody.

This occurred in Algiers. He said he would know the men if he should see them again. The one standing by the corporal at the end of the table, he said was the tallest man. He concluded his statement by saying: "I make this statement to you because I have given up hopes of recovery, and believe that I am going to die."

It further appears that from the facts summarized in the bill of exceptions, that the recorder visited the deceased during the day subsequent to the assault upon him, on which occasion he said that he thought he would get well.

It further appears that on the following day, between 3 and 4 o'clock A. M., the recorder was again sent for, and upon his arrival he found Madden quite weak, and who, when he was questioned by the recorder as to how he felt, responded that he had given up and thought he was a case, or that "he was gone up."

Before proceeding to write the dying declaration, the recorder warned him to be careful as to what he should say, as he was going before his Maker, and that if he did not believe that he was going to die his declaration would not be worth the paper it was written on, to which Madden responded "that he did not wish to die with a lie in his mouth."

He thereupon made to the recorder the statement detailed above, and he reduced it to writing as dictated by him, in the presence of witnesses.

Madden died on the day following. From the evidence it does not appear that his physical condition was subsequently improved, or that the patient thereafter entertained hopes of recovery.

The trial judge, in his reasons, assigned that he was satisfied from the expressions of the deceased, and his condition just prior to the declaration, that he was fully aware of his condition, and had no hope of recovery, at the time, and admitted the evidence.

Dying declarations are those made under a consciousness of impending death, which, however, the declarant need not express in direct terms. His bodily condition and appearance; his conduct and language; as well as statements made to him by his attendants, may be considered, and his consciousness thence inferred. 12 Ann. 274, State vs. Scott.

We do not conceive it to have been necessary that the deceased should have said that he believed he would die *immediately*, but regard it sufficient, if the facts detailed were such as to indicate that the de-

ceased was conscious, at the time of making his declaration, of his *approaching* dissolution.

To render such declarations receivable in evidence, the deceased need not have been at the time *in articulo mortis*. It was only necessary that same should have been made under a sense of *impending* dissolution, which soon thereafter occurred.

To this sense of approaching death, the law attaches the solemnity of an oath, and impresses upon a statement made under it, the character of evidence.

Of this solemnity the deceased was clearly impressed, because, when he was cautioned by the recorder as to the statement he desired to make, he said that he *did not wish to die with a lie upon his lips*. 30 Ann. 365, *State vs. Judge Spencer*; 31 Ann. 95, *State vs. Daniel*; 32 Ann. 1086, *State vs. Trivass*; 36 Ann. 920, *State vs. Molisse*.

The ruling of the judge *a quo* was correct, and the judgment appealed from is affirmed.

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No. 1161.

WHEELER & PIERSON VS. G. A. PETERKIN ET AL.

The omission of appellant to ask for citation of appeal, and to have it served on appellee, when the order of appeal has been granted on motion in open court at a term different from that on which the judgment was rendered, is fatal to the appeal, which must be dismissed.

A PPEAL from the Sixth District Court, Parish of Morehouse.
Bussey, J.

Todd & Todd for Plaintiffs and Appellants.

C. Newton for Defendants and Appellees.

The opinion of the Court was delivered by

POCHE, J. The motion to dismiss this appeal must prevail.

The judgment appealed from was rendered on the 26th of May, 1885, and the order of appeal was granted on motion of appellants' counsel in open court on the 18th of January, 1886, and at a different term of the court than that at which the judgment was rendered.

No citation was asked by appellants and none was served on appellees. Under the circumstances a citation of appeal was as imperatively necessary to perfect the appeal as an ordinary citation is indispensable to support an ordinary action, and the absence of a citation in this case is clearly and inclusively imputable to the fault of appellants.

The only condition under which the necessity of a citation of appeal

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is obviated, is when the party who intends to appeal does so by motion in open court at the same term at which the judgment was rendered. Code of Practice, art. 573.

That provision of our Code is unambiguous and mandatory; it has uniformly been construed so as to defeat the appellant whenever he failed to ask for and to secure a citation of appeal, under an order granted either on petition in chambers or on motion in open court at a term different from that at which the judgment was rendered. *Walker vs. Martolo*, 16 La. 50; *Bolling vs. Anderson*, 10 Ann. 650; *Pratt vs. Erwin*, 5 Ann. 115; *St. Romes vs. Sterling*, 21 Ann. 277; *Potier vs. Thibodaux*, 21 Ann. 618; *Hardy vs. Stevenson*, 27 Ann. 95; *Fournet vs. Van Wickle*, 33 Ann. 1108.

The appeal is therefore dismissed at appellants' costs.

38 664
112 1049

No. 1162.

HELEN STAFFORD AND CURATOR AD LITEM VS. SUCCESSION OF W. S. MCINTOSH.

A creditor who has an unliquidated and unacknowledged demand against a succession is not bound to procure the rendition and effect the liquidation of his claim and its recognition and enforcement by an opposition to the account, but may proceed at once by an independent and direct action for that purpose.

APPEAL from the Twenty-seventh District Court, Parish of Richland. *Ellis, J.*, to whom the case was referred.

David Todd for Plaintiff and Appellant:

Where the administrator has filed his tableau and account, any creditor not recognized therein has a right to sue the succession that owes him and have his claim recognized by judgment. 10 Ann. 224; 3 Ann. 407; 5 R. 270; C. P. 984-6; 19 L. 441; 7 Ann. 367; 5 Ann. 709; 23 Ann. 102; 28 Ann. 322; 2 N. S. 659; 5 N. S. 218; 6 N. S. 450; 1st Rob. 389-404; 3 R. 264; 9 Ann. 500.

Such creditor has also the alternative right to oppose such tableau until his rights and claim are recognized and placed on such tableau. C. C. 1180; 8 Ann. 451; 10 Ann. 224; 10 L. 358; 18 L. 264-283; 23 Ann. 528; 12 Ann. 517.

E. C. Montgomery and *Boatner & Boatner* on the same side.

Wells & Toler for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. The plaintiff is the only issue of the marriage of J. J. C. and Margaret A. Stafford, who both died in the parish of Richland—Mrs. Stafford in 1872, and Mr. Stafford in 1876.

Shortly after the death of plaintiff's father, Wm. S. McIntosh was appointed her tutor, and about the same time administrator of the suc-

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cession of Mrs. Stafford. As administrator and tutor he received the property of the succession, and besides that of the minor valued at about \$35,000. Part of this he caused to be sold and received the proceeds. He collected the rents and revenues, and thus many thousand dollars went into his hands. McIntosh continued in the control and possession of these estates till 1883, when he died. He died without filing any account of his administration, though he left an account of his tutorship never homologated. Shortly after the death of McIntosh, David T. Chapman was appointed and qualified as administrator of his succession. Not long after his appointment, he filed a provisional account and tableau of debts of McIntosh's succession. This account completely ignored the debt owing by McIntosh to the plaintiff.

Thereupon the plaintiff, having been emancipated, brought the present suit, in which she set forth in her petition at length and with great clearness, the indebtedness of McIntosh to her and the specific causes of that indebtedness; that he had gone into possession of all her property, received the fruits of it, had sold part of it and collected the proceeds, and had never paid over to her or her representatives anything, nor filed any account.

The action was brought and the petition formulated to comply precisely with the letter and with the provisions of art. 986 of the C. P., as will be seen from a perusal of it. It reads as follows:

"If the claim (claim in favor of a succession) be not liquidated, or if the curator or testamentary executor or administrator have any objection to it, and consequently refuse to approve it, the bearer of the evidence of such claim may bring his action against the curator or administrator in the ordinary manner before the court of probate where the succession was opened, or before the district court, according to the amount involved, and obtain judgment in the same manner as in other cases."

The suit was, however, dismissed on an exception of no cause of action. There are certain words qualifying the judgment that may throw some light on the reasons of the judge for his ruling—the judge giving no reasons, at least in writing, in support of the same, and the defendant making no appearance in this Court whatever.

The judgment reads thus: "In this case the exception was overruled as to opposition in plaintiff's petition to account of W. S. McIntosh, tutor to the minor, Helen Stafford, and overruled as to opposition to account of D. T. Chapman, administrator of the succession of W. S. McIntosh, and sustained as to the demand of the plaintiff against D. J. Chapman, administrator."

One cannot read the petition without being convinced that plaintiff's

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sole object in bringing this suit was to liquidate the debt of the McIntosh succession to the Stafford succession. The suit may have intended to accomplish effectually what the judge *a quo* supposed, perhaps, could only have been done by oppositions to the accounts mentioned. But we find no word of opposition to the accounts in the petition, and no mention of the existence of said accounts except by way of recital. The fact was alleged in the petition that Chapman, in his account, had ignored entirely the claims of petitioner against the succession of McIntosh, and the administrator was asked to be cited, and was cited, and judgment prayed for against the McIntosh succession for the sums therein mentioned, amounting to some thirty thousand dollars.

We regard the petition as inaugurating an independent suit for the sole purpose of determining the indebtedness. It may be from the fact that it was asked that these accounts be not homologated until the plaintiff's claim could be liquidated by means of this suit, that it might have been contemplated by the plaintiff after her claim was liquidated that then she might, if to her advantage, compel the administrator, Chapman, to recognize the claim and place it among the debts of the succession. But the first thing to be done by the plaintiff was to have her claim liquidated, and that she was proceeding to do by her suit when it was improperly dismissed.

It might be inferred from the language of this decree that the judge was of opinion that it was the duty of Chapman, as the legal representative of W. S. McIntosh, administrator, to have filed the account of administration of the Stafford succession that McIntosh had failed to file. If so it was error, for it was not incumbent upon him to file such account, and he could not have been compelled to do it. He had nothing to do with Mrs. Stafford's succession. 1st Rob. 404; 12 Ann. 717.

We are not to be understood as meaning that settlements of the kind involved in this suit may not be effected by means of opposition, but however that may be, the law reserves to parties a special action to accomplish this purpose. And in this case it was not only legal but there was a marked propriety in resorting to this separate and independent suit. As stated, Chapman was doubtless an entire stranger to all the transactions between McIntosh and the Stafford succession and those also relating to the tutorship of the plaintiff. In all probability it would have been utterly impossible for Chapman to have prepared anything like an accurate or correct account of McIntosh's gestion with those estates. Therefore, the mode of proceeding adopted was highly favorable to the McIntosh succession, inasmuch as its administrator was accurately and explicitly informed of all the causes out of which

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it was charged that McIntosh's liability grew out of, and of all the facts surrounding the whole affair, whereby Chapman, administrator, was afforded the amplest opportunity for investigating and resisting, if he chose, the matters urged against him.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed; and proceeding to render such judgment as should have been rendered, it is further ordered, adjudged and decreed that the exception of no cause of action be and the same is hereby overruled and the cause remanded and reinstated in its entirety, to be proceeded with according to law, at the costs of the defendant in both courts.

No. 1163.

WM. C. CULVERHOUSE ET AL. VS. JACOB MARX.—JAMES PEARSON,
WARRANTOR.

When peremptory exceptions filed *in limine* have been tried and overruled, and answers have been filed, and at a subsequent term the case has been fixed and taken up and is on trial on the merits, the judge has no authority to interrupt said trial, and, of his own motion, to set aside the former judgment on exceptions and grant a new trial thereof, and forthwith to hear them and render judgment thereon sustaining the exceptions and dismissing plaintiff's suit.

The exceptions, *as such*, were out of the case, and the judge had no more authority to reinstate and try them *as exceptions*, than he would have had to interpose such exceptions originally.

The right of judges to grant new trials *ex officio* is subject to the same delays which apply to parties.

The overruling of exceptions is not *res judicata* on the subject matter thereof and does not preclude the court from rendering a different ruling when the same matter is brought up anew in proper form, as by answer to the merits; but this principle does not authorize the court to revive a defunct exception, and by sustaining it, defeat and deny the trial on the merits, which has been regularly opened.

A PPEAL from the Third District Court, Parish of Union.
Holstead, Special Judge.

Thos. O. Benton and James A. Ramsey for Plaintiffs and Appellants.

Graham & Gaskins and J. E. Trimble for Defendants and Appellees:

1. The special judge ordered a new trial, *ex officio*, of the exception which had been passed upon by his predecessor, a special judge, and tried the exception. Plaintiff retained bill.
2. Courts have the legal right to order new trials, *ex officio*, and the exercise of this right is in their discretion. C. P. 547; H. D. P. 987, No. 7; 10 Ann. 766.
3. Plaintiffs alleging want of authority in counsel, who acted for them before the court, must, before they can require proof of their authority, deny it on oath. 27 Ann. p. 73 and authority there cited; 26 Ann. 302; L. D. p. 70, Nos. 2, 3, 4 and 5.
3. Plaintiffs' petition discloses no cause of action. They claim the property as heirs of

38	667
110	269
38	667
113	271
113	273
113	275

Culverhouse et al. vs. Marx.

their mother, but show that defendant and warrantor hold under titles—and allege no reason why these titles should not stand in the way of their recovery. C. P. 44; L. D. p. 520, No. 7, also p. 531, No. 8.

4. The plea of *res adjudicata* filed in exception of defendant and warrantor estops plaintiffs from recovery in this suit. In former suit judgment was rendered on agreement of parties, giving plaintiffs \$567 50 instead of property claimed by them, and in terms settling the dispute between them. This judgment has become final, no appeal or action of nullity having been instituted. In the present suit the judgment is not attacked or mentioned.

The object of judgments is to settle disputes between parties, and it is as to the object of the judgment that the authority of the thing adjudged takes effect. C. C. 2286; 20 Ann. 285; H. D. p. 763, No. 2; 23 Ann. 618; 32 Ann. 882 and 898; 33 Ann. 617.

The opinion of the Court was delivered by

FENNER, J. This is a petitory action, to which the defendant and warrantor interposed *in limine* certain peremptory exceptions.

The judge of the court having recused himself, called Allen Barksdale, Esq., as judge *ad hoc* who, having duly qualified, heard the said exceptions at the November, 1885, term of the court, and rendered judgment overruling them.

Thereafter the cause went to issue on the merits by answers filed by defendant and warrantor.

The case was continued at two succeeding terms and at the April term of 1886, Mr. Barksdale, being unable to attend, proffered his resignation as judge *ad hoc* and J. B. Holstead, Esq., was appointed and qualified in his stead, who thereupon entered his order fixing the case for trial on April 13.

On that day the case was regularly called and taken up for trial, and all the pleadings in the case were read, when the special judge, *ex officio* and of his own motion, entered his order setting aside the former judgment which had been rendered on the exceptions and granted a new trial of said exceptions and, proceeding forthwith to trial thereof, he rendered his judgment sustaining the same and dismissing plaintiffs' suit.

To these proceedings of the judge, counsel for plaintiffs excepted and took a bill of exceptions which is brought up in the record.

The question which meets us at the threshold is as to correctness of the judge's proceeding. We can discover no warrant of law or authority to sustain it.

By the effect of the former judgment overruling them, the exceptions *as such* were out of the case; and the judge had no more right to reinstate and try them *as exceptions*, after the case had been opened on the merits, than he would have had to interpose such exceptions of his own motion, had the parties never filed them.

Rauxet vs. Rauxet.

It is true that judges have the right *ex officio* to grant new trials under art. 547, C. P., but that right can only be exercised ordinarily within the same delays which are allowed to parties to move therefor.

It is equally true that, so far as the overruling of an exception is concerned, the judgment is not *res judicata* on the subject matter thereof, and does not preclude the court from reversing its ruling when the same matter is brought up anew in proper form, as by answer to the merits. *Levy vs. Wise*, 15 Ann. 38.

But this does not authorize the court to revive a defunct exception, after a case is on trial on the merits, to try it separately, and thus to defeat the trial on the merits.

If the subject matters of the exceptions were involved in the issues on the merits the judge, after hearing the merits and in rendering judgment, might have well ruled on such matters according to his discretion without being bound by the former ruling.

But he erred in depriving plaintiff of his trial on the merits and of the opportunity of bringing his whole case before this tribunal.

It is, therefore, ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, and it is now adjudged and decreed that the case be remanded to the lower court, to be there proceeded with according to law and the views herein expressed.

No. 1154.

AUGUSTE RAUXET VS. EMILE RAUXET.

A donation *inter vivos* duly accepted by the donee need not be accompanied by any other delivery.

A person who is alleged to be too ignorant of the English language to understand the meaning of an act of donation drawn in that language will be held bound by such an act, on proof that she understood the English language sufficiently well to dictate a will in that language.

All issues presented in a cause by the pleadings, on which evidence is introduced on trial, will be considered as disposed of by a final judgment, although the latter be silent on some of the issues in the case.

A PPEAL from the Fifth District Court, Parish of Ouachita.
Richardson, J.

T. O. Benton for Plaintiff and Appellee.

Robert Ray and *Robert Richardson* for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff sues for a partition by sale of a piece of im-

38	669
49	1335
38	669
109	1010
38	669
115	815

Rauxet vs. Rauxet.

movable property which he claims to own in indivision and in equal shares with the defendant, his brother.

Both are nephews of the original owner who died on the 28th of August, 1884.

Plaintiff claims title to one-half of the property under a donation *inter vivos* of date of June 18, 1884; and defendant lays claim to the whole property by the effect of a will of the deceased, the aunt of both, under date of May 30, 1884.

Hence he denies the alleged ownership of his brother to the half of the property, and he concludes with a prayer for a partition in kind in the event of a judgment favorable to plaintiff's ownership; claiming also reimbursement of moneys disbursed by him, on account of taxes due on his aunt's property during her lifetime, and judgment for sundry amounts alleged to be due to the succession by plaintiff.

Defendant sets up the nullity of the donation *inter vivos* in favor of plaintiff on the following grounds substantially:

1. Want of delivery of the property.
2. Want of acceptance by the donee.
3. That the donation was obtained by plaintiff by improper influences, fraudulent misrepresentations, and devices practiced on his aunt, who was at the time very old and very weak from sickness.
4. That the act of donation was signed by the donor in ignorance of its real meaning and effect, the same being in the English language which she did not know sufficiently to understand a legal document drawn in that language.

I AND II.

The first two grounds of alleged nullity are answered by the act which was authentic in form, and which recites the formal acceptance of the donee who signed the instrument for that purpose; and by art. 1550 of the Civil Code which reads: "A donation duly accepted, is perfect by the mere consent of the parties; and the ownership of the objects given is transferred to the donee, without the necessity of any other delivery."

On the third ground of nullity, the record is absolutely barren of any evidence of any representations made to the aunt by plaintiff, and hence we are powerless to ascertain whether any or all of them were false, and it is equally silent on the subject of the means, fraudulent or otherwise, used by plaintiff to secure the donation.

The record shows that the act was drawn by the notary at his office, under the direction of a reputable attorney retained therefor by the plaintiff, after which the officer proceeded to the house of the donor, accompanied by two witnesses and by the plaintiff.

Rauxet vs. Rauxet.

After their arrival at the house, plaintiff went into the room of his aunt, who was sick in bed, and remained with her more than half an hour, after which the officer and the witnesses were introduced, and the act was then signed after being read to the donor and other persons present, including defendant's wife.

In all of these proceedings we fail to discover even an intimation of any fraudulent design or unfair dealing on the part of plaintiff or of anyone acting in his behalf.

The only attempt made by defendant to prove circumstances tending in the least to invalidate the donation, was by means of his own testimony consisting mainly of statements made to him by his aunt to the effect that she had signed the act in ignorance, and that her intention was, as it had always been, to leave the whole property to him.

But his recital is silenced by his own acts, which speak louder than his words. The act was signed on the 14th of June, and the deceased lived until the 28th of August following, and no step was taken by either to carry out her supposed intentions; or to expose the alleged deceptions and fraudulent deeds of the other brother.

IV.

The alleged ignorance of the deceased of the English language is not supported by the record.

The very will under which defendant bases all his claims and rests his hopes of success, was drawn in the English language under her directions given in that language to her attorney. On that point the evidence is simply overwhelming against the pretensions of the defendant. Upon the whole, we feel constrained to say that it would be difficult to imagine a weaker attack on an authentic act than the one which is exhibited in this record.

The district judge reached the same conclusions, and rendered judgment recognizing plaintiff's title, and ordering a partition in kind of the property in suit. His judgment is silent on the amounts claimed in reconvention by the defendant. His silence must be construed in law as rejecting the same. 36 Ann. 398, Villars vs. Faivre et al.

As the evidence is insufficient to support the demand, we think that it was correctly ignored.

We note a motion made in this Court by plaintiff for an amendment of the judgment so as to allow time rent on the half of the property from the death of the donor until he obtains possession of the same. When his counsel filed this motion, he doubtless thought that he had made demand for such rent in his pleadings. Such, however, is not the fact, and hence he must enforce his claim by some other proceedings.

Judgment affirmed.

 Todd vs. Larkin et al.

No. 1159.

R. B. TODD, CURATOR, VS. MRS. M. T. LARKIN ET AL.

This suit is an attack by a creditor upon titles of third persons, on the ground that they are pure simulations, and that the property belongs to the debtor and is subject to his debts. On the evidence the simulation is not established to our satisfaction.

A PPEAL from the Sixth District Court, Parish of Morehouse.
Dunn, judge *ad hoc*.

David Todd and Bussey & Naff for Plaintiff and Appellant:

1. Good faith is essential in a person pleading prescription of ten years to real estate, under a title. C. C. 5479.
2. A judgment is not prescribed till ten years after the date of the adjournment of the term of court wherein the judgment is rendered. Page 555; 29 Ann. 518; 35 Ann. 285.
3. Service of citation on one obligor in *solido* stops prescription against the other obligors in *solido*, or the heirs of such obligors. C. C. 3552; 29 Ann. 298; 26 Ann. 608; 30 Ann. 488.
4. A judgment of separation of property is null, if the wife does not pursue her husband's property by an uninterrupted suit to collect her debt, till it is collected or all of his means are exhausted. C. C. 3428; 34 Ann. 690; 27 Ann. 193; 28 Ann. 151, 346.
5. An act of giving in payment from a husband to his wife must be an authentic act. C. C. 2428.
6. When a fraudulent simulation is made, and all of the debtor's creditors are afraid or unwilling to go to the expense and trouble of procuring the evidence and instituting and prosecuting a suit in declaration of simulation, the creditor who goes to this expense and trouble and succeeds in unveiling the simulation, and having the property decreed the property of his debtor, is entitled to be paid out of the proceeds of such property to the prejudices of all creditors who failed to bring such a suit. 9 R. 29; 8 Ann. 453.
7. One cannot claim by reconvention what one is estopped from demanding in a direct action.
8. In a suit in declaration of simulation where it is shown that no money passed, the transaction will be annulled. 1 Ann. 42; 10 Ann. 691; 12 Ann. 666.

Boatner & Boatner for Defendants and Appellees.

The opinion of the Court was delivered by

FENNER, J. Plaintiff is the holder of a judgment against Porter J. Larkin, deceased, rendered in 1875, and recorded in Morehouse parish on November 17th of that year.

In January, 1883, Porter J. Larkin transferred, by an act of sale, to his brother, M. K. Larkin, a certain plantation in said parish; and on March 29th, 1876, M. K. Larkin executed an act of sale of the same property to Mrs. M. T. Larkin, wife of Porter J. Larkin, separate in property.

The object of the present action is to have the foregoing transfers declared to be pure simulations, and to have the property decreed to have been, and to be, that of Porter J. Larkin and his heirs, and to be subject to plaintiff's judicial mortgage.

It is to be noted, as an important fact, that on May 29th, 1873, Mrs.

M. T. Larkin had obtained a judicial separation of property from her husband, Porter J. Larkin, and a judgment against him for \$11,513.47, with legal mortgage on all his property, then duly recorded, and operating as a legal and judicial mortgage, ante-dating by several years that of plaintiff, and this judgment has been duly kept alive and reinscribed.

We fail to find evidence in this record which would justify us in pronouncing simulated titles which have stood unimpeached for so long a time.

All the parties to these conveyances were dead at the time of the trial of this case, except M. K. Larkin. Porter J. Larkin had died in —. Mrs. M. T. Larkin, though alive at the date of institution of this suit, died before issue joined.

The testimony of M. K. Larkin was taken under commission issued by plaintiff, but proving unsatisfactory, plaintiff did not offer it, and defendants introduced it in evidence.

That testimony is positive to the effect that the sale to M. V. Larkin was a real transaction; that Porter J. Larkin desired and intended to sell and induced M. K. to buy; that the consideration was \$4,000, for which four notes of \$1,000 each were given; that he only consented to buy, however, to oblige his brother and upon a verbal understanding that, if he should be unable to pay his notes, his brother would not foreclose, but would return them and take back the place. But his right to pay the notes and keep the property was unquestioned and, in law, his obligation was equally absolute, if insisted on by Porter, because the above verbal understanding was of no legal effect.

It is impossible to treat such a contract as a simulation, because under it Porter Larkin's ownership was absolutely divested and M. K. Larkin acquired the unconditional right to keep the property on paying the price, which is all that, under the effect of the resolutive condition, any vendee acquires.

It is quite possible that Porter's object in selling and M. K.'s motive in consenting to buy, were to put the property beyond the reach of creditors; but this would only subject the transaction to the revocatory action, which is long since prescribed. It is the necessity of plaintiff's case to establish, not fraud, but simulation.

The only rebuttal of this testimony consists of circumstances and presumptions which, however powerful in themselves, find an explanation upon the hypothesis of a fraudulent contract, as complete as upon that of simulation.

So much for the first transfer. Now, in March, 1876, M. K. Larkin,

Todd vs. Larkin et al.

being desirous to sell back the property, found his notes in the hands of Mrs. Larkin, then separate in property from her husband. How she acquired them, on what consideration and for what purpose is not shown.

This failure of proof is not the fault of defendants, their mother and father having both died during the long delay which plaintiff suffered to elapse in sleeping on his rights.

At all events, she held the notes and was legally capable of owning and dealing with them in her separate right.

M. K. Larkin applied to her to buy the property in consideration of the notes. She at first declined to do so, but ultimately consented, and the conveyance to her was executed.

From what we had just said, it is apparent that this was a real transaction, the effect of which was to transfer the title from the real owner for a valuable consideration.

But plaintiffs contend that she was a mere person interposed paying for the property with her husband's means and receiving and holding it for him.

But this is mere assumption and not supported by any weighty proof and loses even its plausibility when it is considered that she was then the holder of the superior mortgage, legal and judicial, against her husband, for an amount equal to the value of the property, to which the property, if acquired by the husband, would be instantly subjected.

What motive, then, for disguise or simulation? How natural, then, that all parties should have intended that the title should pass to the wife, as a real title and as the true owner! If such was the intention, and we are convinced that it was, the wife's title could not be attacked as a simulation, even if the husband had given the notes to her without consideration. The gift of the notes might possibly be the subject of attack under proper conditions, and fraud on creditors might be invoked, but it would be impossible to treat the title as a mere simulation.

We have considered all the circumstances of the case very carefully; but the title to property which has subsisted so long without question, and which was made to a party who, at the time of taking it, held the first mortgage upon it equal to its value, is not to be lightly treated as a simulation.

All the aversion which the judicial conscience rightly feels against

 Heirs of Mason vs. Layton et al.

devices to screen and cover up property under fictitious appearances, loses its force in presence of such a state of facts. The property has gone to the one who had the best right to it; and, except upon clear proof, neither law nor equity would justify our interference with it.

Such was the conclusion of the judge *a quo*, and we approve it.

Judgment affirmed.

Todd, J., is recused.

 No. 1160.

HEIRS OF MASON VS. MRS. M. T. LAYTON ET AL.

1. In a suit against a married woman, appertaining to her separate property-rights, demands respecting the community cannot be determined.
2. A judgment in a previous suit against her by some plaintiff, annulling a sale made to her ostensibly of that part of the property claimed in the present suit by plaintiff, and "putting the parties in the condition they stood prior to the transaction," forms *res adjudicata* with respect to the parties, and will protect a title she may receive under judgment of partition.
3. Plaintiffs' want of authority to institute suit must be specially urged by way of exception *in limine litis*, or it will not prevail.

A PPEAL from the Fifth District Court, Parish of Ouachita.
 Richardson, J.

Stubbs & Russell for Plaintiffs and Appellants.

Stone & Murphy and *C. J. & J. S. Boatner* for Defendant and Appellee:

In order that a party may be held bound by a judgment, it is necessary: 1st. That he should have been sued and judgment prayed for against him. 2d. That judgment should have been rendered actually and in terms against him. 3d. That such prayer should have been made, and such judgment rendered against him in the same quality in which he is sought to be bound under it. R. C. C. 2286.

Judgments must be read and construed with reference to the parties suing and being sued, and the issues presented for adjudication, and cannot be given effect to decide other issues, upon which no evidence was taken, upon another cause of action not set forth in the pleadings, and at variance with and precluding the cause of action set up in the pleadings, even as between the parties, nor can they decide any issue whatever against a party not sued. Where, in a suit against a married woman, demanding the unpaid balance of the purchase price of property sold nominally to her, authorized by her husband and demanding also recognition of mortgage granted in her name upon her separate property as additional security for the notes evidencing the purchase price of the property conveyed, she resists the demand and is released on the ground that the sale was made to and the unpaid balance is due by the community, and that therefore neither she nor her individual property can be held liable, and when the court, in rendering judgment, releasing her and her individual property on the ground stated says, in terms: That the sale and mortgage incident thereto are null and void. Such judgment will be read with reference to the parties and the issues involved in the suit, and such expres-

Heirs of Mason vs. Layton et al.

sions construed to mean that the sale was of no effect as to the issues between plaintiffs and defendant in said suit; and the mortgage referred to to mean the mortgage given in the name of the defendant upon other, her individual property, and not as a judgment against the community not sued granting rescission of sale not prayed for. The more especially where the notes evidencing the balance of the purchase price of the property conveyed are left outstanding and the husband declared, in the opinion confirming such judgment, to be the party liable for the balance due upon these notes, and where neither the notes nor the vendor's lien upon the property conveyed securing them are cancelled, or in anywise affected by the judgment, and where the community was not a party to the suit and the judgment was, in terms, against the wife alone, who cannot represent or stand in judgment for either the community or the husband, as to both of whom she is a third party, and when the cause of action necessary to a judgment rescinding the sale was not set forth in the pleadings, and when no evidence was offered thereon, and where, if such cause of action had been set up, it would have been in conflict with and precluded by the cause of action and the only one which was set forth in the pleadings. R. C. C. 2286; C. P. 119; Bonvillian vs. Bourg. 16 Ann. 363, and authorities there cited: Freeman on Judgments, 3d ed., § 271, 272; 20 Ann. 170; 27 Ann. 366, Lebaube vs. Slack; 31 Ann. 140-1—construing judgment reported. 28 Ann. 296-7.

In order for judgment to bind the community, the community must have been a party to the suit. The wife cannot stand in judgment for the community. Whatever the terms of a judgment might be, it could not affect the community unless given against the husband, the only person through whom this ideal third person could be reached, and the only person in whose name judgment could be rendered against it. R. C. C. 2404; 24 Ann. 295; 28 Ann. 624.

The object of the prayer for general relief is to cover vague allegations or omissions in pleadings upon matters germane to the issues presented, but not to authorize a judgment upon issues not raised, and as to which no evidence was introduced against a party not sued.

Nor could it under any circumstances, even as between the parties, have effect to authorize the granting of relief not prayed for upon a cause of action not set forth, and upon which no evidence was introduced so contrary to the cause of action set forth and the relief asked that by special statute parties are prohibited from joining the two demands in the same suit, the one cause of action precluding the other, under C. P. Art. 149. It is, therefore, clear that plaintiffs could not obtain, under prayer for general relief, a judgment giving relief which they could not have been heard to ask for by special prayer, even in the alternative. Syer vs. Bundy, 9 Ann. 541; 10 Ann. 23; 2 R. 313; R. C. C. 2286; C. P. 149.

A party sued for rents and revenues of all and for proceeds of sale of part, and for partition of remainder of property alleged to be owned jointly and in indivision by plaintiffs with defendant may except that the party suing is not owner and is without interest or capacity to stand in judgment, for if these allegations be true, payment to plaintiffs would not discharge the debt if owing, and partition with plaintiffs would give no title to all of the part drawn in partition even if completed in due legal form.

Where a married woman is sued for proceeds of sale of part and for rents and revenues of the remainder of property bought by the community in her name, and from liability for the purchase price of which she has been released by judgment (34 Ann. 976) on the ground and for the reason that the purchase was not made by her but by the community and when it is admitted that the property in question was always administered by the husband as head and master of the community, and that the proceeds of the part sold, and the rents and revenues of all the property in question, had always been received by the husband and used for the benefit of the community, the wife is not liable. To hold otherwise would be in violation of every principle of marital law bearing upon this question.

The opinion of the Court was delivered by

WATKINS, J. John W. Scarborough as the administrator of the estate of Mary B. Mason, deceased, and as curator of the estate of Alice T. Mason, an interdict, alleges that said estates are the joint owners of one undivided half interest in a plantation adjoining the city of Monroe, on the south, and known as the Big Place, comprising 863 31-100 acres, worth in 1871 and now \$25,000, by inheritance from their mother, Mrs. Hannah Mason, nee Bey; the other half being, by inheritance, the property of Mrs. M. T. Layton, wife of Robert Layton.

Plaintiff represents that in pursuance of an order of court the father and natural tutor of the two heirs whose estates he represents caused their half interest to be sold for \$27,000—*all on time*—with mortgage and vendor's lien retained, to their co-owner, Mrs. M. T. Layton, who gave her notes.

On these notes sums had been paid, aggregating \$9,471, when suit was brought to enforce the collection of the balance due, in which a final judgment was rendered releasing Mrs. M. T. Layton from all liability thereon, but annulling the sale, and restoring the property, as will appear by reference to the suit of Forbes, executor, vs. Mrs. M. T. Layton, 34 Ann. 975.

Plaintiff claims that Mrs. Layton has had possession, and enjoyed the revenues of said plantation since 1871, worth \$2,000 per annum, and during the time the title stood in her name she sold off building lots for sums aggregating \$4,550, and the estates he represents are entitled to one-half thereof—\$2,275, or a total amount due to them for revenues and sales of \$17,275, and he demands a partition of the real estate by licitation and a settlement of rents, and the proceeds of sales.

Mrs. Layton, in her individual right, appears and excepts on the ground that plaintiff, as the representative of the parties named, is not owner of the property in controversy, and has no capacity to stand in judgment, and shows that by virtue of the sale of 1871, all the right, title and interest of the persons named in said property was sold to Robert Layton, her husband, who owns same and the use of her name as purchaser—but who was without the legal capacity to purchase—did not prevent the legal effect of said sale on the divestiture of their title, and its investiture in the *community then and now existing* between her and her husband, Robert Layton, and *she* prays that plaintiff's suit be dismissed.

She urges as an estoppel against the assertion of her liability for revenues and the proceeds of certain sales, certain judicial admissions

Heirs of Mason vs. Layton et al.

of plaintiff, in his same capacity, made in the suit of Forbes vs. Mason, to the effect that said property had at all times been under the administration of her husband, and which she now affirms in her answer to be a fact.

She pleads the general issue, claims the ownership of one undivided one-half interest in the property; denies that same was ever under her separate administration and control, and consequently any responsibility for the revenues; and pleads the prescription of one, three, five and ten years in bar of plaintiff's action.

In the petition Robert Layton was mentioned only as being the husband of defendant, and as such he was cited.

"When one intends to sue a married woman for a cause of action relative to her own separate interest, the suit must be brought against her and her husband." C. P. 118.

The husband was not otherwise named or cited as a defendant. The community is, therefore, not before this court, and the wife has no authority to represent it, or to stand in judgment for it. Hence, we need not notice the assignment of error filed in this Court. In this manner new issues cannot be engrafted on this suit, nor a judgment of this Court—which, in so far as he is concerned, was *res inter alios acta*—be assailed!

This view dispenses us from any consideration of the claim of title in the community, and of its incidents, embracing the demand for the sum of \$9,471 paid on the price of sale in 1871. 24 Ann. 295; 28 Ann. 624; R. C. C. 2404.

If the community is not a party for one purpose, it cannot be for another—if not in respect to the title, it cannot in respect to any part of the revenues of the property sought to be partitioned.

Plaintiff's right to recover same of Mrs. Layton depends upon the proper averment and proof of her having operated and used this property. This has not been done—could not be done. For if she was not purchaser, in her paraphernal right, it could not have been legally under her administration, and she could not be chargeable with its revenues, nor an account demanded of her for them. 36 Ann. 511, Succ. of Boyer.

In *Forbes vs. Layton* the Court said: "There was judgment, relieving the defendant from the debt, annulling the sale, and putting the parties in the condition they stood prior to the transaction." This judgment was affirmed. 34 Ann. 976.

For a like reason we are also dispensed from passing upon defend-

ant's pleas of prescription urged against the money demands of plaintiff.

Prescription does not run against the action for partition, nor the settlement of accounts. R. C. C. 825; 14 Ann. 740; 16 Ann. 170; 12 Ann. 354, Aiken vs. Ogilvie.

The *argument* of counsel that the decree of this Court in Forbes vs. Layton, was *ultra petitionem*, cannot be noticed. It was and is a valid and binding judgment, and between the parties, forms *res adjudicata*. R. C. C. 2286; 16 Ann. 365, Bouvillain vs. Bourg.

On this theory defendant has shown herself without interest to dispute plaintiff's title—the judgment in Forbes vs. Layton will protect her title under a partition made under a decision in this suit.

Defendant's exception that "plaintiff, as the representative of the parties named," is without capacity to stand in judgment was properly overruled by the district judge, and the same objection assigned as error in this Court is unavailing.

John W. Scarborough is the duly qualified administrator of the succession of Mary B. Mason, deceased, and curator for the estate of Miss Alice T. Mason, his appointment having been duly recommended by a family meeting and their proceedings duly homologated, as the evidence attests, and his capacity to stand in judgment is fully verified. The defendant did not except that the curator had not been "specially authorized by the judge, on the advice of the family meeting," to institute this suit, and that objection cannot be inferred.

It is, therefore, ordered and decreed that the judgment appealed from be affirmed, in so far as same relates to the partition of the property; and that same be annulled, avoided and reversed in all other respects—parties to pay costs of appeal ratably.

But we will reserve the right of all parties to have their respective claims determined in some proper proceeding.

CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT OF LOUISIANA,
AT OPELOUSAS,
IN
JULY. 1886.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ,* *Chief Justice.*

Hon. FÉLIX P. POCHÉ,

Hon. ROBERT B. TODD,

Hon. CHARLES E. FENNER,*

Hon. LYNN B. WATKINS,

} *Associate Justices.*

THE STATE OF LOUISIANA VS. ABRAHAM LEWIS, *alias* NISH OR SNOOT.

Criminal courts have no authority to examine members of the grand jury as witnesses concerning proceedings which may have taken place in their room or during their deliberations.

There is no law which prescribes the *quantum* of evidence on which grand juries must rest their conclusions in returning indictments.

Their findings amount at most to accusations, and in their conclusions they are beyond the control of the courts.

APPEAL from the Twenty-sixth District Court, Parish of St. John the Baptist. *Rost, J.*

G. Leche, District Attorney, *H. N. Gautier* and *John M. Ogden* for the State, Appellee.

Chas. A. Baquié, for Defendant and Appellant:

1. Where an indictment is laid before the grand jury without any names of witnesses being indorsed thereon, with the coroner's inquest and the testimony taken thereat, and the grand jury, without summoning, swearing or examining any witnesses in the case.

*Absent during the whole of this term.

38 680
48 250

38 680
114 418

38 680
115 788

38 680
121 682

State vs. Lewis.

- finds a true bill against the accused upon the testimony taken before the coroner, the indictment will be quashed as being found on illegal and insufficient proof. 14 Ann. 461; Archbold's P. and P., vol. I, pp. 98 *et seq.* and foot notes.
2. Such irregularities may be urged in a motion to quash, and competent evidence should be heard in support of the motion.
 3. In the absence of any count or averment to that effect in the indictment, the State should not be allowed to prove that the accused was a fugitive from justice when arrested, thereby illegally creating a presumption of guilt against him. 36 Ann., State vs. Victor.
 4. The general presumption of guilt resulting from flight does not arise when the crime has been committed in the presence of witnesses who testify at the trial. 37 Ann. 77. State vs. Melton.
 5. The accused has a constitutional right of being heard by his counsel and to present his defense to the court and jury, and any abridgment of that right is repugnant to the principle of charity and liberality which characterizes the criminal law towards accused persons.

The opinion of the Court was delivered by

POCHÉ, J. The defendant seeks relief from a conviction of murder without capital punishment, and he relies on two bills of exception :

1st. He charges error in the disposition made by the trial judge of his motion to quash the indictment. His ground was that the finding of the grand jury was not supported by sufficient evidence, but that it rested exclusively on the testimony taken at the coroner's inquest. The judge properly refused to hear evidence in support of the charge of alleged misconduct of the grand jury.

There was no defect of form or of substance apparent on the face of the indictment, and none was even alleged, and hence the motion to quash contained no elements which must form the basis of such a motion.

The finding of the grand jury is not a verdict or judgment; it amounts, at most, to an accusation; and we know of no law which fixes the nature or *quantum* of the evidence on which the grand jury must rest their conclusions.

The law which exacts of members of the grand jury a solemn oath not to disclose the proceedings which take place in the grand jury room can surely not be invoked to open the lips of these same members in order to give testimony concerning the very proceedings which they have promised under the sanctity of an oath to keep secret. If, therefore, the inquiry suggested by defendant's complaint could in the least be sanctioned by law, the investigation would be paralyzed by reason of the utter absence of all means to render it effective.

But in law as well as in reason there is no more authority to justify an inquiry into the nature of the evidence which the grand jury has considered in finding a true bill than there would be to require the

State vs. Hendricks.

District Attorney to disclose or detail the sources of knowledge on which he bases his information in cases where that proceeding is sanctioned by law. *State vs. Jones*, 8 Rob. 617; *State vs. Bunger*, 14 Ann. 461.

2d. The second complaint charges error in allowing the officer who had arrested the accused to answer the question, "when and where was the accused arrested?"

The ground is that the intention of the State was to show that the accused had fled from justice, without any averment to that effect in the indictment.

Nothing in the question or in the record shows that such was the intention of the District Attorney.

And if the question had drawn from the witness an answer showing the fact, the objection would go to the effect, and not to the admissibility of the evidence.

We find no error to the prejudice of the accused.

Judgment affirmed.

No. 1265.

THE STATE OF LOUISIANA VS. VERNON HENDRICKS.

An indictment is not amenable to duplicity, because it charges one or more acts contemporaneously, germane in character, and altogether making one offense, although each of said acts constitutes in itself a minor offense of the same genus with the graver one charged.

A verdict of guilty of shooting with intent to kill is not responsive to the charge of shooting with intent to murder, nor does it meet any offence denounced by any statute of the State.

Where the indictment is good but the verdict returned is unwarranted and illegal, and is, therefore, annulled and set aside, the accused is thereby not entitled to his discharge, but can be tried again under the same indictment.

A PPEAL from the Twelfth District Court, Parish of Avoyelles, *Blackman, J.*

M. J. Cunningham, Attorney General; *John C. Wickliffe* and *John N. Ogden*, District Attorneys.

Cullom & Coco for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant was charged by indictment as follows:

"That Vernon Hendricks * * * did wilfully, feloniously and maliciously make an assault with a dangerous weapon in and upon one Thomas Williams, * * * and did then and there shoot,

38	682
45	1433
38	682
48	295
49	1011
49	1570
38	682
152	541

State vs. Hendricks.

wound and ill-treat him, the said Williams, with intent him, the said Williams, then and there, to kill and murder," etc.

Under this indictment a trial was had, and the jury returned the following verdict: "We, the jury, find him guilty with an assault with a dangerous weapon, and with shooting with intent to kill."

Thereupon a motion in arrest of judgment was filed, substantially to the effect that the indictment charges, in one count, three separate and distinct offenses, viz: those provided by sections 792, 793 and 794 of the Revised Statutes, and was, therefore, amenable to the charge of duplicity; and, further, that the verdict was not in conformity to, or did not find, any offense known to the laws of Louisiana.

It is true, as charged, that the acts recited in the indictment do constitute one or more offenses recognized by the laws of the State. These acts are, however, of a kindred character, were contemporaneous, were parts of the same affair, and, in point of fact, led up to and culminated in the grave offense charged, which evidently at once constitutes the subject of the prosecution, and that is, substantially, shooting with intent to murder. Sec. 791, R. S.

It is certain that, as a general rule, the inclusion in one count of two separate and distinct offenses is duplicity, and fatal to an indictment, but where the acts charged, even though of themselves each a minor offense, are germane to each other and to the main charge, and taken altogether constitute but one affair and make one offense, it is uniformly held, in letter and spirit, to be out of this general rule, and not, in fact, amenable to the charge of duplicity. 2 vol. Bishop Crim. Pro. 191, 192; 33 Ann. 182, *Habe vs. Collins*.

There is nothing, therefore, wrong about the indictment; at least, nothing that condemns it as invalid, although inartistically and carelessly drawn; but when we come to consider the verdict, we meet with more difficulty. As stated, it finds the accused guilty, not of shooting with intent to murder, as charged in the indictment, but guilty of shooting with intent to kill, which it is clear is not responsive to the charge, nor does it meet or respond to any other or lesser offense of the same general or, indeed, of any kind prescribed or denounced by any statute or law of the State.

We shall, therefore, be compelled to sustain the second point embraced in the assignment of the counsel, and set aside the verdict, for the cause mentioned.

This will not have the effect of discharging the defendant, but under authority of the *State vs. Olivier*, recently decided at Monroe,

State vs. Wire.

and not yet reported, supported by the precedents therein cited, the conclusion reached necessitates another trial under the same indictment. *State vs. Foster*, 36 Ann. 857; *State vs. Burden*, 38 Ann.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, so far as it quashes the indictment, be annulled, avoided and reversed, and the case be remanded, to be proceeded with according to law and the views herein expressed.

No. 1259.

THE STATE OF LOUISIANA VS. MOSES WIRE.

1. A motion for new trial that is unaccompanied by any bill of exceptions, or evidence touching the errors complained of, will not be examined.
2. Unless the record discloses a bill of exceptions, motion in arrest of judgment, proper assignment of error, or error apparent on its face, the judgment will be affirmed.

A PPEAL from the Twenty-sixth District Court, Parish of St. John the Baptist. *Rost, J.*

G. Leche, District Attorney, and *Chas. A. Baquiré*, for the State.

Appellee :

It has been repeatedly decided that the jury are the sole judges of the facts adduced in the course of a criminal trial, and that they have the right to disregard certain facts as being untrue, and receive other as being true. 18 Ann. 35; 35 Ann. 373; 20 Ann. 402; 6 R. 540.

It has also been repeatedly decided by this Court that it has nothing to do with the facts in such proceedings, and will not weigh them. 28 Ann. 236; 23 Ann. 129; 30 Ann. 132; Const. 1879, art. 81.

And also that this Court will not interfere with the discretion of the lower court in refusing a new trial, unless there is error patent of record. 28 Ann. 402; 36 Ann. 341; 32 Ann. 842; 33 Ann. 679.

Therefore we submit that the judgment of the lower court should be affirmed.

James D. Augustin for Defendant and Appellant :

In the interest of justice the Supreme Court will sometimes grant a new trial in a criminal case, when no precedent for it exists. *State vs. Gunter*, 30 Ann. 536.

The charge of the lower court and the facts urged as grounds for a new trial, can be brought before this Court in no other way than by bills of exception. *Ibid* 536, 539.

The counsel appointed by the court to defend the accused is entitled to a reasonable time, to be regulated by the judge, for preparation. 16 Ann. 425, *State vs. Ferris*; *State vs. Shonhansen*, 26 Ann. 422.

The affidavit of the accused for a continuance cannot be contradicted; it must be taken as true. 30 Ann. 296, *State vs. Simien*.

Favoring the liberty of the citizen, the Supreme Court will entertain the appeal, although there was no motion to quash, no bill of exception, no motion in arrest of judgment, nor formal assignment of errors. 23 Ann. 433, *State vs. Forrest*.

We make part of our syllabus the humane views and liberal interpretation of the law in favor of the life and liberty of the citizen so pointedly expressed by the court in 30 Ann. p. 540, *State vs. Gunter*. His Honor, Justice Manning, was then Chief Justice, and that

38	684
45	441
48	840
45	1048
45	1144
38	684
52	1255
38	684
104	167
104	445
38	684
106	289

State vs. Wire.

eminent jurist, Hon. R. H. Marr and Hons. Alcibiade DeBlanc and W. B. Spencer, Associate Justices; Hon. H. N. Ogden, was Attorney General, and Robert & Hunter, for defendant. That experienced criminal lawyer, as organ of the court, Justice Egan—the Court say: “While, however, we have applied the principles of well settled law to the various matters revised and discussed by us in detail, on the whole case, we are not left without an impression of the possibility that there may have been irregularities calculated to influence the result of the trial unfavorably to the accused, and that his counsel may have mistaken the manner of presenting them for the consideration of this Court as therefore less injury would be done to the State by our granting another trial than, possibly to the accused by refusing it, and as this Court has held new trials may sometimes be granted though no precedent exist for them, it is ordered that the verdict and sentence appealed from be, and they are, hereby avoided and set aside, and the case remanded to be proceeded with according to law.”

The opinion of the court was delivered by

WATKINS, J. The accused was indicted, tried and convicted of rape, and from a sentence to lifetime imprisonment in the penitentiary, in pursuance of the verdict of the jury, has prosecuted this appeal, which is predicated upon an alleged error of the trial judge in refusing to grant him a new trial, as prayed for.

The application for the new trial was not supported by any evidence, and no bill of exceptions was reserved for the accused, to the ruling complained of, and, even in the brief of defendant's counsel there is no suggestion of any error apparent upon the face of the record, which would fatally affect the proceedings.

However much we may be disposed to favor the liberty of the citizen by entertaining appeals when the proper defense of the accused has suffered through neglect, or mismanagement of counsel, we will restrict that disposition to extreme cases, unless the record discloses error apparent, a bill of exceptions, motion in arrest of judgment, or proper assignment of error. 38 Ann. State vs. Balize; 40 S. 190; 7 N. S. 234; 40 S. 658; 5 N. S. 341.

Neither of those conditions exist in this case. .

This court has repeatedly and recently held that it cannot take notice of any facts adduced during the trial of a criminal case, pertaining to rulings of the judge, unless same accompanies a bill of exceptions, reserved at the time such ruling was made. 35 Ann. 742, State vs. Williams; 32 Ann. 842, State vs. Nelson; 35 Ann. 823, State vs. Belden; 35 Ann. 769, State vs. Jackson.

The counsel for the defendant has filed in this court what he styles an assignment of errors, and which is to the effect, that “all the facts stated in his brief as to the refusal of the judge *a quo* to allow a bill of exceptions to be drawn up * * * and as to the statement of the prosecuting witness,” etc.; and further to the effect that the judge

State vs. Johnson.

stated from the bench "that counsel might do so, but that he would not sign" such a bill of exceptions—but such errors cannot be presented in this manner. 35 Ann. 770, *State vs. Riculf and McClung*; 90 S. 275, *Wallace vs. Thompson*. They are certainly not apparent upon the face of the record, and on this form of procedure we cannot grant the requested ruling.

The judgment is therefore affirmed.

No. 1261.

THE STATE OF LOUISIANA VS CHARLES JOHNSON.

The State is not entitled to prove, in support of a charge of burglary of a house, and the larceny of a pocket-knife therein by the accused, another burglary at a different time and place and the larceny of a gold watch, to interpret the intent of the accused, in the commission of the former.

A PPEAL from the Twentieth District Court, Parish of Lafourche.
Beattie, J.

E. A. O'Sullivan and John N. Ogden, District Attorneys for the State, Appellee.

John S. Billiu, for Defendant and Appellant:

The opinion of the court was delivered by

WATKINS, J. The accused was indicted, tried and convicted of burglary and larceny, committed in the nighttime of the 23d of January, 1886, and from a sentence by the court, to fourteen years imprisonment in the penitentiary, in pursuance of the verdict of the jury, has appealed.

The indictment charges, in substance, that the accused and Nathan Taylor, "on the 23d of January, 1886, in the nighttime the dwelling house of Joseph O. Toups * * feloniously and burglariously did break and enter, with intent the goods and chattels of the said Joseph O. Toups, in the said dwelling-house, feloniously and burglariously to steal, take and carry away; and the said Charles Johnson and Nathan Taylor, one pocket-knife, of the value of ten dollars, the property of said Joseph O. Toups, in the said dwelling-house, there being found, there feloniously and burglariously did steal, take and carry away."

The record contains a bill of exceptions retained for the accused to the evidence of Charles Smith, witness for the State, to the effect that the accused Charles Johnson had told him that he had committed an-

38	686
46	850
38	686
116	87
38	686
1120	432

other burglary at another time and place, and that in the later burglary he had taken a *gold watch*, and that said watch was then offered in evidence by the State; and thereupon counsel for the accused objected to the testimony, and the admission on the ground that same was irrelevant to the issue, and not pertinent to crime charged.

The judge *a quo* appends to the bill the following statement of facts, viz: "A witness was on the stand who was detailing a confession the accused. The confession related to *other* burglaries and thefts committed *about* the same time. The witness stated that accused stated he had stolen a *gold watch*; whereupon the District Attorney showed the gold watch, and asked if that was the one which witness said was like one described.

"The evidence was admitted to show *intent* of the accused in breaking and entering, and the court thought it be (the means) by which to test the truth or falsity of the witness's statements as to the alleged burglary. The jury was charged that accused could only be found guilty of the offense charged in the indictment, viz: the burglary of the house of Toups, and if the verdict was of larceny, then only of the larceny of the knife. But the court charged that the jury might judge of the intent of the accused, if they found the breaking and entering from *all the circumstances of the case*, as proven."

The judge erroneously overruled the objections of the counsel for the accused, to the reception of this testimony on part of the State.

It is difficult to conceive in what way the commission of a burglary, at a *different time* and place from that charged in the indictment, by the accused, could interpret the latter; or in what way the *subsequent* larceny, by the accused, of a *gold watch*, from a person not named, could interpret the previous larceny of a pocket-knife, the property of Joseph O. Toups. It was not proper to allow such evidence to be heard by jury, and the instructions of the trial judge were improper.

Such evidence could not affect the credibility of the accused because he was not a witness, and the truth or falsity of his statement was in no way involved.

The accused had not, upon his own motion, put his character in proof, and the State could not do so otherwise. The witness in question was suffered to testify as to matters that were wholly irrelevant to the main issue on trial—the guilt or innocence of the accused—and totally disconnected with the charge contained in the indictment.

33 Ann. 737, State vs. Gregory.

State vs. Johnson.

It is therefore ordered, adjudged and decreed that the verdict of the jury and sentence by the court be annulled, avoided and reversed, and that the cause be remanded and reinstated for further proceedings according to law.

38 688
46 860

No. 1262.

THE STATE OF LOUISIANA VS. CHARLES JOHNSON.

Same principle as in preceding case.

A PPEAL from the Twentieth District Court, Parish of Lafourche.
Beattie, J.

E. A. O'Sullivan and John N. Ogden District Attorneys, for the State, Appellee.

J. S. Billie for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The accused was indicted, tried and convicted of burglary and larceny, committed in the night time of the 24th of January, 1886, and from a sentence by the court to fourteen years' imprisonment in the penitentiary, in pursuance of the verdict of the jury, has appealed.

The indictment charges, in substance, that Charles Johnson and Nathan Taylor did, on the 24th of January, 1886, feloniously break and enter, in the night-time, the dwelling-house of Cyprien Guidrey, and therefrom did take, steal and carry away one gold watch, of the value of twenty-four dollars, the property of one Henry Guidrey, therein being found at the time.

Under circumstances quite similar to those recited in the case No. 1261—same parties—the trial judge permitted the State to prove, by Joseph Toups, a state of facts indicating that the accused had, at a different time and place, stolen from him a cooked turkey, under similar instructions to those he had given in the case last cited.

For the reasons assigned in that case—*State of Louisiana vs. Charles Johnson*, No. 1261—it is ordered, adjudged and decreed that the verdict of the jury and sentence of the court be annulled, avoided and reversed; and that the cause be remanded and reinstated for further proceedings according to law.

State vs. Heywood.

No. 1264.

THE STATE OF LOUISIANA VS. ANDERSON HEYWOOD.

38	689
49	1531
38	689
51	1233

Article 29 of the Constitution, which provides that every law of the General Assembly must embrace but one object, and must express the same in the title, is mandatory, and any enactment which violates it is null.

Act No. 64 of 1884, entitled, "An act to provide for the punishment of the offense and crime of malicious threatening or threats, the malicious sending of threatening letters or communications of malicious publications, or resorting to malicious acts, or threats of injury to person, reputation or property, though no valuable thing be demanded, or sought to be extorted," embraces at least four separate objects, and is, therefore, unconstitutional, null and void.

A PPEAL from the Twelfth District Court, Parish of Avoyelles.
Barbin, J.

M. J. Cunningham, Attorney General; *John U. Wickliffe* and *John N. Ogden*, District Attorneys, for the State, Appellee.

Cullom & Son and *A. V. Coco* for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. The State has appealed from a judgment quashing an indictment against the defendant, brought under act No. 64 of 1884 entitled, "An act to provide for the punishment of the offense and crime of malicious threatening or threats, the malicious sending of threatening letters or communications, or malicious publications, or resorting to malicious acts or threats of injury to person, reputation or property, though no valuable thing be demanded or sought to be extorted."

The ground of the motion to quash is that the act in question is unconstitutional, being violative of article 29 of the Constitution of the State of Louisiana.

That article reads as follows :

"Every law enacted by the General Assembly shall embrace but one object, and that shall be expressed in its title."

A similar provision had been incorporated in previous Constitutions of this State, and was at different times subjected to judicial test; and it has been uniformly held that the provision was mandatory in its scope and character, and that a violation of its requirements would entail nullity on any act of the Legislature. *Walker vs. Caldwell*, 4 Ann. 297; *State vs. Hackett*, 5 Ann. 93; *State vs. Harrison*, 11 Ann. 722; *State vs. Adeline*, Ib. 736; *Duvergé vs. Salter*, 5 Ann. 94.

The following is the text of the act under consideration :

State vs. Heywood.

"SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That if any person shall, knowingly and maliciously, send or deliver, or cause to be sent or delivered, or cause to be received by another, any letter, postal card, written or printed matter, threatening to accuse him or her, or to cause or procure him or her to be accused of any fault, crime, offense or misdemeanor, or to charge, or cause or procure him or her to be charged, with any fault, misfortune, infirmity or failing, or to publish or make known any of his or her faults, misfortunes, infirmities or failings, or to injure or impair his or her good name, or reputation, or credit, or in any manner to cause him or her to be, or become subjected to, or liable to any public scandal, or public ridicule, or to subject him or her to any scandalous notoriety, or to any bodily harm, or if any person shall maliciously follow, or pursue, or intrude himself or herself upon another, at his or her home, place of abode, or residence, or at or in his or her place of business, office, or at any place of business or office where he or she may be engaged or employed, or on any public street or highway, or in any public place or place of public assembly whatsoever, against his or her will and consent, or shall in any manner, or by any means, maliciously threaten to wound, maim, kill, murder or inflict bodily harm on another, or shall maliciously threaten to burn, or destroy, or damage his or her building or other property, with malicious intent, though no money, goods or valuable thing be demanded, shall, on conviction, be imprisoned, with or without hard labor, not less than six months nor more than three years, and fined not less than fifty dollars nor more than five hundred dollars.

"SECTION 2. *Be it further enacted, etc.*, That this act shall take effect and be in force from the date of its promulgation."

As a sample of obscure composition, it can successfully challenge comparison with any legislative enactment that has been submitted to judicial investigation before this Court; and it has taken us many readings and deep study of its language before we could detect any definite object, as expressed in the title or contained in the body of the act.

But after a trying and patient examination, we have found, or at least we think we have discovered, in the body of the act, that provision is therein made for four separate objects, and that the objects contemplated are not all expressed in the title.

1st. The first object suggested by the inartistic language of the act is to provide for the punishment of threats of accusations or of injurious publications communicated by means of letters or other writings.

2d. The second is a provision for the punishment of the offense of maliciously following, or pursuing, or intruding on, another person, either in public or in private, against his or her will or consent.

3d. The third contemplates a penalty for making, in any manner, malicious threats to do almost any imaginable bodily harm on another.

4th. The fourth intention is to punish the offense of threatening to maliciously burn, or otherwise destroy or damage the building or other property of another. The proposition to punish an offender for sending threatening letters, contemplates an offense as distant from that of maliciously following another person as murder is from arson or burglary; it is also distinct from a threat to do bodily harm to another person, and it is not at all similar or kindred in its essence to that of threatening to burn or destroy the building or other property of another person. And, on inspection, it appears that the three other offenses denounced in the statute are essentially different and distinct from each other, and that each forms a separate subject or object of legislative enactment.

The reasons for such a constitutional provision as that now under discussion, have been considered by this Court in the opinions hereinabove cited, and need not here be repeated.

But the present statute, in the attempt of its framer to provide in one act for the punishment for threats of committing nearly all of the offenses denounced in our Revised Statutes, under the headings of offenses against persons and against property, would be strongly suggestive of the necessity of such a provision, if the same had not been inserted in the Constitution. We conclude that the statute is glaringly unconstitutional, and that it is nought but a dead-letter in the statutes of the State.

Judgment affirmed.

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MRS. DORA LAMBETH, WIFE, ETC., VS. G. W. SENTELL ET ALS., AND
THE SHERIFF.

The Supreme Court will take judicial cognizance of its own judgments in the trial of causes involving executions predicated thereon.

In executions under writs of *fi. fa.*, excessive seizure is not a legal ground of injunction of the execution; the remedy is to apply for reduction of seizure under art. 642, Code of Practice.

The seized debtor has not the right to point out property to be seized when the creditor who prosecutes the execution of the judgment has a privilege or mortgage on the debtor's property.

Lambeth vs. Sentell et als.

The seizure of immovable property is not invalidated by the failure to serve notice of seizure on the tenants. Pipkin vs. Sheriff, 36 Ann. 782, affirmed.

Parties who abuse the writ of injunction to stay execution of moneyed judgments against them should be mulcted in damages.

A PPEAL from the Twelfth District Court, Parish of Avoyelles.
Blackman, J.

E. T. Merrick and A. V. Coco, for Plaintiff and Appellant.

Thorpe & Peterman for Defendants and Appellees:

1. Excessive seizure is no ground of injunction against *feri facias*. Bagley vs. Tate, 10 R. 45; Powell vs. Hayes, 31 Ann. 789; Burgess vs. Gordy, 32 Ann. 1297; Gusman vs. DePoret, 33 Ann. 333.
2. Seizure of rented immovable property under *feri facias* need not be accompanied by notice to tenants. Carroll vs. Chaffe, 35 Ann. 83; Pipkin vs. The Sheriff, 36 Ann. 782.
3. When the creditor has special mortgage upon a part of his debtor's property, he may seize the mortgaged portion under the usual form of *feri facias*, without, specifically, describing the same in the body of the writ. Dunlap vs. Sims, 2 Ann. 239.
4. Where the creditor, having special mortgage upon a part of the debtor's property proceeds by *feri facias* against that part, the debtor has not the right to point out other property to be seized by the sheriff. C. P. arts 646 648.

The opinion of the court was delivered by

POCHÉ, J. This appeal is prosecuted by plaintiff from a judgment dissolving an injunction taken to arrest the execution of a judgment held by the defendant Sentell, with two per cent per annum interest on the amount of the judgment enjoined and damages in the sum of one hundred and fifty dollars *in solido* against herself and her sureties on the injunction bond. The grounds of her injunction were in substance as follows:

1st. That the amount of property seized was excessive, and that in an execution not resting on a special mortgage, she was denied the legal right to point out to the sheriff the property which she desired to be seized and sold first.

2d. That the sheriff could not seize any immovable property until he had commenced by seizing movable property.

3d. That there was no actual or legal seizure of the property for the reason of the sheriff's failure to have notified the tenants on the immovable property.

4. That the seizing creditor had caused to be reinscribed a mortgage intended to secure a sum of \$4400, which has long since been paid, the intention of the seizing creditor being thereby to swell the amount of his claim with a view to destroy competition at the sale, and to thus obtain the seized property at a sacrifice.

The motion to dissolve the injunction was predicated on the ground that plaintiff's petition disclosed no cause of action.

I.

The error of law and of fact which plaintiff has fallen into as to the true character of the claim sought to be transferred against her has doubtless prompted the first ground of her injunction, and it has pervaded throughout the whole case, from the pleadings to the argument of her counsel on appeal.

Having alleged in her petition that the judgment in execution did not import or involve a special mortgage, she resisted, on trial, the introduction of any evidence, including the mandate of this court affirming the judgment enjoined, and the original petition. To an adverse ruling of the court a bill of exception was reserved and is pressed on our attention.

That evidence was utterly unnecessary, and for two reasons:

1st. This court has the undoubted right to take judicial cognizance of its own judgments and decrees, especially in an injunction intended to affect any of its mandates. *Minor vs. Stone*, 1 Ann. 283; *Carroll vs. Chaffe*, 35 Ann. 83.

Now the writ of *fi. fa.* herein enjoined and annexed to plaintiff's petition informs us that it was issued in execution of a judgment of the District Court of Avoyelles, rendered in the case of *G. W. Sentell et als. vs. Dora Lambeth*, wife of *T. O. Stark*, the identical parties herein, and turning to our reports in the 37th Annual, page 679, we find that the judgment was brought on appeal to this Court last July, and that our decree affirmed it, with recognition of the special mortgage claimed by the creditors in their original petition.

2. But in the zeal of counsel they seem to have lost sight of their own pleadings, for their own petition contains the same information.

After describing the identical suit which we had disposed of on appeal, and reciting that the judgment therein rendered was for the sum of \$8,000 with interest of eight per cent per annum from March 3, 1875, plaintiff's petition contains the following averment:

"She shows that, in the act of mortgage executed May 5, 1875, your petitioner granted a mortgage on her property in addition to the *eight thousand dollars* (the italics are ours) for the sum of \$4,400 as security for that sum for her sister," * * * and by the brief of one of her counsel, we are informed that that mortgage covered *all of her property*.

It is thus demonstrated that the claim in execution was secured by special mortgage; and that therefore the rights of the seized debtor are to be controlled by art. 648 and not by art. 646 of the Code of Practice, as contended for by her counsel.

Lambeth vs. Sentell et als.

Art. 648 reads: "The debtor shall not have the right of pointing out to the sheriff the property which he wishes him to seize when the debtor who prosecutes the execution of the judgment has a privilege or mortgage on part of his property," * * *

The fact that this article is found under the heading of the execution of judgments, and that the provision applies in terms to the "execution of a judgment" is a sufficient answer to the fallacious argument of plaintiff's counsel that the right of the debtor to point out property for seizure, is unexceptionally secured in all executions *via ordinaria*.

We therefore conclude and hold that, in this case, the seized debtor could not claim the right of pointing out property.

We note in this connection a point made by one of plaintiff's counsel in his brief, but not included in the pleadings, which is made to rest on art. 650, Code of Practice, which provides:

"Nevertheless, the debtor whose land shall have been seized, shall always be entitled to demand that a portion only, which he shall designate, shall be sold, if that portion is sufficient to satisfy the judgment, but if it be insufficient, a sale of the other portions shall be made." The name of the counsel who makes this point is not appended to the petition, with which he is apparently not familiar. Hence, he has fallen into the error of supposing that that ground had been adopted by his associate. In this, however, he is mistaken. But be that as it may, there is no force in the contention, and it is, to say the least, entirely premature, for the record does not show that the seized debtor has as yet made any demand touching the mode of effecting the sale. From the text of the article it appears that the remedy which it contemplates, has no reference to the seizure, which is the only bone of contention contained in the record.

As to the alleged excessive seizure the record shows that, as soon as complaint thereof was made, the sheriff was ordered to release all but the property specially mortgaged, and that the same has been so released. But the real answer to that complaint is to be found in arts. 652 and 653 of the Code of Practice, which point out the only and the exclusive remedy of the seized debtor in such an emergency. It is no longer an open question in our jurisprudence that such a complaint is not a legal ground for an injunction of the execution. Commenting on these two articles of the Code this Court has said: "It is evident that in contemplation of law, the amount of the seizure never exceeds the amount of the writ." *Buisson vs. Staats*, 9 Ann. 236; see *Bagley vs. Tate*, 10 Rob. 45; *Powell vs. Hayes*, 31 Ann. 789; *Burgess vs. Gordy*, 32 Ann. 1297; *Gusman vs. DePoret*, 33 Ann. 333.

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II.

The complaint that the sheriff could not seize immovable before movable property, could be entertained only in a case where the party prosecuting the execution of the judgment has no privilege or mortgage, and it is already shown that the very reverse is the feature of the case in hand.

III.

If, as alleged by plaintiff in her third ground of injunction, the sheriff has not made an actual or legal seizure of her property, we are at a loss to appreciate her complaint in this particular. To prevent a seizure seems to be the "consummation most devoutly to be desired" by herself and her numerous able and zealous counsel. *Gusman vs. DePoret*, 33 Ann. 338. She is apparently in a predicament similar to that of plaintiff in the case of *Calderwood vs. Prevost*, 9 Rob. 182, to whom this Court addressed the following consolation: "In relation to the advertisement of the plaintiff's watch and chain for sale, without being seized or taken into possession by the sheriff, such a proceeding is undoubtedly irregular and illegal; but we are at a loss to perceive what injury the plaintiff has thereby sustained. He has the free use and enjoyment of these jewels, and it will be time enough for him to complain when he is disturbed in his possession of them. If, however, in the meantime, he is anxious to cure this irregularity in the proceedings of the sheriff, he can do so by placing his watch and chain in the hands of that officer."

The record shows that notice of the seizure was given to plaintiff, and if her tenants who have not been notified of the same, continue to pay rents to her, what right has she to complain? But the notice was not required by law on the tenants. *Pipkin vs. Sheriff*, 36 Ann. 782.

IV.

Our great respect for plaintiff's counsel will not permit us to believe that they are serious in presenting their fourth ground of injunction. What injury can befall a seized debtor through such a harmless pastime as the reinscription of a defunct mortgage, in connection with the seizure of his property? The experience of counsel will doubtless suggest several easy modes, if their client so desires, of brushing away these cobwebs.

A thorough examination of this case has left on our minds the painful impression that plaintiff's recourse to this injunction was ill-advised, and is a reprehensible abuse of the solemn process of a court to impede the administration of justice.

Our sense of duty under that impression is to consider favorably the

 Black vs. Bordelon et al.

defendants' demand for an increase of damages. They have been retarded in a manner unwarranted by law, justice or fair dealing in their legal efforts to collect a lawful and just claim, and they must be compensated therefor.

The judgment appealed from is therefore amended for the purpose of increasing the damages of two per cent per annum interests, on the amount enjoined to ten per cent per annum on the same, and the judgment as thus amended is affirmed at plaintiff's costs in both courts.

 No. 1162.

SIMON BLACK VS. REMI BORDELON, TUTOR, ET AL.

Where a judgment creditor resorts to a revocatory action to annul a sale made by his debtor, on the ground of fraud, such debtor and vendor in the contract assailed is a necessary party to the suit.

A PPEAL from the Twelfth District Court, Parish of Avoyelles.
Blackman, J.

Cullom & Coco for Plaintiff and Appellant:

1. In a revocatory action it is not necessary to make the original debtor party to the suit, where the debt has been previously liquidated by judgment. He then becomes a party without interest. C. C. 1872 and 1876; 1 L. 503; 15 L. 470; 1 R. 256; 10 R. 399; 28 Ann. 928.
2. Not only contracts but all *acts* done by the debtor in fraud of his creditors may be avoided by the revocatory action. C. C. 1989; Cross on Pleadings, p. 252, and the many authorities he cites.
3. The heir's seisin is a legal fiction which becomes a reality only when he accepts unconditionally. In the case of minor heirs, the law accepts for them the succession with the benefit of an inventory. They nor their tutors for them can accept unconditionally. 4 L. 202.
4. They cannot sue for the price of any specific property of the community, where a previous liquidation thereof does not show gains to be divided. 1 R. 378; 2 Ann. 30.
5. The immediate rights of an heir remain in abeyance until he decides whether he accepts or rejects the succession. Beneficiary heir has but a residuary interest which can only be determined when the succession has been duly administered. C. C. 947, 1033, 1073; 17 Ann. 38.
6. Heirs who accept with the benefit of an inventory have no right to be put in possession of the property until the administration thereof is closed. 27 Ann. 351.
7. With major heirs the doctrine is different. 33 Ann. 584.
8. Minors being beneficiary heirs by operation of law, cannot sue for a partition before the closing of the administration. There can be no presumption that no debts exist. 19 Ann. 293. It is necessary that they first provoke a settlement of their mother's estate. 25 Ann. 215.
9. A sale of the succession property for the purpose of effecting a partition among the heirs is not an act of administration, although it be made by an order of court through the administrator, and the sureties of the administrator cannot be held liable therefor. 22 Ann. 308.

Black vs. Bordelon et al.

10. Any other but a judicial partition of minor's property is a contravention of a prohibitory law, is contrary to public policy and is a nullity *ab initio*.
11. The release of a debt without payment, to defraud a creditor, can be avoided by the revocatory action. C. C. 1969.

Joffrion & Bordelon and *Thorpe & Peterman* for Defendants and Appellees :

1. In a revocatory action based upon allegations of fraud, the burden of proof is upon the plaintiff.
2. In such an action the debtor is a necessary party and must be cited. 6 R. 21 ; 31 Ann. 259.
3. Judicial proceedings can be annulled for irregularities or error only by appeal. They can be attacked by independent action only for fraud, deception or ill practices upon the court in the proceedings themselves. C. P., Art. 564, 607.
4. Partition of community, though subject to payment of community debts, may be made between surviving spouse and heirs of deceased, whether or not the community have been previously settled. 23 Ann. 637 ; 31 Ann. 572 ; 32 Ann. 848, 968 ; 33 Ann. 584.

The opinion of the Court was delivered by

TODD, J. The plaintiff, a judgment creditor of Remi Bordelon, brings a revocatory action—the present suit—to cause to be annulled a certain order of court and the sale made under it, by which, it is charged that the said Bordelon fraudulently procured the title to all his property to be placed in the names of the defendants, his minor children.

These children were alone made parties to the suit through their tutor.

There was an exception filed to the effect that all the parties in interest were not made parties to the suit ; that the suit was being prosecuted against the defendants, and that Bordelon, the judgment debtor charged with the fraud of procuring the transfer of his property to his minor children to secure it from the pursuit of his creditors, was not joined in the suit. This exception was overruled by the court *a qua*. On the merits there was a verdict and judgment in favor of the defendants, and the plaintiff has appealed.

The counsel for defendants in his oral and written argument calls our attention to the ruling of the judge *a quo* on the exception, and insists that it was erroneous and asks that the same be corrected.

The appeal brings the entire proceedings in the case before us for review. It is the province of this Court to revise all errors relating to the action and rulings of the lower court to be found in the proceedings. *Levy vs. Roos*, 32 Ann. 1033.

Under this view we shall, therefore, first address ourselves to the consideration of the exception mentioned and the ruling of the court thereon.

Black vs. Bordelon et al.

That all parties in interest should be joined in a suit and made parties thereto where that interest was directly involved, would seem axiomatic. Especially would we be impressed with the truth of this proposition in a case where it was charged that a contract, to which there were two or more parties, was null because they were guilty of fraud in making it. It would seem highly unjust, if not impossible, to investigate and determine the fraud charged, and even annul the contract—the subject of it, when only one of the alleged wrong-doers was before the court, and the other not heard at all, and no opportunity given him to be heard. So far from this seeming requirement being observed in the case before us, we find that those who are not charged as participants in the fraud complained of, and in no light to be viewed other than the mere innocent beneficiaries of the same, are alone sued, whilst the one who is accused of planning and consummating the fraud, and who inaugurated and conducted the proceedings by which its purpose was accomplished, is left entirely out of the case, neither sued nor cited.

This, then, might seem on general principles a strange case, except that it is plausibly, and with some color of authority, claimed that the omission referred to and the course of proceeding adopted is specially authorized by provisions of the Civil Code and a corresponding construction by several decisions of this Court.

These provisions are those contained in Articles 1972 and 1975 of the Code.

The first (1972) reads as follows: "It (the revocatory action) cannot be exercised by individual creditors until their debts are liquidated by a judgment, unless the defendant in such action be made a party to the suit for liquidating the debt brought against the original debtor in the manner hereinafter directed."

Article 1975: "The plaintiff in the action given in this section may join the suit for annulling the contract to that which he brings against the original debtor for liquidating his debt by a judgment; and in such suit either of the defendants may controvert the demand of the plaintiff."

It is clear to our minds that the true intent and meaning of these articles is this:

That a creditor only can exercise the revocatory action, and his debt must be conclusively established, that is, by a judgment; but to favor such creditor and perhaps save needless delay, he is permitted to couple the action for the annulment of the obnoxious contract with an action to liquidate his debt by the required judgment, so that the

two causes may be proved *pari passu*, so that a judgment against the debtor and a judgment annulling the contract assailed may be pronounced at the same time.

The new disposition or character of this action, as given by the Code, necessarily implies that both parties to the contract must be joined in the suit for its nullity.

Article 1978, C. C., declares: "No contract shall be avoided by this action but such as are made in fraud of creditors, and such as, if carried into execution, would have the effect of defrauding them. If made in good faith it cannot be annulled, although it prove injurious to the creditors; and although made in bad faith, it cannot be rescinded unless it operate to their injury."

How can it be determined whether, for instance in a contract of sale, it was made in fraud of creditors or in good faith, and whether in good or bad faith, that it was not injurious to creditors, when the vendor was not before the court? Could such vendor with any color of justice be condemned in these important respects without a hearing? It seems that such a course would not only be violative of a fundamental right, but would necessarily work oftentimes the grossest injustice.

The theory of making only the purchaser of the sale attacked a party, can rest alone on the principle that the judgment against the vendor in such contract, for the debt, is his complete and absolute condemnation on every question of fraud and wrong involved in this kind of an action.

We have carefully reviewed all the decisions to which we have been referred by plaintiff's counsel as sustaining their contention, and, in fact, have examined our entire jurisprudence on the subject, and find none that give any strong support to their position on this point. They are unsatisfactory. The direct issue embraced in the exception under discussion, we are convinced, has either not been squarely presented or, if so, not been fairly met.

Our views on this point are supported by the decision of our immediate predecessors in the case of Miltenberger vs. Weems' heirs, 31 Ann. 259, and to some extent by the authorities therein cited. * * *

This case in the lower court should not have proceeded farther than the trial of the exception, which should have been sustained and the suit dismissed.

It is therefore ordered, adjudged and decreed that the judgment of

Succession of Foreman.

the lower court be annulled, avoided and reversed, and proceeding to render such judgment as should have been rendered, it is now ordered, adjudged and decreed that the exception filed in the court below relating to the non-joinder of the necessary parties to the suit and considered in the opinion, be and the same is hereby sustained, and the suit dismissed at the plaintiff's costs in both courts.

No. 1267.

SUCCESSION OF MELANY FOREMAN.

1. When separate funds or property of the husband have been used to benefit and enrich the community, it will constitute a debt of the community in favor of the husband to the amount of such fund or the value of such property. But the evidence must establish, with reasonable certainty, that the funds were thus used or the property thus employed.
2. The community of acquets and gains includes, at its dissolution, presumptively, everything found in the succession of the deceased spouse, and without reference to the amount brought into the marriage by the respective spouses.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette.
DeBaillion, J.

J. A. Chargois for the Administrator.

M. E. Girard for Opponents and Appellants.

The opinion of the Court was delivered by

WATKINS, J. Melany Foreman died intestate on the 6th of September, 1880, her husband, Edward Hoffpauir, surviving her, and having no forced heirs to her estate, which consisted principally of an undivided one-half interest in the community property.

On the 15th of December, 1881, Garland Foreman, one of the collateral heirs of the deceased, applied to be appointed administrator of her estate, but same was successfully opposed by her surviving husband, who was duly appointed and qualified on the 16th of March, 1882, having previously caused an inventory to be taken of the property of her estate, which was valued at \$1,588.05—including \$70 in cash.

On the 1st of June, 1882, the administrator caused the property to be sold, and the sale yielded the sum of \$2,067.10; and on the 11th of May, 1883, filed his final account on which he charged himself with the foregoing sums aggregating \$2,137.10, and credited himself with expenditures in discharge of *debts of the community* \$1,183.50 and \$401.57

38	700
44	921
38	700
48	710
38	700
50	53
38	700
52	881

 Succession of Foreman.

expenses of administration. He makes an allowance in favor of his deceased wife of \$204.25 on account of her separate estate, part of which was brought by her in marriage and the remainder was inherited from the estate of her mother. He also enters a claim in his own favor for \$3,303 as the value of a lot of cattle, horses, sheep, hogs and cash he owned at the date of his marriage with the deceased "and which were expended for the benefit of the community."

Casting up these accounts he shows his wife's succession to be indebted to him the sum of \$2,521.07.

The homologation of this account is opposed by the collateral relations of the deceased upon the ground that, at the death of Melany Foreman, there was on hand about \$6,000 in cash, and of this \$900 in gold; an amount due to the community and afterwards collected by Edward Hoffpauir, \$1,899; and property by him sold, \$1,559.50; all of which is unaccounted for. Also a lot of stock sold, and the proceeds thereof by him applied to his own use, \$1,400.

Opponents also allege that the estate does not owe and is not chargeable with any of the items carried on the tableau under the head of the passive mass; and they specially object to the item of \$3,303 charged in favor of *his separate* account.

In an amended opposition, they charge the administrator with two hundred panels of fencing, and one horse disposed of by him, and the same is unaccounted for in the account opposed.

The judge *a quo* rejected the account presented and restated same as follows, viz:

DR.

To amount cash and sale. \$2,137 10

CR.

By debts paid..... \$953 60

By expenses administrator 401 57

By due E. Hoffpauir by community..... 405 00—1,760 17

Balance due community.....\$ 386 93

And, as thus reformed, the administrator's account was homologated and opponents have alone appealed.

II.

The judge *a quo* disallowed the entire demand of Edward Hoffpauir for value of his separate property, for the reason that same was not shown by the evidence to have fallen into the community; but he allowed "all bills and accounts paid, as shown by receipts."

In the decree appealed from, no disposition is made of the counter

 Succession of Foreman.

demand of opponents; but they may be considered as inferentially disallowed.

An examination of the record satisfies us that the following items placed on the account and allowed by the judge *a quo* should be and are rejected and disallowed, viz:

Amount paid D. W. D. White.....	\$132 00
Amount paid Isaac Wise.....	7 85
Amount paid Dr. M. L. Lyons.....	30 00
Amount paid Mrs. Willis.....	43 75
Amount contingent expenses.....	40 00

Aggregating..... \$253 60

and that all others should be and same are approved and allowed.

III.

Edward Hoffpauir states as a witness, in respect to his own claims, that he was married to the deceased, Melany Foreman, about fifty years ago, and that at that date he was branding sixty-six calves—wild cattle—and had about twenty head of wild horses and mares and four gentle horses, also about thirty head of sheep and fifty head of hogs, and \$200 in cash; and that he subsequently received \$500 in cash.

Says he was a cow-boy, and was twenty-two years old when he married, and thereafter lived happily.

Nathan Hoffpauir corroborates his brother's statement. But neither of these witnesses disclosed, if they knew, what disposition was made of any part of this property. It is quite certain that they do not state that same was used by the community of acquets and gains thereafter, existing between himself and deceased, and hence it was not legally chargeable with the value thereof; and the claim thereto of Edward Hoffpauir was properly rejected by the judge *a quo*. 26 Ann. 605, Blair vs. Dominguez; 2 Ann. 44; 11 Ann. 297; 10 R. 181, Stewart vs. Packwood; 6 R. 508; 10 R. 18; 30 Ann. 275, Denegre vs. Denegre; 15 Ann. 597.

IV.

With regard to the demands and counter claims urged by opponents, we find the following items supported by sufficient evidence, and same are therefore allowed, viz:

Amount paid Ed. Hoffpauir by George Morgan since death of

Melany Foreman.....	\$ 200 00
Amount paid Ed. Hoffpauir by Elijah Green.....	500 00
Amount paid Ed. Hoffpauir by Isaac Foreman.....	99 00
Amount paid Ed. Hoffpauir by Garland Foreman.....	1,100 00

Aggregating..... \$1,899 00

 Succession of Foreman.

There is some evidence in the record to the effect that, at the death of Melany Foreman, there was a field or pasture that was enclosed with a picket fence, and that same was removed or disposed of afterwards, presumably with the consent or knowledge of her surviving husband; and also that certain stock, hack, wagon and horses were likewise disposed of, and for which he should be held responsible on his account; but it is entirely too disultory and unsatisfactory to support a judgment. The amount, nor value of same, is not fully proven, and it does not appear clearly that same were disposed subsequent to Melany Foreman's death; yet the testimony on this point is confirmatory of her husband's other indebtedness.

V.

From a careful scrutiny of the testimony of the numerous witnesses that were interrogated, we conclude that the account as restated by the judge *a quo* should be canceled, and same is hereby amended in the following particulars, viz:

DR.

To amount cash and sale	\$2,137 10
To amount debts collected	1,899 00
	<hr/>
	\$4,036 10

CR.

By amount of expenses and by debts paid.....	1,506 57
Balance due community between deceased and administrator, \$2,529 53	

To one-half of this sum the opponents are entitled, inasmuch as the surviving husband has married a second wife and has thereby lost the usufruct of same; but we will not adjudge the administrator to pay interest as the date of his second marriage is not fixed by the evidence.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended, and the administrator's account as restated be approved and homologated and made the judgment of the court, and the appellee pay all costs.

 ON APPLICATION FOR REHEARING.

An application for rehearing has been made by opponents and appellants, an examination of which has convinced us that the *debit* items of the account as recast in original opinion, need some correction; though the opponents are in error in placing "the amount of expenses and debts paid at \$1,331.47 in lieu of \$1,506.57, as announced in opinion."

The item of "amount due E. Hoffpauir by community, \$405, allowed in the account, as restated by the judge *a quo*, is in error, because all

. Police Jury vs. Wise.

the claims allowed him were rejected by us; and we neglected to deduct from the community assets the amount of the paraphernal claim of deceased, which was shown to be \$284.25, and this sum we failed to allow to the opponents.

Adjusting these balances and again restating the account, we have the following, viz:

Dr.

To amount cash and sale	\$2,137 10
To amount debts collected	1,899 00
	<hr/>
	\$4,036 10

Cr.

By amount of expenses and debts paid in course of adminis- tration	1,101 57
By amount to balance	\$2,934 53
Less paraphernal claim of the deceased	284 25
	<hr/>
Balance due community	\$2,650 28
One half due opponents	1,325 14
Also deceased's separate claim	284 25
	<hr/>
Total due opponents	\$1,609 39

And it is therefore ordered, adjudged and decreed, that the opinion and decree herein previously rendered be and the same is hereby amended and corrected so as to conform to the views herein expressed, and that as thus amended and corrected, our original opinion remains undisturbed.

Rehearing refused.

No. 1271.

HOWARD HOFFPAUR, PRESIDENT OF AND REPRESENTING THE POLICE
JURY OF VERMILION PARISH VS. SOLOMON WISE.

The Supreme Court will notice *ex proprio motu* radical defects of pleadings in consequence:
of which no final judgment could be rendered in the premises.

Police juries like all other corporations created under the laws of Louisiana are artificial beings or persons who can act only in the mode prescribed by the law creating them. The president cannot stand in judgment for the police jury, without special authorization. Affirming Police Jury of Ouachita vs. Mayor and Council of Monroe. 38 Ann.

A PPEAL from the Third Ward Justice's Court, Parish of Vermilion.
Labauve, J.

W. W. Edwards for Plaintiff and Appellant:

38 704
45 1819

38 704
109 436

38 704
113 737

38 704
118 827

38 704
123 162

Police Jury vs. Wise.

1. The title to Act No. 84 of the Acts of 1878, is sufficient to sustain all the provisions of the act, either under the Constitution of 1868 or 1879. *State vs. Bott*, 31 Ann. 663; 37 Ann. 191; *Cooley on Const. Lim.* pp. 144 (marg.) and 145; *Blumenthal vs. Hueter*, *Western Rep.* vol. 1, p. 634 (Sup. Ct. of Ill.); *Slack vs. Ray*, 26 Ann. 675; *Police Jury vs. Colomb*, 20 Ann. 198; *New Orleans vs. R. R. Co.*, 27 Ann. 415; *State vs. Henry*, 15 Ann. 397; Art. 86. Const. 1879; *State vs. Natal*, No. 9562, 38 Ann. —, (not yet reported.)
2. If a portion of said Act No. 84 is unconstitutional and void, enough remains which is valid, and must be held good. See *Cooley on Const. Lim.* pp. 178 (marg.) and 180; 14 Ann. 7; 33 Ann. 783; 35 Ann. 1141.
3. The Court will never hold a law to be unconstitutional, unless it is clearly so. 20 Ann. 587, 198.
4. The prohibitions of the ordinance of the police jury sued on can be enforced without the aid of the latter portion of Sec. 1, Act 84. See R. S. 1870, sec. 2743.
5. The Legislature can delegate to municipal corporations certain legislative power to regulate police, sanitary and tax matters, such as in the present instance are conferred on police juries by said Act No. 84. *Cooley on Const. Lim.* pp. (marg.) 118 and 211; *Dillon Munic. Corp.* sec. 308; *Minden vs. Silverstein*, 36 Ann. 912; 35 Ann. 1010.
6. Act 84 of 1878, and the ordinance thereunder, are not local, nor a "regulation of trade." *State vs. Dalon*, 35 Ann. 1141; *Cooley*, p. 588 (marg.).
7. The charter of Abbeville, as to section 6, was repealed by implication, clearly so far as the present suit is concerned, by the third section of said Act 84 of 1878. See sec. 3, Act 84, and also sec. 2, 20 Ann. 140.

P. P. O'Bryan and R. S. Perry for Defendant and Appellee:

Act 84 of 1878 is unconstitutional, because the object of the provision declaring violations of ordinances of the police juries shall be treated as misdemeanors, and prosecuted on information or indictment, is not mentioned in its title. 33 Ann. 981.

It is unconstitutional, because that clause being vital to it, and unconstitutional, the balance of the act falls with it, and because of that unconstitutionality. *Sedgwick on Construction*, p. 413, note (a).

Police jury ordinances passed pursuant to Act 84 are for that reason void.

Police juries can exercise no power not delegated to them. *Dillon's Municipal Corporations*. §§ 89, 141.

The power of regulating the sale of intoxicating liquors is restricted to the General Assembly by Constitution of 1879, Art. 170. An act of the Assembly delegating the power is not an act of regulation, but is an abandonment of the power to regulate to another.

The intention of Article 170 was that the Assembly might pass a general law, and to preclude all local laws.

There is no act of the Assembly which purports to delegate such power to the police juries, except Act 84 of 1878, and Revised Statutes 2743, which acts are unconstitutional. The section of R. S. refers to liquors solely.

Any such acts, if in existence, are unconstitutional, because in conflict with Article 46 of the State Constitution, which restricts the power to regulate trade, whether in exercise of the police or any other power, to the General Assembly, and excludes it from delegating the power.

Local laws of the General Assembly, or of the local authorities, are unequal and unjust in their operation, and are in conflict with the laws of the land and the Constitution of the State. 33 Ann. 985.

By special Act 103 of 1850, the police jury of Vermilion is excluded from exercising any jurisdiction within the corporate limits of the town of Abbeville, and its ordinances are ineffective there. The act has not been repealed.

All ordinances of police juries not authorized by a legal delegation of power, are illegal and null.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff, claiming to represent the police jury of Vermilion parish, brought this suit for the enforcement of an ordinance of the police jury prohibiting the sale of goods and merchandise on Sundays within the limits of that parish; and he prosecutes this appeal from a judgment declaring the ordinance sued upon to be null and void, and rejecting his demand.

The record discloses a fatal error in the pleadings which we are compelled to notice *ex proprio motu*.

In his petition plaintiff alleges that he herein sues "in the name of the police jury of Vermilion parish, for the use and benefit of the parish of Vermilion," but he nowhere alleges that he was specially authorized to stand in judgment for the police jury, and naturally he made no attempt to introduce any proof of such authority.

The ordinance sought to be enforced is in the record and contains the following significant clause:

"Resolved, further, That it shall be the duty of the district attorney to institute and prosecute suits for the recovery of all fines that may be incurred by parties violating the provisions of this ordinance, and to turn over to the parish treasurer the balance of all fines collected thereunder, after deducting fifteen dollars as a compensation for his services in each case."

It thus appears that, far from conferring on the president the authority to represent the parish in such suits, the police jury expressly, and in terms not to be mistaken, delegated that power to another and entirely distinct officer, who is entrusted with the additional power to receive all amounts which he may recover by suit, and to turn over the balance, after deduction of his compensation, to the treasurer.

It therefore follows that the receipt of no other officer would be satisfactory in law, and that no other officer could institute or prosecute such a suit in his own name for the use of the parish.

In the recent case of the Police Jury of the Parish of Ouachita vs. Mayor and City Council of Monroe, 38 Ann. —, (not yet reported,) we had occasion to consider a similar question, and we held in that case that, although the president had alleged a special authority from the corporation for the institution of the suit, his action could not be maintained in default of proof of the pretended authorization.

Under the guidance of the laws governing corporations and prescribing the mode in which they must act and operate, and under the authority of numerous adjudications of this and of other courts of last

Mestayer vs. Corrigé.

resort, we therein laid down the following rule, which is decisive of the point now under discussion:

"Police juries, like all other corporations created under the laws of Louisiana, are artificial beings or persons who can act only in the mode prescribed by the law creating them. No officer of a police jury can legally bind, or stand in judgment for, the corporation without special authorization."

We repeat here, as we said there, that no law of this State confers on the president of a police jury the power or authority to stand in judgment for the corporation, or to legally bind it in any contract or proceeding, in the absence of a special authorization. In this feature of their corporate powers, police juries do not differ from other municipal or private corporations. *Bright vs. Metairie Cemetery Association*, 33 Ann. 58.

We therefore conclude that the police jury of the parish of Vermilion is not a party to this suit, and that a judgment in favor of the defendant would not and could not legally bind that corporation; and that all proceedings herein are nullities, including the appeal bond which was executed by the plaintiff in his alleged representative capacity.

The legal result of these considerations is the dismissal of plaintiff's action as in case of non-suit, and the judgment appealed from must therefore be amended so as to conform to those views.

It is therefore ordered that the judgment of the court *a qua* be amended in so far as it absolutely rejects plaintiff's demand; that said demand be rejected and the action dismissed as in case of non-suit, at the costs of plaintiff in the lower court, and at defendant's costs on appeal.

No. 1276.

FELIX MESTAYER VS. SINSON CORRIGÉ.

1. An ordinance of a municipal corporation, authorizing the exaction of certain rates, fees, charges and tariffs from each and every person selling articles within its corporate limits, but *without* the market-house or market-place; or person keeping a butcher's stand *within* the corporate limits, but *without* the market-place, or market-house, for the purpose of raising *revenue*. is one exacting a "tax" or "license" for revenue, and same cannot be enforced as contributions sought to be raised by the exercise of the police power delegated to it.
2. The taxing power of a municipality is its only power for obtaining revenue, by exactions levied on its citizens, and that power is limited to the *ad valorem*, or property tax, and the license tax; and any statute or municipal ordinance authorizing a levy beyond the constitutional limitation is null and void.

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Mestayer vs. Corrigé.

A PPEAL from the Twenty-first District Court, Parish of Iberia.
Gates, J.

E. S. Perry for Plaintiff and Appellant:

A charge or fee on sale of marketable commodities imposed by a municipal corporation for purposes of revenue, are not legal. If imposed under the police power, for police purposes, they are legal.

The police power of the State, as to exclusively local matters and subject to the restrictions of constitutional limitations, may be delegated by the General Assembly to the local authorities.

The markets are peculiarly an object for police regulation.

Article 19 of the charter of New Iberia, adopted in 1886, pursuant to Act 110 of 1880, confers plenary power of supervision and control of markets on the board of trustees.

The right to collect a daily fee for each stall is maintainable. 34 Ann. 1051, *et seq.*

The town ordinance of 10th August, 1885, expressly imposes a charge of twenty-five cents on each stall in the corporation market-house.

Article 19 of the charter authorizes the board to permit outside stalls and stands, only on condition they shall pay same charges as are paid by stalls in the corporation market-house.

By establishing a stall outside the corporation market, Courrégé has accepted that condition and has agreed, tacitly, at any rate, to pay the charges legally imposed on stalls in that market. The case of Blaser, 36 Ann. 363, is not applicable.

The collection of fees legally imposed by the board may be imposed by forfeitures and fines, which may be collected by ordinary suit, as is provided by ordinance of 10th August, 1885. 34 Ann. 1051.

Article 19 of the charter conferred such authority on the board. 34 Ann. 1051; 30 Ann. 1003; 32 Ann. 1378; Dillon on Corporations, 3d edition, §§ 432, 433, *et seq.*

T. D. Foster and *E. Simon* for Defendant and Appellee:

1. Political corporations have no inherent power to levy a tax. They must derive this power by grant from the Legislature, and it must be expressly conferred. See Cooley on Taxation, pp. 208, 396, 408; Cooley on Const. Limitation, pp. 191, 201; 33 Ann. 633; Dillon on Corporations, vol. 2, secs. 605, 606; *Ibid*, vol. 1, p. 396.

2. The right to make all needful regulations under the police power, give no right to tax for revenue. Dillon on Corporations, vol. 2, pp. 709, 710, sec. 609; 34 Ann. 1050.

3. License laws are of two kinds. First, those for raising a revenue; second, those for police regulation. The first include the exercise of the power of taxation, and, in this State, those of every profession, trade or calling subject to pay a tax are graduated and governed by special laws, according to gross receipts. The second, viz: police power, cannot exceed the costs of issuing the license and the costs of regulating the business. Cooley on Const. Law, p. 586; 31 Ann. 829; Acts of General Assembly, 1881.

4. Political corporations cannot impose a greater license tax than is imposed for State purposes. Constitution 1879, art. 206; 34 Ann. 840.

Nor can they impose a greater tax on property than the maximum limit allowed by the Constitution of the State. See Article 209 of State Constitution; 34 Ann. 840; 36 Ann. 363.

5. The police power cannot be used for the purpose of raising revenue. See Dillon on Municipal Corporations, 3d ed., § 768; 34 Ann. 750, 1052.

6. To bring a charge, tariff or tax when levied within the scope of a police regulation, it must be shown that the amount thus levied is used exclusively for that purpose. 34 Ann. 1052; 36 Ann. 363.

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The failure to do this establishes the charge, etc., to be a license tax for revenue, and if in excess of the license tax of the State it is unconstitutional and cannot be collected. In this case it is far in excess. See Ordinance of Board of Trustees, p. —; State Constitution, arts. 203, 206, 209; 34 Ann. 840; 36 Ann. 363.

7. An exaction and charge of a specified and fixed amount in money for the daily privilege of pursuing a business useful and necessary to the community and in no shape dangerous or vicious, is to be taken as one made and levied for revenue and not a police regulation. 34 Ann. 750, 1050; 36 Ann. 363.
- The amount charged and levied in the ordinance being so extortionate and exorbitant, is itself evidence of the purpose to raise a revenue, to say nothing of the facts which disclose beyond question the purpose to be to raise a revenue, and divests it of all semblance of police power. 31 Ann. 828; Dillon on Mun. Corp. sec. 361, note § 386.
8. Such exorbitant and extortionate daily charges of specified amounts for every slaughtered animal is a license or tax, and is intended to raise a revenue, and in either instance is unconstitutional. 34 Ann. 1050; 36 Ann. 363.
 9. The police power of the town of New Iberia cannot be exercised beyond that granted by the Legislature in its charter. What the town pretends to do as a police regulation must have been clearly granted by the charter. 36 Ann. 363; 29 Ann. 21, 261; 32 Ann. 923, 1293; 34 Ann. 750, 1051; Cooley on Const. Limitation, 191, 387; Dillon on Mun. Corp., 3rd ed., 141; Cooley on Taxation, 408.
 10. When the power to exact money for police regulation is granted, it is more narrowly construed than that for revenue; and in all cases when it is granted it has always been restricted to a reasonable fee for issuing the "license." The power to make police regulations for the government of markets, etc., does not carry with it and include the power to exact money and license fees. See Cooley on Taxation, 408; Dillon on Mun. Corp. 3d ed., §§ 361, 357 (2d ed., § 291); § 768 (2d ed., 609); 538, note 1; 350, note 361; 34 Ann. 1050.
 11. Political corporations have no right to enforce obedience to its ordinances unless that power has been expressly granted by the General Assembly, and no right to collect its revenues, whether taxes or license taxes, legal or illegal, by fine or imprisonment, unless that right is granted in its charter by the General Assembly. 6 Ann. 515; 34 Ann. 751; 37 Ann. —.
 12. In determining the constitutionality of a town ordinance, the active effect of it must be considered, rather than the mere reading. The evidence establishes its active effect, and in the instant case shows beyond doubt that its object is to raise a revenue and is unconstitutional; because, if a tax on property it is in excess of the maximum limit; if a license tax, it is in excess of that levied by the State of Louisiana, and hence unconstitutional. See Constitution of the State of Louisiana 1879, arts. 209, 206; Acts of General Assembly 1881 (extra session), No. 4; 36 Ann. 363.
 13. The case of the State of Louisiana vs. Louis Blaser, reported in 36 Ann. 363, identical with this case both in the law and facts.
 14. A charge of a specified amount for the privilege of keeping a market is a license or tax. 34 Ann. 1050.

The opinion of the Court was delivered by

WATKINS, J. Defendant resists an ordinance of the town of New Iberia, exacting certain rates, fees, charges and tariffs daily from each person selling the articles mentioned or keeping butcher or market stands, *anywhere within the corporate limits* of that town, and whether within or without the market; and conferring the right to collect same

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as a franchise of the market-house upon the lessee of the same, who is given the right to bring suit before the mayor of the town or any justice of the peace having jurisdiction for the collection of said daily rates and charges, and for the enforcement of the penalty of five dollars against such person as shall forfeit to the corporation or to the lessee of the corporation market-house "for each and every refusal to pay said rates, fees, tariffs and charges herein established when due," etc.

These rates and charges are the following, viz:

1. From each and every butcher's stand situated within the Main Market, and also from each and every butcher's stand outside of said Main Market and within the corporate limits of said town..... \$0 25
 2. For each slaughtered beef..... 60
 3. For each slaughtered calf, provided the forequarters do not weigh over fifty pounds..... 40
 4. For each slaughtered calf, provided the forequarters do not weigh over fifty pounds..... 50
 5. For each slaughtered hog weighing over one hundred pounds..... 50
 6. For each slaughtered sheep..... 30
- * * * * *

I.

The plaintiff alleges himself to be the lessee of the corporation market-house in the town of New Iberia, pursuant to an ordinance passed by the board of trustees on the 10th of August, 1885, and that he has complied with all the terms and conditions thereof, and that he, as such lessee, is entitled to collect all said charges and penalties as are either permitted or imposed by the corporation as rights and franchises of said market-house.

He shows that his lease began on the 1st of September, 1885, and will conclude or terminate on the 31st of August, 1886. He shows that the defendant, Simon Corrigé, "has for *several years* past carried on the business of butcher within said corporate limits at a stand or market place outside of said corporation market-house, and that for the last twelve months he has kept his said stand on the southwest side of Main street, in the upper portion thereof, as he does" at this time, and is due him \$371.80 for which he prays judgment.

Defendant denies the right of plaintiff to recover on the ground that the ordinance under which he sues as lessee "is unconstitutional, illegal and unwarranted in law, because the exactions and charges it imposes is a tax or license for *revenue* * * and it is violative of the

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Constitution and existing laws of the State * * * * and said pretended ordinance * * is unconstitutional and illegal, on the further ground that neither the law of the State nor the charter of the town of New Iberia gives the power and legal right to enforce the collection of its revenues by fine for violation of its ordinances, whenever it is attempted to collect a license or tax for *revenue*, which is the object of this illegal ordinance."

The question propounded is whether the rates, charges and fees sought to be collected, and authorized by the statute and ordinance complained of were, in the nature of a tax or license, granted under the taxing power of the State; or constituted a contribution sought to be raised in the exercise of the police power of the State, delegated by statute to the city of New Iberia.

The taxing power of the city of New Iberia is its only power for obtaining revenue by exactions levied on its citizens, and that power is limited to the *ad volorem* or property tax and the license tax.

The Constitution declares that "no parish or *municipal tax* for all purposes whatsoever, shall exceed ten mills on the dollar of valuation, etc." Constitution, art. 209.

It is obvious that if the statute or ordinance in question attempted or was intended to authorize a municipal tax beyond the constitutional limitation, to be either assessed or collected in the manner indicated, same would be undoubtedly unconstitutional and void. 36 Ann. 363, State vs. Louis Blaser; 34 Ann. 750, State vs. Patamia; 6 Ann. 515, Municipality No. 1 vs. Pauce.

II.

Can plaintiff's right be recognized and enforced upon the theory that these rates and charges are contributions legally authorized by the State in the exercise of its *police power*?

The Constitution provides that "the exercise of the police power of the State, shall never be abridged, etc." Const. Art. 235.

It also provides that "the police juries of the several parishes, and the constituted authorities of all incorporated municipalities of the State, shall alone have the power of regulating the slaughtering of cattle and other live stock within their respective limits, etc." Const. Art. 248.

In 34 Ann. 1050, Delecambre vs. Clere, this Court had the question now before us under consideration and there held: "Whilst this section conferred authority incident to police powers to regulate private markets or the selling at private stands of meats, etc., and the right even to suppress the same and to impose fines and penalties to enforce its ordinances on the subject and punish their violation, it conferred no

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power to levy a tax, or license, or fee, tariff, or rate, as it is termed in this case, on butchers and other persons.

"There is a recognized distinction between the taxing power and the police power conferred on corporations. Licenses or taxes may be imposed on certain branches as a *regulation under the exercise of the latter power*, but it must plainly appear that they are imposed strictly and exclusively in aid of such power and not for the purpose of *revenue*. The rule is that mere police power, and the right to make needful regulations under it, gives no right to tax for revenue."

In *Dillon on Municipal Corporations*, it is announced that the authority to establish and control markets is one of the police powers that may be exercised by municipalities. Sec. 93.

"The *taxing power* is to be distinguished from the *police power*. * * The power to *license and regulate* particular branches of business or matters is *usually a police power*; but when license, fees, or exactions are *plainly imposed for the sole or main purpose of revenue*, they are in effect *taxes*."

Again: "Ordinarily the mere power to license or to subject to police regulations, does not give the power to tax distinctly for revenue purposes; but it *may give* the power when such appears from the nature of the subject matter and upon the whole charter or enactment, to have been the legislative intent, but not otherwise." 2 *Dillon, Municipal Corp.*, Sec. 609.

"In harmony with the foregoing principles it has been held that, under the authority to license and regulate draymen, etc., a municipal corporation may, by ordinance, require a license to be first taken out, and charge a reasonable sum for issuing the same and keeping the necessary record, but cannot, by virtue of this authority, *without more*, levy a tax upon the occupation itself; and under the power to *regulate*, it may make proper police regulations as to the *mode* in which the employment shall be exercised." Same, Sec. 292.

"So authority to a city to adopt rules and orders 'for the due regulation of omnibuses, stages,' etc., was held not to authorize the adoption of an ordinance requiring the payment of a tax or duty, on each carriage licensed, ranging from one to twenty dollars, according to the different kinds of carriages and stands occupied.

"This was regarded as a direct tax upon the vehicle used or its owner, and not necessary to secure the objects of the above grant of power to the city." Same, Sec. 293; 12 *Wallace*, 418, *Ward vs. Maryland*; 29 *Ann.* 261, *Mayor vs. Gustave Roth*; 32 *Ann.* 923, *Board of Trustees of New Iberia vs. Migins*; *Cooley on Taxation*, p. 387.

 Kinder vs. Lyons et al.

In *Delecambre vs. Clere*, this Court held that a charge of "twenty-five cents per day, termed a tariff or fee for keeping a *private butcher's stand* within the corporate limits of said town," was in that instance a license or tax imposed upon the calling or occupation of the defendant which was that of a butcher.

After a careful review of all the authorities cited and others at hand, we have reached the conclusion that all of the exactions demanded are within the terms "tax" and "license," and that same were manifestly intended by the mayor and trustees of the city of New Iberia to constitute a source of revenue under the apparent exercise of delegated police power, and that said statute and ordinance are unconstitutional, null and void to the extent of plaintiffs demands and that the judgment of the district court should be and the same is hereby affirmed.

This decree does not apply to that part of the ordinance which authorizes the exaction of twenty-five cents "from each and every butcher's stand situated *within* the Main Market."

Judgment affirmed.

 No. 1277.

JAMES A. KINDER VS. DAVID H. LYONS, SHERIFF, ET AL.

1. Under the amendment of Article 81 of the Constitution of 1879, this Court has appellate jurisdiction of suits involving rights to homesteads, irrespective of the value of the property alleged to be exempt.
2. Homestead provisions of the Constitution of 1879 avail only those who register claims therefor, antecedent to contracting debts sought to be enforced against it.
3. A judgment liquidates, but does not create a debt. It recognizes existing, but confers no new or additional rights.
4. Property exempted from seizure and sale, under the provisions of the homestead law of 1865, is predial and not urban.
5. Laws conferring homestead rights must be strictly construed.

A PPEAL from the Fourteenth District Court, Parish of Calcasieu.
Read, J.

Geo. H. Wells & Son for Plaintiff and Appellee.

G. A. Fournet for Defendant and Appellant.

 ON MOTION TO DISMISS APPEAL.

The opinion of the Court was delivered by

WATKINS, J. Plaintiff requests us to dismiss this appeal on the ground that the amount in controversy is below the lower limit of the jurisdiction of this Court.

Kinder vs. Lyons et al.

Plaintiff's petition discloses his action to be one restraining the sheriff and seizing creditors from selling certain property he claims to have registered and set apart as a homestead and which he avers to be exempt from seizure, under the provisions of the act of the legislature of 1865 and Articles 219 and 220 of the Constitution of 1879 and Act 114 of 1880. He alleges that said property is worth \$1,800, and that the illegal seizure thereof has caused him damage to the extent of \$200 attorney's fees and \$350 general damages, the whole exceeding \$2,000 in amount.

The trial was by jury, and there was a general verdict in favor of the plaintiff, without damages, and the defendants, Marx & Kempner, plaintiffs in execution, appealed.

It is not "the *amount* in dispute," but the *matter* in dispute, in such case, that gives this Court appellate jurisdiction. Under the amendment of Article 81 of Constitution of 1879, this Court has appellate jurisdiction of "suits involving the rights to homesteads." Act No. 125 of 1882.

In a recent case this Court said of this amendment: "It is over *such* cases of homesteads alone, as are mentioned in the present Constitution, that this Court has *exclusive* jurisdiction. 37 Ann. 109, State ex rel. Davidson vs. Judge.

The motion is refused.

ON THE MERITS.

I.

The following is a statement of this case:

The plaintiff alleges in substance that he is the owner of a house and lot in the town of Lake Charles, occupied by himself and family; that he is the head of a family dependent upon him for support; that he has set apart and registered this house and lot as a homestead; that this property is exempt from seizure and sale under the law of 1865, Articles 219 and 220 of the Constitution of 1879, and Act No. 114 of 1880; that he registered his homestead June 15, 1882; and that the judgment under which the seizure was made was rendered after the registry and setting apart of said property as a homestead.

The defendants' answer, coupled with an exception of no cause of action, is an express denial that plaintiff is entitled to the homestead exemption, in bar of defendant's claim; they aver that the debts, for which the judgments sought to be executed were obtained, were contracted previous to the adoption of the Constitution of 1879; that no rights of homestead or exemptions from seizure and sale, as against

Kinder vs. Lyons et al.

said debts, were vested in plaintiff by virtue of Articles 219 and 220 of the Constitution of 1879, or Act 114 of 1880; that the property seized is urban property and cannot be claimed as a homestead exemption under the Act of 1865; and that the plaintiff has no *right of action* either under the laws of 1865, the Constitution of 1879, or Act 114 of 1880, because the registry of his pretended homestead could impair no previously acquired rights of the defendant's seizing creditors to have said property seized and sold to satisfy just and legitimate debts previously contracted.

In the succession of Furniss, 34 Ann. 1013, this Court held: "Under the homestead provisions of the Constitution of 1879, the exemptions therein provided only take effect from the date of registry, as provided by law, and are *inoperative against debts contracted prior to such registry.*"

Parties invoking the protection of the homestead laws, which are in derogation of common rights and must be strictly construed, are required to prove that they come within *both their spirit and letter*. Galligan vs. Payne, 34 Ann. 1057, and authorities therein cited; 37 Ann. 263.

In *Thomias vs. Guilbeau*, 35 Ann. 927, this Court held: "Claims of homestead exemptions affecting *debts* and contracts which existed *previous* to the adoption of the Constitution of 1879, must be controlled by the legislation in force at the time the *contract* was entered into." 34 Ann. 831, *Poole vs. Cook*; 32 Ann. 980, *Gilmer vs. O'Neal*.

In the case quoted from, the Court say: "The debt which they seek to enforce was *not created* by the judgment of October, 1880, which conferred no new right, but merely recognized rights and obligations which were created by the Act * * of June 26, 1877. Hence, the contract from which plaintiff's obligation springs was made and entered into in 1877, and all homestead rights affecting the same must be governed by the laws then in force." Page 929.

Plaintiff's declaration of his homestead exemption of property involved in this controversy was filed for record, and recorded on the 15th of June, 1882.

The petition in the suit of *Marx & Kempner vs. James A. Kinder*, No. 598, recites that it was brought upon defendant's promissory note for \$247 50, bearing date October 17, 1877, and payable on the 1st of January, 1878, with interest from date, and the note is annexed; though judgment was not signed until June 19, 1882.

The suit No. 599 was brought upon the joint note of Sam. Kinder and J. A. Kinder, for \$411 51, bearing date September 10, 1877, and

 Succession of Thibodeaux.

falling due on the 10th of January, 1878, and judgment was signed on the 18th of June 1882.

The facts of this case are quite similar to those presented in the case of Thomas vs. Guilbeau, and the same ruling is applicable.

II.

It has been frequently decided by our predecessors that the property exempted from seizure and sale under section 1691 of the Revised Statutes of 1870, which embodies the provisions of the homestead law of 1865, is predial and not urban. 25 Ann. 219; Crilly vs. Sheriff; 26 Ann. 645, Hargrove vs. Flournoy; 28 Ann. 575. Roberts vs. Gordy.

Our conclusion is that plaintiff's homestead, asserted under both the Act of 1865 and the Constitution of 1879, can be sustained under neither.

It is therefore ordered, adjudged and decreed that the verdict of the jury and the judgment of the district court appealed from be avoided, annulled and reversed; and, proceeding to render such judgment as should have been pronounced, it is ordered, adjudged and decreed that the demands of the plaintiff be rejected, and that he be taxed with the costs of both courts, and that the seizing creditors, Marx & Kempner, be permitted to proceed with the seizure and sale of the property, sale of which was enjoined, and according to law.

 No. 1275.

SUCCESSION OF ZÉNON ELIZÉ THIBODEAUX.

ON OPPOSITION TO THE DEMAND OF ADMINISTRATION BY MOZART THIBODEAUX.

There is no law to justify and no room or reason for the appointment of an administrator to a succession which owes no debts, and after the property has been put in the possession of the heirs who have accepted the same, thus winding up and finally settling up the succession.

If the existence of debts should be afterwards discovered, the creditors would have recourse against the heirs, but not against the succession which has ceased to exist.

A PPEAL from the Twenty-first District Court, Parish of St. Martin.
Gates, J.

Mouton & Martin for the Appellee.

Felix Voorhies for the Appellant.

The opinion of the Court was delivered by

POCHE, J. At the death of Zenon Elizé Thibodeaux, which occurred in 1867, an inventory of the property left by him was taken and Paul

38	716
51	1046

38	716
51	1056

38	716
112	172

38	716
126	542

Succession of Thibodeaux.

E. Thibodeaux was appointed and qualified administrator of his succession.

In 1868, all the heirs of the deceased, including the administrator, effected among themselves a partition by authentic act of all the property depending upon said succession; and in 1881, the administrator died.

In 1885, Mozart Thibodeaux claiming to be an heir of the deceased, Z. E. Thibodeaux, filed an application for the appointment of administrator of the succession, alleging the necessity of such an administration and the death of the administrator Paul E. Thibodeaux.

His application was opposed by one of his co-heirs on the ground that the succession had been finally settled, the heirs, all of age, having been put in possession of their respective shares of the property thereof, there being no debts and there being consequently no succession to administer.

This appeal is prosecuted by the opponent from a judgment in favor of the applicant.

The record fully establishes the state of facts contended for by the opponent and appellant, and our jurisprudence has firmly settled the rule that when the heirs of a succession, which owes no debts, have been placed in possession, as such, of the property left by the decedent, there is an end of the succession which is wound up and settled, and thus ceases to exist—and that therefore there is no reason or room for an administrator.

If, after such an operation, any debts should be discovered, the recourse of creditors could not be exercised against the succession, which has no longer any existence, but against the heirs, who would thus become debtors for their virile shares of their ancestor's debts. *Sevier vs. Sargent*, 25 Ann. 221; *Succession of Walker*, 32 Ann. 321; *Succession of Hebert*, 33 Ann. 1107; *Succession of Baumgarden*, 35 Ann. 675; same, 36 Ann. 46; *Succession of Geddes*, 36 Ann. 963; *Succession of E. S. Powell*, 38 Ann. —, not yet reported.

The applicant in this case has not even alleged the existence of any debts due by the succession, or any other legal conditions sufficient to justify his coveted appointment as administrator of a succession already wound up and fully settled.

The judgment of the district court is, therefore, manifestly erroneous, being stripped of all support either in reason or in law.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be annulled, avoided and reversed, that the opposition herein be sustained and that the application of Mozart Thibodeaux for the appointment of administrator of the succession of Zenon Elizé Thibodeaux be denied and rejected at his costs in both courts.

State ex rel. Fontenot vs. Judge.

No. 1273.

THE STATE EX REL. POLYCARP FONTENOT VS. THE JUDGE OF THE
THIRTEENTH JUDICIAL DISTRICT COURT, PARISH OF ST. LANDRY.

In appeal from a judgment rendered by a justice of the peace to a district court, where a motion is made to dismiss the same on the ground that the matter in dispute is under the lowest limit of the appellate jurisdiction of this court, the appellant should be permitted to offer evidence to maintain his appeal, unless his want of right to the appeal conclusively appears from the face of the papers.

APPPLICATION for Certiorari.

Lewis & Brother, for the Relator.

W. C. Perrault and *K. Baillio*, for the Respondent:

1. Relator in a case like the one at bar, cannot in his petition introduce new allegations or facts not appearing in the record. The court will disregard such new allegations, and decide the case on the face of the papers. 32 Ann. 1222; 33 Ann. 256.
2. A petition for certiorari which fails to aver that the respondent judge arbitrarily and without cause refused to hear relator and his witnesses, is lacking in essential averment, and no relief can be granted him thereunder. 36 Ann. 481, 482.
3. The answer or return of the respondent judge, in an application for a certiorari, being the official act of a sworn officer, is not required to be sworn. It is considered as being made under oath.
4. Under the jurisprudence of this State, prior to the year 1879, the Supreme Court could only issue the writ of certiorari when invoked in aid of its appellate jurisdiction. 15 Ann. 120; 22 Ann. 459, 517; 16 Ann. 164; 25 Ann. 381; 30 Ann. 457; 31 Ann. 795.
5. Appeals from magistrates' courts are carried directly to district courts. The only exception to this rule is where the legality or constitutionality of a municipal tax, toll or impost is put at issue, in which case only, the appeal is carried to the Supreme Court. Constitution of 1879, arts. 111 and 81.
6. The Supreme Court will not exercise the supervisory jurisdiction granted by art. 90, unless it affirmatively appears: 1st. That the lower judge was guilty of a clear usurpation of power not conferred by law. 2d. Where he has arbitrarily or without cause refused to perform some plain duty imposed upon him by law, and which he had no discretion to refuse. 3d. Where relator has no adequate remedy in any other form of proceeding. Even in these cases, the Supreme Court will not revise the action or the judgment of the lower court on the merits, but will only inquire into and revise their regularity and legality in point of form. 32 Ann. 549, 552; 33 Ann. 1301; 32 Ann. 1222; 33 Ann. 256, 255, 15. A refusal to hear or receive evidence because inadmissible, does not fall within the purview of this supervisory power. 36 Ann. 481, 482.
7. A judgment of a court wanting in jurisdiction *ratione materiae*, is null, and a clear action lies to annul it. C. P. 604, 606, par. 3. Such a judgment can be even collaterally assailed.
8. Under art. 608 C. P., the nullity of a judgment may even be demanded on appeal provided the nullity appears on the face of the papers. But such nullity must be demanded. C. P. 608.
9. Magistrates' courts have no jurisdiction of a suit wherein "the right of property" or the "possession of an immovable" is put at issue. C. P. 1068.
10. Where an averment of jurisdiction is made, an appellate court will permit the proof of

 State ex rel. Fontenot vs. Judge.

jurisdiction by affidavit or otherwise to be made. But it is not permissible to supply by affidavit, not only the proof, but the averment of jurisdiction on appeal. 30 Ann. 1138; 31 Ann. 856; 33 Ann. 1051; 2 Ann. 283; 8 Ann. 282, H. D. p. 18, No. 1. and cases cited.

11. There is an obvious and manifest difference between the offer and the right to prove the value of the object in dispute, in the court of the first instance, and the right to do so in the appellate court. In the latter, the jurisdiction must be averred, and must appear from the face of the papers—and no evidence is admissible to supply its omission.
12. In the case at bar the district judge having properly rejected the evidence offered to eke out jurisdiction, the case was left as it was originally: with a demand by plaintiff for ten dollars damages. This amount being below the appellate jurisdiction of the district court, the appeal was properly dismissed. Const. 1879, art. 111.

The opinion of the Court was delivered by

TODD, J. This is a certiorari proceeding.

The relator alleges in substance that he was sued before a justice of peace in the parish of St. Landry, to compel him to cut a certain levee and to pay ten dollars damages caused by the levee. That judgment was rendered by said justice as asked for, that is to pay ten dollars to the plaintiff in the suit, and cut the levee complained of; that he appealed from this judgment to the Honorable the District Court of the parish of St. Landry, the Hon. G. W. Hudspeth presiding; that in said court a motion was made to dismiss the appeal on the ground that the court was without jurisdiction to entertain the appeal for the reason that the matter in dispute was below the limit of its appellate jurisdiction; that thereupon the relator offered to introduce evidence to satisfy the judge touching the question of jurisdiction by proving the money value of the demand made and the right involved respecting the said levee, and the cutting of the same sought to be effected by the suit; that the judge refused to hear said evidence, and dismissed his appeal. The relator charges that this action of the judge was error, and he seeks to have it so declared, and at the same time to compel the judge to hear his testimony offered on the trial of the motion to dismiss the appeal.

By the writ in question we can determine whether the judge erred in his refusal to hear evidence on the point in question.

In the reasons given by him for his ruling and for the dismissal of the appeal—which we find in the record—he seems to have concluded, from the face of the papers, that the only real matter in dispute was the ten dollars which the relator was condemned to pay by the judgment appealed from, and that, therefore, the question of jurisdiction was not open to evidence. Whether the court had jurisdiction to entertain the appeal is a question not now before us, but only whether

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he should have heard evidence touching the question raised by the motion to dismiss.

In this court, where similar questions are presented, unless it conclusively appears from the pleadings that the court is clearly without jurisdiction, it is permitted the appellant, for the purpose of determining the question of jurisdiction and the appealability of the case, to submit affidavits respecting the amount involved or the value of the matter in dispute, which are always viewed and received by the court as properly before it for consideration.

We do not agree with the judge *a quo* that it conclusively appeared from the face of the papers presented in the appeal before him, that his court was without jurisdiction.

The suit before the justice was to compel the relator to cut his levee and to pay ten dollars damages caused by the levee.

It might well be that the most important and valuable interest of relator involved in the suit was the right to maintain and keep intact his levee, which it was the object of the suit to compel him to destroy. We do not pretend to say that this right was of value sufficient, together even with the ten dollars in dispute, to give jurisdiction to his court of the appeal, but we do think that the record presented a sufficient showing to authorize the appellant and relator to submit evidence of the value of his said interest with a view of maintaining his appeal. Thus concluding, we think it was error in the judge to refuse to hear this evidence, and error likewise to dismiss the appeal without or before hearing it.

The order of dismissal was, under this view of the matter, premature and unauthorized, and we think, under the provisions of the article of the C. P. above quoted, that the relator is entitled to the relief asked for.

It is therefore ordered, adjudged and decreed that the ruling of the respondent judge refusing to hear evidence touching the right of the relator to maintain and relating to the jurisdiction of the court to entertain the appeal, and respecting the value of the right, interest or matter in dispute in the controversy, be and the same is hereby corrected and the order dismissing the appeal set aside, and the appeal reinstated for the purpose of permitting the relator to submit or offer evidence on the points mentioned, and subject to the motion to dismiss the appeal, at the cost of respondent.

ON APPLICATION FOR REHEARING.

I.

WATKINS, J. Respondent suggests that there is error in our judg-

ment taxing him with the costs, and insists that such a case as this is exceptional, and is not governed by the rule laid down in C. P. 549, to the effect that "in every case the costs shall be paid by the party cast, except when compensation has been allowed or real tenders made," etc.

But the next article is still further to the purpose: "The same rule shall be observed with regard to the party cast on *incidental demands*, whether they be dilatory or declinatory."

Relator cites the case of *Borgsteed vs. Black*, 5 Ann. 753, as furnishing authority for the position that is assumed by him. That was a case involving an election contest, and consequently bears no analogy to the present action. The Court said that the party cast in that suit was not bound for the costs, for two reasons: 1st. That that suit was not an ordinary civil action, but one of public concern. 2d. That the statute on the subject of contested elections did not authorize it.

In *State ex rel. Montague vs. Coquillon*, justice of the peace in the parish of St. Tammany, 35 Ann. 1101, in which a writ of *certiorari* against respondent was applied for to this Court, on the allegation that he had rendered judgment in an unappealable case against the relator, without allowing him a hearing, as the law requires, and the following decree was entered, viz: "It is therefore ordered, adjudged and decreed that the judgment rendered by the respondent magistrate against the relator, on the 4th June, 1883, be annulled and avoided, and that respondent be ordered to try the case anew, in conformity with the provisions of the law, and that the respondent pay the costs of these proceedings."

We think this exception not well taken.

II.

Respondent further suggests that we have entertained relator's petition for a writ of *certiorari* entirely independent of the supervisory power vested in this Court by the Constitution, article 90; and which relator does not invoke, and the judgment complained of did not cite.

He then suggestively enquires: "Can this Court (independently of the powers conferred by Article 90) grant any relief in an unappealable case, by writ of *certiorari*?"

Reference to C. P. 857 and 860, will satisfy respondent's enquiry. But, if anything necessary to relator's adequate relief under them is wanting, Article 90 supplies the deficiency, and we will cite it now, in support of our complete jurisdiction.

On this we rely for a sufficient answer to the cases cited by the respondent, viz: 9 Ann. 522; 2 Ann. 979; 16 Ann. 164; 15 Ann. 120; 30 Ann. 457.

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We do not understand that any set phraseology should be employed in relator's petition to entitle him to relief. It is quite sufficient that he has, in due form, made his grievances known to this Court, which is clothed by the Constitution with the supervisory power to examine and correct, and which has the undoubted authority to draw legal inferences from a given state of facts, coupled with the duty to apply the remedy. The relief was *not* granted *ex proprio motu*, nor "gratuitously extended," to a case in which no such relief was invoked. We think this Court is perfectly competent to entertain jurisdiction of the writ of *certiorari*, either alone or when coupled with *mandamus*.

III.

Respondent further insists that relator has not *presented* a case entitling him to the relief demanded; or, in other words, that this Court should not order "the district judge to reopen the case of Deville vs. Fontenot, and order him to receive evidence which, after due hearing and argument, he held inadmissible."

Relator's counsel places strong reliance upon State ex rel. Bright & Co. vs. The Judges, etc., 36 Ann. 481, and from which they quote this phrase, viz: "But that means an arbitrary refusal to hear any witnesses at all, and not to the rejection of testimony *as inadmissible*." That is to say, irrelevant to the issue.

In that case the objection that was urged to the testimony was that "it had not been properly stamped."

"This mandate (*certiorari*) is only granted in cases where the suit is to be decided in the last resort, and when there lies no appeal, by means of which proceedings absolutely void might be set aside, as where the inferior judge *has refused to hear the party or his witnesses*," etc. C. P. 857.

What was the question before the district court, and involved in the suit of Deville vs. Fontenot, then on trial? Its appellate jurisdiction of that cause. What did the court decide? That it conclusively appeared from the face of the record that it had no jurisdiction *ratione materiae*, and refused to hear any evidence going to show the money value of the plaintiff's demand and dismissed the suit. He did not reject the evidence for the reason that same was inadmissible and not pertinent to the issue; but for the reason that the issue was one upon which no evidence could be received at all.

IV.

Relator had a perfect right to apply for the writ of *certiorari* and *mandamus* at one and the same time, or separately.

Louis et al. vs. Giroir et als.

In our previous opinion and decree we granted relator no relief that was not strictly consonant with the writ of *certiorari* alone. Montague's case above cited is a complete precedent on this point.

V.

We have taken pains to express our views again, and even more in detail than before, in order to fully relieve the minds of the respondent and his zealous counsel from the erroneous impression they seem to entertain that our previous opinion was rendered gratuitously, *ex proprio motu* and without deliberate consideration.

Rehearing refused.

No. 1278.

DON LOUIS JEAN LOUIS ET AL. VS. THERENCE GIROIR ET ALS.

In a petitory action the description of the lands in suit, by sections and townships in reference to United States surveys, is sufficient. That is certain which can be made certain. A petition charging that the defendants are in joint possession of the lands in suit, is not amenable to the objection that it does not charge what portion of the several tracts sued for is in the separate possession of any of the defendants.

A PPEAL from the Twenty-fifth District Court, Parish of Lafayette.
Bourges, judge *ad hoc*.

Felix Voorhies and *E. Sinson* for Plaintiffs and Appellants.

M. E. Girard for Defendants and Appellees.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs, in a petitory action, prosecute this appeal from a judgment maintaining an exception that their petition is too vague and indefinite to put the defendants, thirteen in number, on their several defenses, in failing to allege what portion of the two tracts of land sued for was claimed from each or any of the defendants.

The trial judge held that the description of the lands was insufficient, and that the petition was defective for the additional reason that it failed to allege what definite portion of the land was occupied by each or any of the defendants.

The insufficiency of the description of the lands had not been specifically set up by the defendants, and in our opinion the judge committed a double error in resting his judgment thereon. The defendants had not complained of the description. But in point of fact the de-

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scription is sufficient. The lands are described as: "Sections 93 and 94, in township 10 south, range 5 east, southwestern district of Louisiana, situated in the parish of Lafayette."

By consulting the United States surveys the lands may be accurately located, and a greater precision is not required in a petitory action. That is certain which can be rendered certain. *Lea vs. Terry*, 15 Ann. 160.

As we read the petition, we understand that the defendants are sued jointly and that they are charged to be illegally in joint possession of the two tracts of land which are contiguous. If such be the charge intended to be made by plaintiffs, they surely could not be required to state otherwise or differently.

It may be, as suggested by defendants' counsel, that their possession is several and not joint. But that defense cannot be considered in determining the alleged insufficiency and vagueness of plaintiffs' pleadings.

That ground is contained in another exception which defendants have interposed, but as that and other exceptions were not passed upon by the trial judge we are powerless to review them in the present appeal. In due time they may claim our attention. *Harris vs. Pickett*, 37 Ann. 747. We are limited to the disposition of the matters only which are brought up in each appeal.

To the extent of our examination we conclude that the views of the district judge are erroneous.

It is therefore ordered that the judgment appealed from be annulled, avoided and reversed; that the exception maintained be overruled, and that the case be remanded for further proceedings, costs of this appeal to be taxed to defendants and appellees, other costs to abide the final determination of the cause.

No. 1281.

J. O. HALPHEN VS. U. A. GUILBEAU AND T. LEZAIR BROUSSARD.

1. Under the provisions of Act No. 40 of 1880, the judge of an adjoining district, who is called to try a cause, in which the presiding judge is recused, acts *pro hac vice* and in that court, and during the time he is thus engaged in the performance of duty, the presiding judge is displaced.
2. The judge of an adjoining district thus appointed, has no authority to grant an order at chambers within his own judicial district, and in his capacity as judge of the latter, transferring the suit to an adjoining district. Such an act is a nullity.

A PPEAL from the Thirteenth District Court, Parish of St. Landry.
Hudspeth, J.

Halphen vs. Guilbeau and Broussard.

C. H. Mouton, Jos. A. Breaux, Edward Simon and F. F. Perrodin for Plaintiffs and Appellant:

1. Nine months having elapsed—since the case had been transferred—a transfer was absolutely necessary under the terms of the law.
2. Notice prior to transfer was not necessary. The law being mandatory had to be obeyed. It was thus obeyed in the case to which reference is made in the body of the brief. Court and suitors accepted the transfer in said case and not a word was said about the necessity or the most remote propriety of such a notice.
3. The order was granted at chambers in the case at bar. There was nothing illegal in that. Such an order can be granted at chambers under section 1936, R. S.
4. The judge to whom the case was transferred, had full authority in the premises until the nine months had elapsed; after that time, the court to whom transferred had full authority.
5. The dismissal of an exception, the reversal of the judgment of dismissal and the reinstatement of the case by the Supreme Court, is not a trial; the case has not been tried, and under Act 40 of 1880, it could be transferred.
6. The act of the judge in transferring a case "must not be interfered with, except in extreme cases of glaring wrong or of unbearable injustice." *Fontelieu et al vs. Conrad DeBaillon, Judge, et al*—decision rendered not reported.

H. L. Garland, R. S. Perry and Felix Voorhies for Defendants and Appellees:

A transfer under sec. 5 of Act No. 40 of 1880, is a change of venue and must be governed by R. S. 3901 *et seq.*

No transfer of a case can be made at chambers except in changes of venue, and contradictorily with all parties interested.

No default can be entered before the court to which a case is transferred, unless opposing parties be notified of the transfer.

An application to transfer, under Act No. 40 of 1880, addressed to the judge of the 25th District Court, the case pending before the Twenty-first District Court, is erroneously and improperly addressed, even though the judge of the Twenty-fifth District shall have been appointed, under recusation, to try the case. And an order of transfer signed under such an application by the judge of the Twenty-fifth District Court, and outside of the Twenty-first District, is null, and the whole proceeding is null.

Section 5 of Act No. 40 does not arbitrarily, on expiration of nine months, divest original court of jurisdiction when a case is progressing and in which many issues have been disposed of.

It does not require that the case shall have been finally tried within the nine months.

ON MOTION TO DISMISS APPEAL.

The opinion of the Court was delivered by

WATKINS, J. T. L. Broussard, one of defendants and appellees, moves to dismiss the plaintiff's appeal, for the reason that, since the death of the defendant U. A. Guilbeau, the *contestee* for the office in controversy, his daughter, Anita Guilbeau, one of his heirs, has not been legally cited as appellee, by means of citation to the surviving widow of the said deceased, and as tutrix of the children of their marriage—as said Anita was united in marriage with Charles Delacroix on the 14th of January, 1886, antecedent to plaintiff's petition for appeal

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on the 7th of May, 1876; and he charges this neglect to have been the plaintiff's fault.

The citation of this heir, in our opinion, was an unnecessary formality, because she was not a necessary party to the appeal.

The *gravamen* of the dispute is the election *vel non* of plaintiff, to the office of sheriff of the parish of St. Martin in 1884. The heirs of defendant certainly acquired, by their ancestor's death, no right to the office in controversy—whatever may be said with regard to the fees and emoluments thereof, an office is not a heritable right or property.

The defendant and appellee, T. L. Broussard, holds and claims the right to exercise the functions of sheriff, by virtue of an appointment of the Governor to fill a vacancy therein, which was occasioned by the death of the contestee, U. A. Guilbeau, who was theretofore returned elected.

He was duly cited and we think properly. In fact, he was a party to a previous appeal in this case—37 Ann. 710, Halphen vs. Guilbeau and Broussard.

Motion overruled.

ON THE MERITS.

The origin and facts of this case are succinctly and fully stated in our previous opinion in 37 Ann. 710, Oscar Halphen vs. U. A. Guilbeau and T. L. Broussard, which was a suit to have reconstructed and reinstated the lost records therein, which right was recognized.

At the November term, 1884, Fred Gates, Judge of the Twenty-first Judicial District, on the suggestion of counsel for T. L. Broussard, entered an order of recusation and selected and designated Conrad DeBaillon, Judge of the Twenty-fifth Judicial District to try the same; and on the 4th of December, 1884, he was called upon to preside and proceeded with the trial thereof, and certain exceptions were filed. While same were under consideration, the court was adjourned from day to day upon the order of Judge Gates, so as not to interfere.

Thereafter various proceedings were taken in the suit—too numerous and conflicting for particular detail—which culminated in the dismissal of plaintiff's suit, and the said appeal in February, 1885, was the sequel.

Subsequent to the decision of the issues raised in that appeal plaintiff, through counsel, applied for and obtained an order to be signed by C. DeBaillon, Judge of the Twenty-fifth Judicial District "at chambers at Lafayette, La., this 3d of September, A. D. 1885," to the effect that, as nine months had elapsed since said suit was assigned to him for trial,

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that same "be and the same is hereby transferred to the Thirteenth Judicial District Court in and for the parish of St. Landry, the judge of which court is competent to try the same."

In *State ex rel. Fontelieu vs. Conrad DeBaillon, Judge, etc.*, 37 Ann. 392, this Court said: "Under Act No. 40 of 1880, which regulates the manner of trying recused cases, the recused judge is stripped of all control over the case, which is *transferred, in its entirety*, to the judge selected to try the same.

"If nine months elapse after recusation without a trial, *the cause must then be transferred to the district court of the nearest parish of an adjoining district*, the judge of which is competent to try the cause.

The order *must emanate from the judge first appointed to try the case, who alone has the legal authority to make the same.*"

In *State ex rel Gates vs. Beattie, Judge*, 38 Ann. —, unreported, this Court recently held: "In case of such transfer of the suit, the judge of the court to which the transfer is made, has as full and complete authority and jurisdiction over the same as if it had originated in that jurisdiction."

The order transferring the case in this instance, did not emanate from the judge first appointed to try the case. It is perfectly true that Conrad DeBaillon, Judge of the Twenty-fifth Judicial District, had been called by Judge Gates to go into the Twenty-first Judicial District and try the case. This he did. In so doing, it was by virtue of his authority to exercise the duties and perform the functions of judge *in that court*. While he thus exercised them, the judge of that district was *functus officio* for the time being. This is fully illustrated by the fact that during the time Judge DeBaillon was engaged in the trial of the case, Judge Gates ceased to perform the functions of his office. The order purporting to transfer this cause from the parish of St. Martin, in the Twenty-first Judicial District, to the parish of St. Landry, in the Thirteenth Judicial District, executed by Conrad DeBaillon, Judge of the Twenty-fifth Judicial District, at his chambers, in Lafayette, La., was an absolute nullity, and wholly without any effect in law, and did not operate the transfer of the suit thereto, and the judge of the Thirteenth Judicial District was and is wholly without jurisdiction or authority over said cause, it never having been transferred from the parish of St. Martin, where it was filed.

Judgment affirmed.

Succession of Breaux.

No. 1274.

88 728
52 881

SUCCESSION OF EUGENE BREAU—OPPOSITION TO TABLEAU AND ACCOUNT BY URANIE PELLETIER.

1. The dowry is given to the husband for him to *enjoy* the same so long as the marriage shall last. R. C. C. 2347.
With respect to the effects of the dowry, the *husband* is subject to all the obligations of the usufructuary. R. C. C. 2365, 549, 594.
If the dowry consist of immovables, or of *movables not valued by the marriage contract*, the husband or his heirs may be compelled to restore the same at the dissolution of the marriage. R. C. C. 2367.
2. At the dissolution of the marriage all effects which both husband and wife reciprocally possess, are *presumed* common effects, or gains, unless it be satisfactorily shown which of such effects they brought in marriage or which have been given them separately, or which they have respectively inherited.
3. In order to charge the community for separate account of the *husband*, the proof must show, with reasonable certainty, that his property, or money, has been used for the benefit of the community.

A PPEAL from the Twenty-first District Court, Parish of St. Martin.
Gates, J.

C. H. Mouton for Opponent and Appellee.

Felix Voorhies and Mouton & Martin for the Administrator, Appellant.

The opinion of the Court was delivered by

WATKINS, J. Uranie Pelletier, the opponent, and Eugene Breaux, deceased, were married on the 20th of June, 1854. There was a marriage contract between the spouses, but it contained no stipulation that there should exist no community between them.

No children were born of their marriage. Uranie Pelletier survived the husband. At the date of Eugene Breaux's marriage with opponent, he had nine children, born of a former marriage with Josephine Beguenand, and to whom he was indebted in the sum of \$1307.13, and which sum he paid them respectively, as they arrived at their majority, and during the existence of the community.

The opponent, Uranie Pelletier, accepted the community with benefit of inventory.

In the tableau of distribution and classification of the estate of Eug. Breaux, the administrator shows the active mass to be \$5508.95; but also shows that same is in part composed of property belonging to the community, existing between deceased and opponent, and alleges the necessity of same being kept separate, with their charges respectively, in order that a fair distribution be made.

He then makes a statement of what the community is composed, viz:
Cash on hand.....\$ 890 00

 Succession of Breaux.

Ledoux's note.....	200 25
Numa Patin's note.....	140 00
Land, No. 6 of tableau.....	910 00
Cotton in seed (sold).....	18 24
Corn in seed (sold).....	70 00

Total community assets.....\$2,228 49

Of this, one-half belongs to opponent, add the other to the heirs of the deceased—he having died intestate—“after deduction is made of its debts and liabilities” and which are enumerated as follows, viz :

1st. One-half of the law-charges and costs incurred in the settlement of the estate of deceased.

2d. One-half of the claims of the spouses against the community. These are designated as follows, after deducting costs\$ 148 80

I.

Amount as per marriage contract..... 125 00

II.

“The personal property of Eugene Breaux, as per marriage contract above mentioned, consisted in part of horned cattle, horses, etc., which have been disposed of for the use and benefit of the community..... 850 00

III.

“Negro James mentioned in said marriage contract, was sold during their marriage, and shortly before the war * *

This amount was employed for the benefit of the community to meet its liabilities and charges, during the four years the war lasted..... 1200 00

IV.

“Money loaned by deceased to Widow Rosemond Pelletier and subsequently collected through sale of land to St. Pé, and which forms part of cash inventoried, and the mortgage note of Numa Patie represents the balance. That amount enured to the benefit of the community, and the estate is its creditor for..... 1000 00

V.

“The estate is also a creditor of the community for a sum by deceased collected from the estate of his first wife, and employed for the benefit of the community..... 2250 00

“Claims of spouses against the community aggregating..... 5425 00

“Of this, the individual claims of Eugene Breaux against the community aggregate..... 5300 00

Succession of Breaux.

"The debts and charges *absorbing* the whole of the community * * and after deducting costs and the privilege claims, * * the balance of that community, *i. e.*, \$954, goes to the estate of Eugene Breaux, to be added to the active mass of that estate, etc."

Uranie Pelletier opposed this tableau and classification on the following grounds, substantially, viz:

That, in addition to the sum the deceased used of the community funds, with which to make settlements with his children by a previous marriage, \$1307.13, the active mass of the community is incorrectly stated to be \$2228.40, and that same should be increased by the preceding sum of \$1307.13; and that there was sufficient money on hand at the death of deceased to have paid "all legitimate debts due by the community."

She specially opposes the items carried on said tableau as claims of deceased, against the community, as illegal, viz:

The items of \$850, \$100, \$1200, \$2250, \$5300.

Respondent and opponent specially denies that any of these items are debts or charges due by the community and prays for the rejection and disallowance of all of same and that the administrator be charged with the specified sum of \$1307.13, and they be decreed the owners of one undivided one-half of the land described in item No. 6 on the tableau, and appraised as No 2 in the inventory of the deceased.

II.

The testimony shows that the plantation of Eugene Breaux was in a better condition in 1854, when he married Uranie Pelletier, than when he died in 1882. At that time he had a number of cattle, horses and mares, also three or four yoke of oxen and about fifty sheep. Some of the witnesses state that the plantation and improvements had diminished in value, at least one-fourth, between the date of the marriage in 1854, and his death in 1882—a period of about thirty-two years.

Michel Breaux, a son of the deceased, who states his age to be twenty-seven years, says that the sheep were sold to Valery Ledoux; that he delivered six cows to Arthur Patin, the agent of Uranie Pelletier, the opponent, to replace the cattle that she brought in marriage.

He further states that his father paid every one of the heirs—children of a former marriage—the amount coming to them, but he fails to state the source from which he derived the means—presumably from the community, of which he was the head and master.

Uranie Pelletier was one of the heirs of Henrietta Breaux, widow of Jean Pelletier. None of the lands inventoried in the succession of

 Succession of Breaux.

Eugene Breaux have been sold. The opponent in an authentic act, formally accepted the community with the benefit of inventory.

Aside from certain documentary evidence, this is in substance the whole of the administrator's evidence in support of his tableau, and classification of the debts and charges against the community above enumerated.

From the homologated settlement made, in 1858, of the proceeds of the sale of the estate of Henrietta Breaux, widow of Jean Pelletier, it appears that opponent, as an heir, applied her interest, as an heir, to the payment of "several purchases made by her husband * * as appears by the *proces verbal of sale*, \$1209.81.

Her share being, as above stated, \$1158.35½, leaving a balance in favor of the succession of \$51.45½.

III.

The judge *a quo* held that all the items enumerated in the tableau as community, properly belonged to it, but omitted any discussion in regard to the item No. 6, same being land valued at \$910, inasmuch as the same remained unsold. He treated the proceeds of the sale of movables made on the 1st of February, 1883, in the absence of countervailing proof, as assets of the community, \$1223.95.

He also held the sum paid by the deceased in settlement of the amounts coming to the children of his first marriage, was presumably paid with community funds, and he should be charged on his account with \$1307.13.

Making total amount of the active mass of the community,	
not including the land remaining unsold.....	\$3849.57
Less amount of community debts.....	273.80
Leaving net amount of community.....	3575.77

One-half to the widow.....	1787.88
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The account admits that the land indicated upon it as item No. 6, and valued at \$910, is an asset of the community, and one-half interest therein belongs to opponent.

The rehearsal of the evidence we have given above clearly shows that the separate rights and claims of the deceased, Eugene Breaux, against the community, are not supported by proof, and same must be rejected and disallowed.

For the sum of \$1787.88, the court *a qua* gave opponent judgment against the estate of her deceased husband, as her undivided half interest in the community; and the further sum of \$125 by her brought into the community at the time of her marriage. This should have

Clerc vs. Boudreaux, Mayor.

been deducted before division was made. He further ordered that the account filed by the administrator be rejected, and that he be ordered and required to file a new account in conformity with the particulars of said decree, and fully recognizing opponent's ownership of one undivided half interest in land mentioned on tableau as No. 6, and No. 2 on the inventory, and appeared at \$910.

IV.

"At the time of the dissolution of the marriage all effects which both husband and wife reciprocally possess are *presumed* common effects, or gains, unless it be *satisfactorily proved* which of said effects they brought in marriage, or which have been given them separately, or which they have respectively inherited." R. C. C. 2405.

Under the proof, indubitably the effects indicated are "common effects, or gains." There is no evidence in the record to establish the claims of deceased against the community. The administrator failed to trace the separate property into the *possession of the community*, or to show that same was sold, or disposed of for its use and benefit. 30 Ann. 275, Denegre vs. Denegre. Succession of Melany Foreman, 38 Ann. —, unreported, and decisions therein referred to; 36 Ann. 605; 10 R. 181.

Judgment affirmed.

No. 1270.

CHARLES CLERC VS. S. BOUDREAUX, MAYOR, AND BOARD OF TRUSTEES
OF THE TOWN OF NEW IBERIA, AND FELIX MESTAYER, LESSEE.

(Consolidated with)

AUGUST PASCAL.

VS.

S. BOUDREAUX, MAYOR, ET ALS.

A justice of the peace has no jurisdiction *ratione materiae* to entertain a suit, in which damages actually suffered, amounting to \$90 00, are demanded, and in which defendants are enjoined from claiming and collecting daily charges for the use of a market stall, and from closing same and keeping it closed, and from ever interfering with him in his business." 37 Ann. 583, State ex rel. New Orleans vs. Judge; 33 Ann. 146, State ex rel. Fredricks vs. Skinner.

A PPEAL from the First Justice's Court, Sixth Ward, Parish of
Iberia. *Duleus, J.*

Clerc vs. Boudreaux, Mayor.

E. Simon and T. D. Foster for Plaintiffs and Appellants :

1. Justices of the peace have jurisdiction in all matters except succession or probate matters, where the amount in dispute does not exceed one hundred dollars. See State Constitution, Art. 125; Code of Practice, Art. 1064.
 2. They have jurisdiction for sums of money, whether debts, taxes or fines, provided they do not exceed one hundred dollars. C. P. Arts. 1063-1064.
 3. To determine jurisdiction *ratione materie*, the amount in dispute at the time the suit is filed must govern and control, and not future amounts that may or may not accrue. C. P. Arts. 87, 88, 91; State Const., Art. 125.
- Courts cannot confer jurisdiction. C. P. Art. 92.

Breaux & Renoulet for Defendants and Appellees :

The plaintiffs pray to obtain a perpetual injunction to prevent the exercise of a right exceeding in value one hundred dollars. The State ex rel N. O. Gas Light Co. vs. Judge et al, 37 Ann. 583.

They desire to have a lease annulled—the rental is more than seventeen hundred dollars—and to prevent the lessee of the corporation of New Iberia from collecting more than one hundred dollars each month during the existence of the lease.

Plaintiffs do not allege that the specific rates and charges are not collectible for certain mentioned days, but they pray that the defendant corporation and others be forever enjoined from collecting any rates and charges during the extent of the lease. The lease attacked commences on 1st September, 1885, and will end August 31, 1886.

The plaintiffs seek the Court's sanction not to pay these charges and thus to enable them to carry on business, paying more than one hundred dollars each month, without paying any charges or dues to the corporation.

They—if defendant's position be correct—have no right to carry on business without paying a license, hence the question of carrying on business is involved.

Plaintiffs each claim ninety dollars. They put at issue the validity of the town charter and of the ordinances, and the right of the corporation to collect certain dues.

In all these matters at issue the court *a qua* is without jurisdiction *ratione materie*.

The opinion of the Court was delivered by

WATKINS, J. The cases are consolidated, and the plaintiffs' appeal from the judgment of the justice of the peace maintaining the exception of no jurisdiction *ratione materie* filed by the defendant.

Plaintiff enjoined the town corporation of New Iberia, and Felix Mestayer, lessee, from collecting a daily charge or tariff imposed upon them as butchers, and also from closing up their places of business, on the ground that the ordinance adopted August 10, 1885, under which the daily charge and tariff was imposed, was unconstitutional and illegal.

I.

The only question to be considered in determining the jurisdiction of the justice of the peace is "the amount in dispute." Does the "amount in dispute * * exceed one hundred dollars, exclusive of interest?" Const. Art. 125.

The plaintiff, Clerc, alleges in his petition that he, as the keeper of

Clerc vs. Boudreaux, Mayor.

a private market in the town of New Iberia, was required by the defendants to pay "certain charges on his business to the amount of twenty-five cents daily, for his stall * * sixty cents and other charges daily for every slaughtered animal which he has for sale, etc.," or upon his refusal so to do, his place of business was closed up without warrant of law.

He further alleges that "the *action* of said parties is unconstitutional and illegal * * and by said illegal acts referred to he *has been* damaged in the sum of \$90 * * * and that they will *daily enforce* the pretended and illegal ordinance of the board of trustees, and that he will suffer an irreparable injury thereby unless restrained and enjoined * * from interfering with his business."

He prays an injunction against the mayor and lessee restraining them "and all other agents acting under them, from demanding and collecting *daily* the said pretended and illegal charges and taxes, and from closing and keeping closed his above mentioned premises, and from *ever interfering* with him in his business in *anywise* * * and that they be condemned to pay *in solido* the amount of \$90, etc."

Felix Mestayer, one of defendants, sets forth that he has "leased the market-house of the corporation of New Iberia, with the right to collect all rates, charges and tariffs annexed thereto, *as set forth in plaintiff's petition*, for twelve months, beginning on the 1st day of September, 1885, and ending 31st of August, 1886, for the price of \$1,712 50, and particularly the right to collect the rates and charges mentioned from Charles Clerc, extending throughout the said lease," etc.

He avers that, though the specific rates and charges are to be collected daily, he is enjoined from collecting same during the whole extent of, and at any time during the said lease, and the amount involved largely exceeds one hundred dollars; that the monthly rent, or rate of said Charles Clerc, largely exceeds \$100, and "the right to carry on said business without paying said license is involved;" and plaintiff also claims \$90 actually sustained.

He excepts that the justice of the peace was without jurisdiction *ratione materiae* to try this cause.

This suit was filed on the 1st of September, 1885, at the incipency of the lease.

The case of Pascal vs. same defendant, involves the same issues.

On the trial one witness testifies that he keeps a butcher's stall in the New Iberia market-house, and that his "business exceeds \$100 per month; it amounts to \$8 or \$9 per day—gross sales," though he does not know the amount of the business of Charles Clerc.

Clerc vs. Boudreaux. Mayor.

The plaintiff, Aug. Pascal, as a witness, states that he kept a stall outside of the market-house, and his daily sales of meat amounted to about \$6, and exceeded \$100 per month.

Felix Mestayer testified that Mr. Charles Clerc's business is larger than that of J. Courrigé's and August Pascal's.

The plaintiff, in each of these consolidated suits, enjoins the defendants from demanding and collecting the daily rates and charges for the use of market stalls, and from closing same and keeping same closed, and "from *ever* interfering with him in his business, in any-wise, and demands the sum of \$90 damages actually sustained.

The judgment of the court appealed from, dismissing the two suits for want of jurisdiction *ratione materia*, was unquestionably correct, and it is therefore affirmed, the plaintiff and appellant to pay cost of both courts.

CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT OF LOUISIANA,
AT SHREVEPORT,
IN
OCTOBER. 1886.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ,* *Chief Justice.*

Hon. FÉLIX P. POCHÉ,

Hon. ROBERT B. TODD,

Hon. CHARLES E. FENNER,

Hon. LYNN B. WATKINS,

} *Associate Justices.*

No. 181.

LIZZIE DICKSON vs. W. P. FORD, CLERK, ET AL.

Parol testimony is admissible to show the real consideration of a contract evidenced by an authentic act, when the same is not expressed or described therein. The mortgagor who acknowledges an indebtedness as the foundation of the mortgage, when the act makes no mention of the source or origin of the debt, can have recourse to parol evidence to show the consideration of the debt or principal obligation, as a necessary step to establish the subsequent extinction or satisfaction of the debt.

The reason of the rule is that the evidence is admissible, not to vary or contradict the act, but to perfect it by supplementing omitted information.

A party who allows his former attorney to give evidence of matters confided to him by the client, without objection, will be presumed to have given his consent thereto, as provided for in Article 2283, C. C.

APPEAL from the First District Court, Parish of Caddo.
Taylor, J.

Wise & Herndon for Plaintiff and Appellee.

Land & Land for Curator *ad hoc*, and *J. H. Shepherd* for W. R. Barstow, Appellants:

*Absent during the whole of this term on account of illness.

38 736
109 954
109 988

38 736
113 454
113 455
114 823

38 736
116 665
116 955

38 736
118 627

Dickson vs. Ford, Clerk, et al.

1. Authentic acts make full proof against the parties, not only of their agreement, but also of what passed before the notary. *Succession of Tete*, 7 Ann. 95.
2. In the absence of a specific averment of error, fraud, ambiguity and the like, oral testimony is especially inadmissible to show that the consideration mentioned in an act of mortgage was not the true consideration. Such testimony necessarily varies and adds to the terms of the written instrument. *Vial vs. Meel*, 37 Ann. 903.
3. Attorneys at law are prohibited from divulging confidential communications, without the consent of their client. C. C. 2283; 4 N. S. 361; 2 Ann. 923; 15 L. 88; 15 Ann. 533. The law being prohibitory, will be enforced by the court, though no formal bill be reserved. 23 Ann. 747; 24 Ann. 401; 26 Ann. 221.
4. The filing of a reconventional demand interrupts prescription. *Driggs vs. Morgan*, 10 R. 119.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff sues for the cancellation of a special mortgage of \$2,500, which she executed in January, 1881, in favor of W. R. Barstow, who is made a party hereto as well as his assignee, Wm. Thurman, the present holder of the mortgage, who is herein represented by a curator *ad hoc*.

Plaintiff avers that the sole purpose and the true consideration of the mortgage were to secure Barstow from any loss or damage which might have resulted from a release bond in a litigation then pending against her, which bond had been procured for her by Barstow on his personal responsibility, and that said litigation having been finally settled and the demand against her having been fully satisfied, the purpose of the mortgage no longer exists, and that it should be cancelled.

The defense is a general denial, coupled with the averment of the good faith of the transfer from Barstow to Thurman in August, 1885, with a plea of estoppel of plaintiff's denial of an indebtedness acknowledged in an authentic act importing a confession of judgment, followed by a demand in reconvention for a judicial recognition and enforcement of the mortgage.

The defendants have appealed from a judgment in favor of plaintiff.

The serious contention in the case involves the objection to any parol evidence to show the alleged true consideration of the mortgage, on the ground of the familiar rule that such evidence cannot be admitted against or beyond what is contained in the acts. C. C 2276.

That rule has been the subject of countless adjudications from this Court, and it has been uniformly interpreted and construed so as to admit parol evidence to show error or fraud in the acts, or to show the real cause of the contract when the same is not fully expressed or described therein.

Such a construction was followed in very recent opinions of this

Dickson vs. Ford, Clerk, et al

Court as at present composed, but the earnestness with which defendants' able counsel have urged the vigorous enforcement in this case of the general rule, as an inflexible bar against all attempts to abridge or modify the irresistible force and effect of authentic acts, has induced us to go once more over the whole field of discussion on this subject, and to review our whole jurisprudence on a point of more than ordinary importance and of great interest.

Our study of the question includes the consideration of a case so strikingly similar to the controversy in hand that we herein transcribe in full the language used by Judge Martin as the organ of the Court in his statement of the salient points discussed in the case of *Falcon vs. Boucherville*, 1 Robinson, p. 337:

"The defendant is appellant from a judgment perpetuating an injunction obtained to stay proceedings on an order of seizure and sale which he had procured, the judgment having been rendered on the ground of the absence of any consideration to support the defendant's claim to the mortgage he sought to enforce. The authentic act, from which the confession of judgment is said to result, expresses only that the mortgagor has declared that he owes the mortgagee the sum of three hundred dollars, without stating the nature of the debt or the consideration from which it arises. The plaintiff alleges that the real consideration of the debt of \$300 mentioned in the authentic act was the payment by the mortgagee of a judgment which Foley had obtained against the mortgagor for \$96 and interests, and a compensation to the mortgagee for his services in a suit which he was to carry on for the mortgagor. * * * That the mortgagee has utterly neglected and refused to pay the said judgment * * * or to institute the suit aforesaid; whereby the consideration of the debt of \$300 for which the mortgage was given has entirely failed. Our attention is first drawn to a bill of exceptions taken by the defendant to the admission of parol evidence to establish the nature of the consideration of the debt and its failure. It does not appear to us that the court erred. The plaintiff relied on the failure of the consideration, and as this consideration was not stated in the act, it became necessary to establish it by testimony, in order to prove its failure."

The testimony was admitted and considered, and under its effects the mortgage was annulled.

Now, in the instant case, it appears from the act that the mortgagor only acknowledged an indebtedness of \$2500 to the mortgagee, for which she executed her note payable in six months, and granted the mortgage, and the act contains no statement as to the nature or origin

Dickson vs. Ford, Clerk, et al.

of the debt. Defendants contend that such language necessarily and exclusively infers the existence of a past contracted indebtedness, and that nothing is open to explanation or discussion.

In this lies their principal error, for in this case as well as in the Falcon case, the consideration of the mortgagor's indebtedness may have arisen from some other cause; in the former case it was alleged to have arisen from obligation of the mortgagee to pay a judgment obtained against the mortgagor, and to render certain future services; in this case it is averred to have arisen from the responsibility assumed and the risk incurred by the mortgagee in procuring a release bond for the mortgagor. Jurisprudence and the common experience of business men alike demonstrate that a past pecuniary indebtedness is not the exclusive source of an indebtedness sufficient to serve as a foundation for a mortgage.

Article 3292 of the Civil Code provides: "A mortgage may be given for an obligation which has not yet risen into existence; as when a man grants a mortgage by way of security for indorsements which another promises to make for him."

The source of indebtedness used as an example in that article is of the essence of the source of indebtedness which plaintiff alleges as the foundation of the mortgage which she executed in favor of Barstow.

Hence we conclude that the silence of the act touching the origin of the obligation which the mortgage was intended to secure, left the door open to parol evidence to supplement the omitted information as a necessary step to show the subsequent failure, or more properly, the contingent future extinction of the consideration of the mortgage. It is elementary that when the obligation secured by the mortgage becomes extinguished by any legal mode, the mortgage itself ceases to exist. In the textual language of the Code (art. 3285), "in all cases when the principal debt is extinguished the mortgage itself disappears with it."

The legal and true purport of the proffered parol evidence, as we understand from the record, is not to vary or contradict any of the recitals of the authentic act, not to disprove the existence of a mortgage as contemplated therein or created thereby, not to establish the non-existence of the consideration or of the principal debt which is therein stipulated as the foundation of the mortgage resulting therefrom, but simply to establish the true and covenanted source or origin of the principal debt or obligation sought to be secured, not as a means of defeating the legal force and effect of the mortgage resulting from the contract, but merely to establish the subsequent extinction of the in-

Dickson vs. Ford, Clerk, et al.

debtedness acknowledged by the mortgagor, the true source of which was not set forth or recited in the act, as a means of extinguishing the mortgage as the obligation accessory thereto.

To that end and under that restriction the proffered parol evidence was legally admissible, and in that light we have considered it.

The reason or the philosophy of the rule which, as an exception, flows logically from the very terms of the general rule, is that parol evidence, in such cases, is admitted, not against or beyond what is contained in the acts, as a contradiction of the clear recital, or legal meaning of the stipulations contained therein, but on the contrary, to give effect to the contract arising therefrom, by supplementing necessary information omitted therefrom, or to ascertain the true intent of the parties when the same is not clearly expressed or described therein.

As thus understood and construed, the rule is not amenable to the charge that it tends to destroy or impair the sanctity or binding force of authentic acts, but on the contrary, it tends directly to enhance the validity and efficacy of such acts, by substituting light for darkness, certainty for obscurity, and truth for error.

It is under the sense of such a duty that this court has so uniformly sanctioned the rule, and has applied in the following cases, which we have selected from a multitude of adjudications in similar controversies: *Berard vs. Berard*, 2 La. 3; *Broussard vs. Subrique*, 4 La. 350; *Palangue vs. Guesnon*, 15 La. 311; *Williams vs. Vance*, 2 Ann. 909; *Roberts vs. Boulat*, 9 Ann. 29; *Laramia vs. Courrégé*, 13 Ann. 25; *Fleming et al. vs. Scott et al.*, 26 Ann. 545; *Cole vs. Smith*, 29 Ann. 551; *Jackson vs. Miller*, 32 Ann. 432; *Levy vs. Ward*, 33 Ann. 1033; *Vignie vs. Brady*, 35 Ann. 560; *Armstrong vs. Armstrong*, 36 Ann. 551; *Bellock vs. Gibert*, 36 Ann. 565.

We therefore find no error in the ruling of the district judge, as complained of in defendant's bill of exceptions.

In our examination of the evidence in the record we are met by an objection of defendant's counsel to the consideration of the testimony of W. H. Wise, one of the present counsel of plaintiff, on the ground that he was at the date of the act, the agent or attorney of Barstow, for the purpose of accepting the mortgage, and that he is prohibited by law from giving evidence of anything that has been confided to him by his client.

Without expressing any opinion as to whether Mr. Wise was in that transaction the attorney or counsel of Barstow, or whether the subject-matter of his testimony involves the disclosure of confidential communications, within the meaning of the law invoked against him (C.

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C., art. 2283), we find from the record that no objection was made below to his testimony by Barstow or his counsel, but that on the contrary, he was cross-examined, without any reservation or explanation, touching the instructions received by him from Barstow in connection with the mortgage in question.

The argument that the law is absolutely prohibitory, and that this court must *ex proprio motu* discard any testimony given below in violation thereof, even in the absence of any objection, is not sound, and is not sanctioned by the text of the article.

Unlike the prohibition contained in article 2278 of the Code, touching the absolute and unqualified exclusion of parol testimony to prove certain facts, art. 2283 contains a very material qualification to the prohibition, namely, that the attorney shall not give such evidence "without the consent of such client." As no objection was urged by the client or his present counsel at the trial below, the consent of the client must be presumed, and the evidence thus becomes legal and admissible. In such cases the client will not be allowed to take his chances of testimony of his former attorney, if the same be favorable to his cause, and to subsequently repudiate the same if he is frustrated in his expectations.

After a thorough examination of the evidence, we reach the conclusion that it is overwhelmingly in support of all the necessary allegations of plaintiff's petition, and that Thurman, the assignee, who acquired the note long after its maturity, is subject to all the equities which could and do affect the original mortgagee.

Judgment affirmed.

No. 182.

J. HENRY SHEPHERD VS. MISS LIZZIE DICKSON.

Where the fee of an attorney is a contingent one, as where he agrees to prosecute the suit for one-half that may be realized from the claim or the judgment thereon, prescription for the fee only begins to run from the time it is exigible, that is from the collection of the judgment.

A PPEAL from the Second District Court, Parish of Bossier.
Drew, J.

Land & Land for Plaintiff and Appellee :

1. In fixing the compensation for the professional services of an attorney in any particular case, there are two considerations which will determine the judgment of this Court. One is the extent and kind of service, and the labor incident to its rendition; the other is the ability of the party who is liable to pay. *Breaux, Fenner & Hall vs. Franche*, 30 Ann. 338.

Shepherd vs. Dickson.

2. In an insolvent succession, whose entire assets have been recovered by the labors and industry of an attorney, a fee of one-third will be allowed. Succession of Linton, 31 Ann. p. 132. The fact that the attorney would have received absolutely nothing had his efforts failed, should be considered. Ib. 134, on rehearing.
3. Where it appears that the services of an attorney have been long continued, wisely directed and valuable, this Court will be guided as to the money value of his services (in the absence of special agreement as to his fees, and of specific evidence as to the extent of his services) by the opinion of the local bar to which he belongs. Succession of Jackson, 30 Ann. 463.
4. A contingent fee is not exigible until the judgment is collected. It is the duty and right of an attorney in such a case to collect and even to revive the judgment, 32 Ann. 305. and his fees are not exigible until the judgments are collected. 34 La. Ann. 1187. Hence in case of contingent fees, prescription does not run from the date of judgment, but from date of collection thereof.

Snider & Smith for Defendant and Appellant :

1. Defendant, under the general denial, can prove, when sued on a *quantum meruit*, a special contract to show value. *Powers vs. Steamer Patriot*, 3 L. 348; *Stone vs. Clifford*, 3 L. 349; *Budreaux vs. Tucker*, 10 Ann. 80. Defendant may, under general issue, show any fact tending to prove that she is not indebted to plaintiff as alleged. *Frank vs. Allen*, 3 M. 381; *Davis vs. Davis*, 17 L. 259; *Bonnabel vs. Bouligny*, 1 R. 292.
2. Attorney's fees are prescribed by three years from date of judgment in the case. R. C. C. 3538; *Morgan vs. Brown*, 12 Ann. 159; *Hiestand vs. Labatt*, 11 Ann. 30; *Howe's Heirs vs. Brent*, 6 N. S. 248; *Morse vs. Brandt*, 2 N. S. 515; *Linton vs. Harman*, 5 Ann. 603; *Looney vs. Levy*, 35 Ann. 1012. Continuity of services does not interrupt prescription. *Coote vs. Cotton*, 5 L. 15; *Howe's Heirs vs. Brent*, 6 N. S. 248; *Cresap vs. Winter*, 14 L. 553; *Cooley vs. Succession of Latourette*, 7 Ann. 223; *Chadwick vs. Waters*, 3 N. S. 432; *Linton vs. Harman*, 5 Ann. 603; *Looney vs. Levy*, 35 Ann. 1012.
3. The Supreme Court will fix attorney's fees without regard to the opinion of witnesses, in accordance to the exertion of legal knowledge, the responsibility incurred and the labor bestowed, etc. 5 N. S. 399; 3 Ann. 517; 27 Ann. 467; 12 R. 414; 25 Ann. 647 (fee reduced from \$3,000 to \$500); 6 Ann. 565. Fee graduated by value of the services rendered. *Stein vs. Bowman*, 9 L. 284.

The opinion of the Court was delivered by

TODD, J. This is a suit to recover of the defendant \$5458, of which amount \$4625 is an account for professional services as an attorney-at-law, and the residue the amount of two written obligations.

The controversy between the parties is confined to the account for professional services. The answer was a general denial and plea of prescription. The jury returned a verdict for the full amount of the demand, less \$275, declared prescribed, and from a judgment on this verdict the defendant has appealed.

It is shown that the plaintiff was the attorney for the defendant for a period of about five years. That his services were rendered in the prosecution and defence of many suits, some of them in both the district and Supreme Courts of the State, several involving large amounts, greatly protracted and severely and even bitterly contested.

Shepherd vs. Dickson.

They were of a character to impose great responsibility on the attorney and to require the exercise of the utmost labor and skill.

The services, we find, were faithfully rendered, and in several instances resulted greatly to the benefit and advantage of the client.

The account is proved by the testimony of the plaintiff, supported by that of the able and efficient judge before whom part of the litigation was conducted, and by three of the leading and most experienced members of the bar; all of whom had more or less personal knowledge of the nature of the services and the character of the litigation in which they were rendered.

Against this array of testimony we have the testimony of but one witness, an attorney of much less experience than the others, who differed with them with respect to only one item of the account.

One of the suits mentioned in the account was a damage suit for \$15,000.

It was attempted to be shown that there was an agreement between plaintiff and defendant to the effect that he, plaintiff, was to prosecute that suit for one-half the amount he might recover on the claim or the judgment to be rendered thereon, and besides was to give the defendant the benefit of his services in all other cases in which she was interested, and connected with the succession of her father, which embraced most of the items in the account. This agreement was not established satisfactorily to our minds.

Such an agreement was rather of an extraordinary character, requiring very strong evidence to support it, whilst the evidence offered was of the weakest kind, and was flatly contradicted.

Proof was offered of the fees charged by other attorneys for similar services in some of the cases mentioned in the account, and which were less than those charged by the plaintiff; and it is contended that plaintiff's charges should be regulated by theirs. We cannot accept such a test of the correctness or incorrectness of plaintiff's account.

These attorneys were as likely to render their services to the defendant gratuitously if they chose, and many and various circumstances may have governed them in fixing their charges, of which we have no knowledge; and besides, that an estimate made by one person for services performed should be held up as a rule for another in the legal profession, is an unheard of proposition.

Again, it is urged that this court is not bound by the opinions of attorneys-at-law touching the question of fees any more than by the opinions of experts in other matters, and the judges may disregard such evidence, and form their conclusions from their own experience

Mulhaupt vs. Enders.

and knowledge. We have, to be sure, the power to do this, but from our personal knowledge of some of the litigation to which the account refers, as members of the court, as well as that derived from an examination of the record, and from the great respect we entertain for the witnesses who have testified on this point, and confidence in their experience and judgment in such matters, we would not feel justified in exercising such power.

PRESCRIPTION.

The jury rejected \$275 of the demand because prescribed, about which no question is now raised.

The plea could have no possible application to any other item of the account unless to the suit for damages of Lizzie Dickson vs. M. Hugh Dickson et als. This is the same suit referred to above, in which there was a contingent fee—the plaintiff to receive one-half that was realized. This suit was decided in October, 1881, and all that was realized by the defendant from her judgment therein was collected in 1883 and 1884.

The fee was not exigible until these collections were made, 32 Ann. 308, and consequently prescription only began from that time.

Judgment affirmed.

No. 179.

MRS. N. T. MULHAUPT AND HUSBAND VS. WILLIAM ENDERS.

Failure of lessor to maintain the thing leased in a condition such as to serve the use for which it is hired, and to make repairs necessary to that end, while it may give the lessee the right to claim a dissolution, or to claim damages resulting from such failure, does not confer upon him the right to continue to use and occupy the premises without compensation; and if, notwithstanding a suit to dissolve, he fails to restore or offer to restore the thing leased to the lessor and continues to use and occupy it, he is liable for the rent during the term of such occupancy.

Where the lessee fails to pay the rent due under such circumstances, the writ of provisional seizure is a lawful remedy, and damages cannot be recovered for its issuance.

A PPEAL from the First District Court, Parish of Caddo.
Taylor, J.

Land & Land for Plaintiffs and Appellees.

J. W. Jones for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Plaintiffs sued for rent due and to become due on a ten years' lease to defendant of a certain building in Shreveport, accom-

Mulhaupt vs. Enders.

panied by a process of provisional seizure under which defendant's property on the premises was taken into custody of the sheriff on the 10th of February, 1885. On the same day, the sheriff, at the instance of plaintiff who advanced the premiums, insured the seized property for \$7,000. On the 15th of February, the property was destroyed by fire.

Thereafter, on March 5th, defendant filed his answer and plea in reconvention, in which he admitted the lease, but averred that the lessor had failed to comply with his obligation to maintain the thing leased in a condition such as to serve the use for which it was hired, and had failed to make repairs necessary for that purpose notwithstanding due demand, in consequence of which he had brought a suit against plaintiffs for annulment of the lease; averred the destruction of the property by fire; set up that the provisional seizure had been wantonly, illegally and tortiously issued; and claimed, as damages, the sum of \$7,600, the value of his property destroyed by said fire and the further sum of \$500 as counsel fees in this suit, confined in a supplemental plea to fees for dissolving the sequestration.

Subsequently, defendant bonded the policies of insurance which had been taken out by the sheriff; voluntarily adjusted his losses by the fire with the insurance companies, receiving in satisfaction the sum of \$5,535 and the debris of the machinery which he sold for \$575.

From a judgment in favor of plaintiffs for \$66.66, amount of rent due, up to the date of the fire, with privilege, and rejecting the reconventional demand, defendant has appealed.

The judgment is certainly correct under the issues and facts of this case.

Notwithstanding his complaints of the unserviceable condition of the premises dating back for several months, and notwithstanding his suit to annul the lease instituted a few weeks before the present action, defendant maintained his occupancy and use of the premises, without even offering to deliver them to plaintiff, and so continued up to the moment of seizure.

It is perfectly clear, therefore, that he was liable for the rent.

Granting that the alleged faults of the lessor might have entitled the lessee to claim a dissolution or damages resulting from such faults, they certainly could not confer upon him the right to occupy the premises without compensation. Now we have before us no issue as to the dissolution of the lease and no claim for damages for any fault of lessor under the lease. Under these circumstances, we regard all the evidence on the subject of the condition of the premises and the neces-

Chaffe & Sons vs. Trezevant et als.

sity for repairs as irrelevant; for, conceding all that plaintiff claims, its only effect would be to entitle him to claim dissolution of the lease on restoring or tendering the premises to the lessor, or to claim damages for non-repair; but if he continued voluntarily to use and occupy the premises without even offering to restore them, his suit for dissolution could not dispense him from paying the rent during such occupancy.

The judgment in favor of plaintiff, confined as it was to the term of actual occupancy, was manifestly correct.

From this it conclusively appears that the writ of provisional seizure was lawfully issued, and the damages claimed on the charge that it was wanton and malicious have no foundation.

In any event defendant having, under the policies of insurance, voluntarily accepted a certain sum much less than the face of the policies as the value of his goods destroyed, could not be heard to claim a greater amount on that account from plaintiff.

The writ of provisional seizure having been lawfully issued and sustained, of course the claim for counsel fees vanishes.

Judgment affirmed.

No. 176.

JOHN CHAFFE & SONS VS. P. J. TREZEVANT ET ALS.

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1. A contract entered into with the State Board of Engineers, under act No. 7 of 1884, for cutting the bends and straightening certain navigable watercourses in this State, the expense of which is borne by private and interested individuals, and under the circumstances detailed in opinion, is a private enterprise, and cannot be maintained or enforced on the pretence that it is in the exercise of the police power of the State, or that it finds sanction in the levee laws of the State.

A PPEAL from the First District Court, Parish of Caddo.
Taylor, J.

Alexander & Blanchard, for Plaintiffs and Appellants:

1. Private property shall not be taken nor damaged for public purposes, without just and adequate compensation being first paid." Constitution of the State of Louisiana, art. 156, C. C. 497, 2628, 2629.
 2. The decisions in this State go only to the extent of holding that the State, through its proper officers, has the exclusive right to determine the propriety, location and mode of building public levees, and that for any damage incidentally caused by such work, the State is not liable.
- All of these decisions are based upon the laws which impose a servitude upon the lands of all riparian owners in this State. C. C. 665, 457, 861, 862; 7 Ann. 150; 11 Ann. 165; 12 Ann. 185; 13 Ann. 401; 34 Ann. 494.

Chaffé & Sons vs. Tresevant et al.

3. It has been held that for houses actually taken and destroyed in the course of construction of a public levee, the owners were entitled to compensation. 12 Ann. 185.

Also that for land taken and damaged in building a dam across the mouth of a bayou, under the supervision of the State Engineer, and in accordance with an act of the Legislature, the owner was entitled to compensation, and could maintain his rights by injunction. 13 Ann. 401.

Both of these cases were decided under the Constitution of 1852, which contained no such provision as art. 156 of the Constitution of 1879.

4. The *Beas* case is not applicable to this. In that case no part of his place was actually taken. The damages were purely incidental to the construction of the levee, and were occasioned, as plaintiff claimed, by the failure or omission of the State engineers to put it on the front of his plantation, whereas they located it in the rear.

In this case the plaintiff's plantation was to be severed by cutting a canal through the middle of it, and turning the channel of Red river through it, thus taking a large body of cultivated land, and destroying his gin-house, store house, dwelling, cabin, fences and other improvements. The damage is direct and immediate.

5. The case of *Green vs. Swift*, 47 Cal. 536, is not against us, but on the contrary supports our position.

It was there held that the damage suffered by plaintiff was incidental only to the prosecution of a lawful public work, for which he was entitled to no compensation. But the opinion further states that the act of the legislature was constitutional, because it provided for compensation to all persons from whom property was directly taken by the new channel of the river.

6. An act of the legislature which authorizes the taking of private property for public use is unconstitutional, unless provision is made in it for compensation. 2 Gray 1; 103 Mass. 120; 127 Mass. 50; (24 American Law Reports 338).

Wise & Herndon and *Young & Thatcher*, for Defendants and Appellees :

The opinion of the court was delivered by

WATKINS, J. Act No. 7 of 1884, provides that whenever the levee commissioners of any district, or the police jury of a parish not included within any levee district, shall request the State Board of Engineers to make an examination, or survey of any stream therein, said board are required, when such examination is made, and if thereafter they think the navigation of such streams will be improved or the land will be protected from overflow by cutting across the bend, and straightening such stream, "they are hereby required to have the work done under the laws and regulations governing the construction of the public levees.

Arising under this statute are the following substantial facts :

On the 20th of November, 1885, the State Board of Engineers, at the request of the police juries of Bossier and Caddo parishes, caused an examination to be made of a portion of Red River, a navigable stream, and recommended that ditches be cut across the bends at certain points, and particularly the one on which is situated plaintiff's Pascagoula plantation, worth about \$20,000.

In pursuance of said report a contract was made with defendants, duly approved by the Governor, to cut the canal across the said bend of the river, and they were proceeding to carry it out when met with plaintiffs' injunction.

The report upon which their contract is based is that "considering all the circumstances of the case as affecting protection from overflow, it will be *advantageous* to cut through the bend above-mentioned."

The evidence shows that defendants had entered upon plaintiffs' Pascagoula plantation with the avowed intent to cut a canal across the bend of the river, in order to divert its course from the natural channel, and cause it to flow across, and through said plantation, in its entire length, immediately through the cultivable portion, and most valuable buildings and improvements thereon, whereby it would have been completely severed by the stream, leaving an island on one side, consisting of about 500 acres, not susceptible of natural drainage, and about 300 acres on the opposite side.

The witnesses concur in the opinion that the direct and immediate effect of this deflecting the bend of the river and turning the flow of the stream across plaintiffs' land would be to inflict on them a loss of \$8000 or more.

Plaintiffs' injunction prevented the cutting of the canal.

The statute in question made no provision for compensation to individuals suffering injury, and none was tendered plaintiffs.

Under this state of facts they insist that this statute violates arts. 155 and 156 of the State Constitution, and that all acts done under it are null and void; also, that the particular work in question was in reality a *private* enterprise, and not one of public utility.

The defendants argue that, in the exercise of its general police power, the Legislature had a constitutional right to enact the law in question, and, in pursuance thereof, the contract for cutting a canal through plaintiffs' plantation for the purposes recited, was a legal and enforceable one, and plaintiffs are not entitled to compensation for any injury they might sustain thereby.

The learned judge of the court below likens the right sought to be exercised to the taking of the property of individuals to prevent the spread of a conflagration, a pestilence, or the construction of levees upon lands adjacent to navigable watercourses to prevent inundation, no compensation being required.

They rest upon the maxim that the public safety is the supreme law, and it must be first consulted. The interest of the citizen being

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subordinate to that of the State, the former must yield in case of conflict.

I.

What the police power of a State is it is difficult to determine with precision. It is generally said to extend to the protection of the lives, health and property of the citizen and the preservation of good order and good morals; to the promotion of domestic tranquility and the comfort and quiet of all persons.

By the general police power of a State persons and property are "subject to all kinds of *burdens* and *restraints* in order to secure the general comfort, health and prosperity of the people."

It has been well said that "it is a settled principle, growing out of the nature of well-ordered society, that every holder of property however absolute, and unqualified may be his title, holds it under the implied liability that his *use* of it shall not be *injurious* to the equal enjoyment of others, having an equal right to the enjoyment of their property, nor *injurious* to the rights of the community." *Bass vs State*, 34 Ann. 494.

Citing 7 Cush. 53, *Commonwealth vs. Olger*, plaintiffs allege that defendants were employed and engaged by private individuals to do the work of cutting the bend across the petitioners' plantation, and that any pretended contract with the State, or its officials, was a mere subterfuge, and that the funds with which to pay for same were supplied and furnished solely by the interested persons whose lands lie above Pascagoula bend.

Quite a number of citizens of the immediate vicinity, alleging themselves to be interested in the question, intervene and adopt the allegations of plaintiffs' petition.

They allege that the cutting of Pascagoula bend is not necessary for the purpose of improving the navigation of Red River, or for the general protection from overflow, nor was it so intended by defendants.

"On the contrary, they charge specially, and allege that it was a job, or scheme of a few individuals owning lands above the said bend to relieve and benefit themselves at the expense of the plaintiffs and intervenors, their neighbors, who lived below them."

The plantations of all the intervenors are shown to be valuable and above overflow, and are situated below Pascagoula.

The cutting of a canal through it, as proposed, would cause the river to rise higher, and subject them to overflow. It would increase the current, and cause the banks of the river to cave. From these two causes great damage would be suffered by them, to the extent of many

thousands of dollars. It would also cause a large portion of plaintiffs' plantation to overflow annually.

The estimated cost of cutting Pascagoula bend is \$1700, and about \$3600 for the cutting of three bends included in contract. This amount, except \$100 appropriated by the State, was to be paid by private individuals, and was actually subscribed by them.

The report of the State Board of Engineers states substantially that the floods in Red River, in the neighborhood of Tone's bayou, have reached an unusual height, overflowing the natural banks of the river, and requiring additions to the height and extent of the levees there, beyond the means of the State and sub-district to undertake; and "*it is believed that the cutting across of certain bends of Red River, below the region of the high water, would locally reduce the height of floods, and thus tend to prevent overflow * * ** but that such a system *should not be made general, nor be greatly extended, until time has been given to ascertain the changes actually resulting from a few such cuts, and for the bed of the river to adjust itself to new conditions. * ** Our conclusion is that, considering all the circumstances of the case as affecting protection from overflow it will be *advantageous* to cut through the bends above-mentioned. * * We learn, however, that funds for construction of the work have been raised by subscription, and arrangements have been made by which the cost to the State will be only nominal, or say the round sum of one hundred dollars."

Under this state of facts it seems to us clear that the enterprise enjoined is a private one—only an experiment, inaugurated in the interest of a few private individuals, for their own advantage. We are, therefore, dispensed from discussing the serious constitutional questions entertained by the judge *a quo*, in his opinion.

We do not think that there is involved, in this case, any question of the exercise of the police power of the State, and hence there is no necessity for us to pass upon the constitutionality of the statute in question.

In our opinion the work contracted for was not to be done in pursuance of the laws and regulations governing the construction of the public levees.

Much reliance has been placed upon the opinion of this court in *Bass vs. State*, 34 Ann. 494, and *Green vs. Swift*, 47 Cal. 536.

The latter is not in point, for reasons above assigned, and the former finds support in the theory that servitudes are imposed for the public utility, and relate to the space which is left for the public use by the adjacent proprietors, on the shores of navigable streams, and for making

and repairing levees. R. C. C. 457; 21 Ann. 165; 4 Ann. 73; 18 La. 295; 6 Ann. 77; 7 Ann. 150; 111 U. S. 704.

If, in this case, the plaintiffs sustain loss it cannot be said that it must be attributed to an unfortunate investment upon a caving bank. 11 Ann. 166; R. C. C. 665.

The work projected cannot be defended upon the ground that it was necessary to confine the waters and shelter the inhabitants from overflow and inundation. 12 Ann. 655.

Each proprietor is personally interested in his own protection, as well as his neighbors, yet, as the property situated upon navigable streams, that are subject to overflow, are of little value without levees, the Legislature has the power to compel such riparian proprietors to make levees in front of their plantations without any further compensation than the increased value which such works would confer upon their lands. The levee laws are not intended to apply to lands which are entirely above overflow.

It has been held that the levee system of Louisiana has been devised and maintained for the preservation of *arable* lands from overflow and inundation.

Each levee has been considered as a continuation of one great system, or plan for the preservation of the *cultivable fields* of the inhabitants.

It has never, heretofore, been deemed a part of the levee system that a proprietor was bound to yield a part of his soil for the construction of levees for the purpose of reclaiming overflowed lands, where it was not originally necessary to prevent his land from inundation, and when he is not benefited by them. If this was permitted, money would be taken from him without an equivalent, to enrich others. "The principle of such a system would be to make great ameliorations, benefitting a large number of people at the expense of the few who might own property in the immediate vicinity of the works requisite to effect these improvements.

"There is no principle in the levee laws in this State which justifies this theory." *Cash vs. Whitcomb*, 13 Ann.

In our opinion defendants' theory finds no application or sanction in the levee laws of this State. The work enjoined is not such a work of public improvement as is contemplated in R. S. 1390, and the enforcement of defendants' contract would operate a direct and invidious distinction in favor of certain interested individuals, and to the great detriment of plaintiffs and intervenors, without previous adequate compensation paid.

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Grant everything that the report announces, and the contract under it cannot be maintained. It only suggest the propriety, convenience and utility the cutting of this canal would subserve, and these suggestions negative the idea of the existence of any great necessity, or impending danger, the cutting of this canal would prevent or avert.

The inauguration of such a system, as is clearly contemplated, would be destructive of the most valuable plantations in the vicinity of Pascagoula bend, if not of Red River valley.

The plaintiffs' injunction should have been maintained.

It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided, annulled and reversed, and that plaintiffs' injunction be sustained and made perpetual, and that the defendants be taxed with the cost in both courts.

Judgment reversed.

No. 183.

A. GOODWILL ET AL. VS. POLICE JURY OF BOSSIER PARISH ET AL.

The police juries of the several parishes have no power to interfere with or obstruct navigation on any navigable watercourse, by the construction of bridges without draw across the same or by the erection of embankments therein.

A watercourse will be held to be a navigable stream when in its natural state it is such as to afford a channel for useful commerce.

That condition is not affected by the formation thereon of natural barriers resulting from sand bars or rafts formed by the accumulation of timber.

A PPEAL from the Second District Court, Parish of Bossier.
Drew, J.

Land & Land for Plaintiffs and Appellants :

1. Police juries may be prohibited by a writ of injunction from obstructing any stream susceptible of navigation. *Ingram vs. Police Jury*, 20 Ann. 296.
2. Police juries have no power to construct public levees. The law gives them simply the management and control of completed public levees. Acts 88 of 1880; 104 of 1882; 84 of 1884.
3. Their power over non-navigable streams is limited to cases where it is necessary to fill up the same for the purpose of carrying the public highways over such streams; provided no injury be thereby occasioned to the neighboring inhabitants. R. S. of 1870, sec. 2743-13.
4. When the closing of a non-navigable stream by a police jury would destroy or greatly impair the navigation of a neighboring stream, and thereby inflict injury on the public, such closure is not authorized by the above statute. Police juries cannot do indirectly what they are prohibited from doing directly.
5. The right of the State to close or obstruct streams is confined to such as are of no value to the public for purposes of navigation. *Boykin & Long vs. W. A. Shafer*, 13 Ann. 129.
6. "Mack's Bayou," which defendants have been enjoined from closing, was by Act 175 of

Goodwill et al. vs. Police Jury et al.

1867, declared to be susceptible of navigation for purposes of trade and commerce and the levying of the same was forbidden by Act 63 of 1876, because it was an essential feeder of Lake Bisteneau, an important navigable stream.

7. The evidence shows that, as a matter of fact, "Mack's Bayou" is susceptible of navigation by small steamboats, flats and other craft. The true test of the navigability of a stream does not depend on the mode by which commerce is carried on nor the difficulties attending navigation. 20 Wallace, 430.

Snider & Smith and J. A. Lowry for Defendants and Appellees:

1. Act No. 63 of 1876 is a nullity in this, it has no title. Art. 114, Const. 1868; art. 29 of Const. of 1879.
2. If Act No. 63 of 1876 be a nullity then, under general powers of police juries, the police jury of Bossier parish had the power to authorize the construction of a dirt bridge across Mack's Bayou, if it be not navigable. R. S. of 1870, sec. 2743, Nos. 2 and 13; Act No. 87 of 1882; sec. 1 of Act 84 of 1884; Act 175 of 1867.
3. An action will not lie for damages resulting from a lawful act, it is *damnum absque injuria*. *Donovan vs. City of New Orleans*, 11 Ann. 711; *Reynolds vs. Shreveport*, 13 Ann. 426; *New Orleans vs. Wandemere*, 12 Ann. 84; *Orr vs. Home Ins. Co.*, 12 Ann. 255; *Base vs. State*, 34 Ann. 494; *Charles River Bridge vs. Warren Bridge*, 7 Pick. 344. and 11 Peters; U. S. Reports, 420; *Cooley on Const. Lim.*: 481, 676.

The opinion of the Court was delivered by

POCHÉ, J. This suit involves the power of the police jury of Bossier parish to close Mack's bayou, which is a stream flowing from Red river and emptying through several other bayous into lake Bisteneau in said parish.

Plaintiffs in injunction are residents of Minden, a town in Webster, an adjoining parish, situated a short distance from the head water navigation of Dorchest bayou, which empties into lake Bisteneau at its northeastern extremity.

Alleging that Mack's bayou is a navigable stream, and that it is, in addition, one of the principal sources of water for, or feeders of, Lake Bisteneau, which affords to this section of country the only navigable highway to Red river, and through it to the great markets of the country and of the world, they claim the legal right to prevent the closing of the same.

They are appellants from a judgment, based on the verdict of a jury, dissolving their injunction and dismissing their action.

The defence is a denial that Mack's bayou is a navigable stream within the legal meaning of the term, and the consequent legal authority in the police jury to exercise absolute control over it for the purposes of public highways, by means of bridges constructed over it or of embankments erected in it.

The pivotal question in this case, therefore, consists in ascertaining whether the bayou is or not a navigable stream. All the sources of

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legal authority in the police jury to control that stream, as urged by defendants, are expressly conditioned on the fact that the stream be not susceptible of navigation for the purposes of commerce.

Section 2743 of the Revised Statutes of 1870, par. 13, empowers police juries to "cause any water course *which is not navigable* (italics are ours) to be filled up for the purpose of carrying the public highways over the same; provided that no injury be thereby occasioned to the neighboring inhabitants."

The proviso of Act 87 of 1882 confers the power to certain corporations with the consent of police juries where navigation terminates, and of police juries of adjoining parishes interested, to bridge without a draw such waters within ten miles of the terminus of high water navigation on watercourses which cannot be navigated except at high water.

Section 1 of Act 84 of 1884 has exclusive reference to the control of police juries over completed levees erected under the general power of the State, in keeping with the levee system which prevails therein, and over public roads within the limits of their respective parishes.

It appears that no provision in any of these enactments can be construed as conferring the power on police juries to interfere with, or obstruct in any manner, navigation on any navigable watercourse in this State, and much less to close, as proposed in this case, any such stream.

And we may add that the attempt of the State to delegate such power to police juries, or to any other State functionary or authority, would be defeated on proper showing by the courts, as violative of the letter and spirit of the Act of Congress by which Louisiana was admitted into the Union. Stat. at large, vol. 2, pp. 642 and 706.

Our reports are somewhat meagre of information on this important subject. We find but two cases which have some bearing on this question.

In the case of Boykin and Lang, 13 Ann. 129, this Court found that while bayou Black, in the parish of Terrebonne, was a navigable stream by nature, its use for commerce had been at first impeded by the accumulation of timber within its banks, and that by the subsequent removal of those impediments, the stream has lost its utility for navigation by the too rapid discharge of its waters. Hence the court sanctioned as a legal means to enhance the navigation of the bayou the construction of locks by an individual, and maintained his consequent right to charge and collect tolls in compensation therefor. The court rested its conclusions very guardedly on the fact well shown that the

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proposed works would not impede, but would positively improve navigation on that stream.

In the case of *Ingram vs. Police Jury of St. Tammany*, 20 Ann. 226, the court enjoined the defendant from erecting a bridge across the Bogue Falia river, because the construction of the bridge would impede navigation on a navigable stream. The injunction was granted at the instance of a private individual, who showed that he was interested in the navigation of the watercourse.

It must be noted that in either of these cases the police jury did not attempt to close the watercourses.

From these and other authorities, which we have consulted, we reach the conclusion that the navigability of a watercourse depends upon the fact whether the river, in its natural state, is such as that it affords a channel for useful commerce, although its free navigation may be at times encompassed with difficulties by reason of natural barriers such as rapids and sandbars or accumulation of timber forming rafts.

The Supreme Court of the United States held that a small stream whose navigability was materially embarrassed by rocks and rapids, and could only be navigated by means of Durham boats, and by means of locks and other artificial apparatus, was a navigable stream within the legal meaning of the term. The case of the *Montello*, 20 Wallace 430, and authorities therein cited.

The preponderance of the evidence in this record, although it is conflicting, affords satisfactory proof that Mack's bayou is by its nature a navigable stream, and that it has been frequently and for many years navigated by small steamboats and flatboats in the transportation of cotton, merchandise and other commodities.

Under the plainest rules of evidence the negative testimony of defendant's witnesses who say that the bayou is not navigable, and that in their recollection it has never been navigated for the purposes of commerce, must yield before the positive testimony of witnesses of unimpeached veracity, who state, as captains and pilots of steamboats, that they have navigated the stream, giving the names, dimensions and capacities of the vessels used in the trade, and the years in which they thus used the watercourse for the purposes of commerce. They also give the dimensions of the stream at the point where it flows out of Red river, at which place it is 120 feet in width and it has 20 feet in depth during the highest water tide; and it is at that point that the proposed embankment is to be thrown.

From the record we find that the country surrounding the town of

Tutorship of Minor Heirs of Byland.

Minden have two water highways to Red River, both by the Dorcheat River and Lake Bisteneau, one of the routes through that lake and through Loggy bayou into the Red, the other also through the Dorcheat and that lake thence in a northwestern direction through Swan Lake, Red Chute Lake, Cross bayou and Mack's bayou, into the Red at a point considerably above the latter, and not remote from the city of Shreveport.

Through Mack's bayou as an outlet, Red river pours a large volume of water through the streams above-mentioned, thus feeding Lake Bisteneau, and thus enhancing its navigation, which would be materially affected and much reduced in facilities by the closing of Mack's bayou.

We thus perceive the great utility which was naturally expected from that bayou in that double system of navigation, and we hold that it does not lie within the power of a police jury to alter or defeat the object to be accomplished.

The navigability of the bayou is not affected by its present condition, which is the result of the accumulation of timber which has floated and stopped against numerous bridges which had been built across the bayou, with or without legal authority, it is immaterial, and have formed rafts which at the present time seriously obstruct navigation thereon, and to some extent impede the free flow of waters through its banks.

It is therefore ordered that the judgment of the lower court be annulled, avoided and reversed; that the verdict of the jury be set aside, and it is now ordered that plaintiffs do have and recover judgment perpetuating the injunction to prohibit the police jury of Bossier parish from closing Mack's bayou in said parish by means of the embankment proposed to be thrown therein, at or near the point where it flows out of Red river, and for costs in both courts.

No. 185.

TUTORSHIP OF MINOR HEIRS OF T. AND E. BYLAND.—WALLING HEIRS
OPPONENTS.

Where a judgment is rendered on an opposition to an account of a tutor charging him with a personal liability to the heirs represented by him, an appeal from such judgment taken by him in his capacity as tutor only, will not be entertained.

An appearance by an attorney for a defendant in a cause, except for the purpose of excepting to the citation, cures the want of citation.

Tutorship of Minor Heirs of Byland.

When the defendant in a suit files a plea to the jurisdiction of the court and the plea is overruled and a judgment rendered, and no appeal is taken, the question of jurisdiction becomes *res adjudicata*, and the judgment cannot in a collateral proceeding be treated as an absolute nullity for want of jurisdiction in the court rendering it.

A PPEAL from the First District Court, Parish of Caddo.
Taylor, J.

J. H. Shepherd for the Tutor, Appellant:

1. An administrator may urge any defense he has, whether by general denial, confession and avoidance, or peremptory exception. 1 R. 533; 5 R. 123; 3 Ann. 223; 6 Ann. 54.
2. The petition must contain a clear and concise statement of the object of the demand as well as the nature of his title or the cause of action on which it is founded. C. P., 173; Pickett vs. Vance, 14 Ann. 668.

There must be a definite statement in substance and grounds of action, and the relief sought must be expressed with precision; vague and indefinite allegations of indebtedness cannot support a petition, and loose and indefinite allegations will not be noticed. 13 Ann. 374; 14 Ann. 797; Lamorere vs. Cox, 32 Ann. 1045.

A party must describe a note, with much greater certainty must he describe the amount due him. 27 Ann. 225.

Where a plaintiff or opponent to an administrator's or tutor's account fails to state the amount he claims, but merely refers to a judgment; but does not annex the same to his opposition or make it a part thereof, an exception of no cause of action should be sustained. Lamorere vs. Cox, 32 Ann. 1045. A party cannot be admitted to prove what he has not alleged. 9 Ann. 124.

3. A judgment rendered against a party who has neither been cited nor appeared, is an absolute nullity. 5 N. S. 429; 7 N. S. 161; 1 R. 80; 13 Ann. 27; 21 Ann. 27.

Nothing will cure want of citation except appearing and answering to the merits. 17 Ann. 91; 21 Ann. 438.

4. Where a party denies under oath that a plea filed in his name was filed without authority and the allegation is borne out by the proof, the act of the attorney is not binding. 15 —. 569; Louque, 69, No. 4.
5. A judgment rendered on default in absence of parties by a justice of the peace, is inoperative until legal notification in accordance with art. 1131, C. P. If, therefore, no *fi. fa.* could issue until the service of the requisite notice, the holder of such a judgment, who neither alleges or proves notice or previous presentation for approval of claim, ought not to be permitted to collect said judgment by an opposition to a tutor's or administrator's account, otherwise all appeal is denied.
6. A judgment rendered by a court without jurisdiction is absolutely null. 26 Ann. 127; 28 Ann. 744; 27 Ann. 630; 30 Ann. 130, 793.

Alexander & Blanchard and *J. B. Slaterry* for Opponents, Appellees:

Opponents' claim is for \$97.18 and interest, and there being no other opposition, this is the only amount in controversy, and the appeal should be dismissed. 37 Ann. 429; 35 Ann. 1025; 34 Ann. 585.

A tutor appealing from a judgment in his official capacity only, cannot contest on appeal items in said judgment rendered against him individually. 37 Ann. 126; 33 Ann. 1319; 32 Ann. 290.

When estates are in the possession of minor heirs, debts due by such estates must be sued for before the courts of ordinary jurisdiction. C. P. 996; 6 N. S. 519; 30 Ann. 93; 35 Ann. 826; 36 Ann. 744.

Where a defendant has not been cited, but appears in court and contests the cause on any other ground than the want of citation, the defect is cured. 9 M. 497; 2 L. 286; 31 Ann. 540; 35 Ann. 130.

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The opinion of the Court was delivered by

TODD, J. This appeal was from a judgment sustaining an opposition to a tutor's account.

There is a claim to dismiss the appeal suggested in the appellees.

First, on the ground that the opposition is made by creditors whose claim amounts to only \$96.18 principal; and secondly, that the appeal is taken by the accountant Toombs as tutor, whereas the judgment against him, beyond the recognition of the debt of opponents, is against him personally, and he has not appealed personally.

I.

The first ground for dismissal is not good.

The amount of funds or property in the hands of the tutor belonging to the tutorship exceeds \$2,000, and this fact determines our jurisdiction, and not the amount of the opponents' or creditors' claim.

II.

The controversy so far as relates to the demand to have the claim of the opponents recognized as a just claim, and placed upon the account as such, is one exclusively between the creditors and Toombs as tutor, and the judgment of the lower court to this extent is appealable, but in so far as the opposition and the judgment maintaining it adds to the liability and debt of the tutor to the heirs he represents, to that extent it is in favor of the heirs and against the accountant personally, and from which he should have appealed in his personal capacity.

The appeal, except as relates to the claim and its recognition, must therefore be dismissed, and to that extent the appeal is dismissed, and in other respects maintained.

ON THE MERITS.

There was an exception to the opposition on three grounds:

1. That there was no cause of action.
2. *Res adjudicata*.
3. Prescription.

Under the plea of no cause of action, it is urged that the claim of the opponents purports to be based on a judgment rendered before a justice of the peace, but the amount and number of judgment are not given.

The title of the suit is given, the name of the justice, the ward and parish are stated. Besides, in the rule taken against the tutor to compel the rendition of the account, there is a complete description of the judgment as to amount due, and in short in every particular the opposition and rule for accounts are but parts of the same proceedings. The omission of the amount was not, therefore, a fatal defect.

It was contended, however, that the judgment in question was rendered without citation. There appears to have been a citation issued, but no return on the same. It is, however, shown from the record or minutes of the proceeding that an attorney appeared for the defendants and filed a plea to the jurisdiction, which was overruled. The appearance of the attorney supplied or cured the want of citation. 21 Ann. 27; 23 Ann. 803; 31 Ann. 540; 35 Ann. 130.

Again it is urged that the magistrate court was without jurisdiction to render the jurisdiction.

As stated above, the plea to the jurisdiction was filed in the very suit in which the judgment was rendered and in the court before which the case was pending, and the court held that it had jurisdiction and overruled the plea, and no appeal was taken therefrom. The ruling on this point was therefore final and conclusive.

2d. We find nothing in the record upon which to found the plea of *res adjudicata*, and there is no force in it.

3d. The judgment was not prescribed, since ten years had not elapsed since its rendition. The plea of prescription was properly overruled.

For the reason given it is therefore ordered, adjudged and decreed, that the appeal from the judgment of the lower court, so far as said judgment adjudicates a personal liability from. A. S. Toombs to the heirs represented by him be dismissed, and in all other respects the judgment be affirmed at the cost of the appellant.

No. 191.

JOHN G. ORIOL, TUTOR, ET AL. VS. E. B. HERNDON, ET AL.

1. When a community is unliquidated and owes debts, the administration of the estate of the husband involves that of the community, and the community property may be validly sold by the administrator of the husband's succession for the payment of community debts.
2. In case of sale by an administrator to pay debts, rules applicable to alienation of minor's property do not apply, and citation to heirs is unnecessary.

38	759
114	389
38	759
124	682

A PPEAL from the First District Court, Parish of Caddo.
Taylor, J.

R. J. Looney and J. H. Shepherd, for Plaintiffs and Appellants.

Alexander & Blanchard, for Defendants and Appellees:

The opinion of the Court was delivered by

FENNER, J. Salvator and Ellen Justi were husband and wife, living under the *regime* of the community.

Railroad Company vs. Sheriff.

The wife died in 1872, and the husband about one year later.

The wife's succession was never opened, nor was any tutor to the minor children ever qualified until very recently.

The husband's succession was opened, and the real estate involved in this suit, which stood in his name, but was community property, was inventoried in his succession, and constituted the sole asset appearing on said inventory.

The administrator filed a tableau of debts, amongst which appeared taxes and debts arising during the existence of the community, and due by it; represented that he had no means to pay the debts; that a sale of the property was necessary in order to pay the same; and obtained an order of sale accordingly. After due proceedings, the sale was made and the property adjudicated to defendant herein, who has since held the same as owner.

The plaintiffs, as heirs of Salvator and Ellen Justi, bring this suit to recover the property on the ground of nullity of the above proceedings and sale.

The grounds of nullity urged, are :

1st. That the wife's interest in community property cannot be sold under proceedings had in the succession of the husband.

Where the community is unliquidated and owes debts, the contrary has been held too often to require more than a citation of authorities. *Durham vs. Williams*, 32 Ann. 162; *Succession Cason*, Id. 792; *Succession Boyer*, 36 Ann. 515; *Killilea vs. Barrett*, 37 Ann. 865; *Succession Bright*, 38 Ann. 141; *Succession McLean*, 12 Ann. 222.

2d. That the heirs were not cited or made parties.

In case of a sale by an administrator to pay debts, it has been frequently held that the rules applicable to the alienation of minor's property do not apply, and that citation to the heirs is unnecessary. *Carter vs. McManus*, 15 Ann. 676; Id. 15 Ann, 641; *Vincent vs. D'Aubique*, 19 Ann. 528; *Davidson vs. Davidson*, 28 Ann. 269. The cases in 9 La. 580, and 1 Rob. 381. cited by plaintiffs, do not apply.

Judgment affirmed.

No. 193.

VICKSBURG, SHREVEPORT AND PACIFIC RAILROAD VS. JOHN LAKE,
SHERIFF AND EX-OFFICIO TAX COLLECTOR.

The action of the police jury, sitting as a board of reviewers, is of a *quasi* judicial character, and should not be disturbed except for cogent reasons and upon clear and satisfactory proof of error in assessment.

A PPEAL from the First District Court, Parish of Caddo.
Taylor, J.

Wise & Herndon for Plaintiff and Appellant.

Land & Land and *M. S. Crain*, District Attorney, for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. The plaintiff company claim that a portion of their line of railway, situated in the parish of Caddo, with its rails, road-beds, etc., being of about twenty miles in length, was by the assessing officers thereof placed upon the parish assessment rolls for the year 1885, at a valuation of \$170,000, and that said assessment and valuation is erroneous and greatly in excess of the actual cash value of same, "and is not equal and uniform, with assessments of similar property situated in other parts of the State of Louisiana, of equal or greater value.

They allege the true value of their property to be not more than \$4,000 per mile, i. e., \$80,000 for that section of their railway and appurtenances, and they pray that the assessment be reduced to that rate per mile.

The defendant avers that the plaintiffs' property was lawfully and fairly assessed for the sum of \$170,000, "the actual cash value of its road-bed, iron, tracks, superstructures and other property in Caddo parish, subject to taxation, other than lands and lots assessed separately."

Quite a number of witnesses were interrogated with regard to the net revenues and running expenses of the road; also with regard to the date of its construction, the cost of its construction, present condition and approximate value.

Plaintiffs introduced in evidence a certificate from the Auditor of Public Accounts, showing in tabulated form what are the assessments for the year 1885 of different railways that traverse different parishes of the State, viz: Illinois Central, Mississippi Valley, Northeastern, Louisiana Western and Texas Pacific; but it does not include their own.

The assessment of plaintiffs' property in Caddo was, in 1884, as follows, viz:

VICKSBURG, SHREVEPORT AND PACIFIC.—1884.

City property.....	\$ 6,400 00
Lands.....	20,000 00
Bridge.....	100,000 00
Track, etc.....	100,000 00
	<hr/>
	\$226,400 00

Railroad Company vs. Sheriff.

The assessment for 1885, viz :

Value of lands.....	\$ 30,000 00
City property.....	8,900 00
Railroad track, etc.....	170,000 00
	<hr/>
	\$208,900 00

(Bridge not on roll, excluded in road-bed).

This shows that, notwithstanding the value of the bridge—separately assessed in 1884—entered into the assessment of plaintiffs' "railroad track, etc.," in 1885, the *total* assessment of their property had been reduced by the sum of \$17,500.

The evidence discloses that plaintiffs made no effort to have the 1884 assessment reduced, and it may be fairly assumed that same was satisfactory.

The learned district judge, in his written opinion, says: "There can be no doubt that this bridge has increased the value of that part of the plaintiffs' line located in this parish.

"Without the bridge this part is valueless, except for the rent it pays, and is virtually a mere fragment of a road beginning at Shreveport and ending in an old field in Texas. It has not been operated by the plaintiffs' company for many years, and is now leased by the Texas and Pacific Company as an inlet into Shreveport from the west and north. The construction of the bridge has connected plaintiffs' system of roads east of the Mississippi and Red rivers, and greatly facilitated the handling of all freight and passenger traffic, which they may secure from the vast region west of the latter. In short the bridge supplies the missing link in a chain of railroads connecting and extending eastward from this point to the Atlantic, and westward to the Pacific oceans.

"In view of these facts, it is idle for plaintiffs to deny that the bridge has increased the value of their road in this parish. If it has not, it is difficult to understand why they should expend so large a sum as \$300,000 in its construction.

"The police jury properly considered the bridge as a factor in fixing the general value of the track lying within this parish. * * They could not have done otherwise and not have violated the law."

Again: "It sometimes happens that a railroad is more valuable in one parish than in another, or more valuable in one than in another part of same parish.

"A great many circumstances go to produce this inequality of value. It may be better constructed, or more recently repaired, or traverse a more populous and productive country, or terminate in a thriving

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town, or have better stations, or terminal facilities at one part than at another.

"In fact, a great number of circumstances might be cited as giving a local value to a road greater at one point along its line than at others in the same parish.

"The taxing authorities of every parish must take these things into consideration in fixing values, for the obvious reason that they are elements of value, and their duty under the law is to assess this value in the parish."

Again: "The assessor of Caddo has nothing to do with the valuation put upon railroads in the other parishes, nor can he regulate his valuation by an average of the several valuations of the different parishes, or by an approximation based upon the general value of a road as an entirety.

"This can be done only by a State board of equalization."

Again: "The board of review took into consideration all these different elements of value. It did not select any one mile of the twenty miles of road, as for instance that mile on which the bridge, depot, round-house and turn-table are situated—which, of course, is worth more than ten times as much as any other mile—and estimate the value of the whole road according to the value of this particular mile.

"They assessed the whole twenty miles at \$170,000, and found that this amount represented the sum of the values of the several elements considered of—in other words the value of the track and its appurtenances which included the bridge."

The judge *a quo* heard all the witnesses and carefully weighed and considered their evidence. He concludes his opinion by saying: "The valuation of this property by the assessor was reviewed by the police jury, a body of men supposed to be acquainted with the value of the different subjects of taxation in the parish.

"Their action in the premises is *quasi* judicial, and is presumed to be based on evidence and inquiry.

"It ought not to be disturbed unless proved to be erroneous, and I cannot say that such proof has been administered in this case."

We have read carefully all the evidence in the record, and it has convinced us of the correctness of his conclusions.

Judgment affirmed.

McKenzie et al. vs. Bacon et al.

No. 187.

JULIA C. MCKENZIE ET AL. VS. GABRIELLA BACON ET AL.

A suit for the dissolution of the sale of immovable property, coupled with a demand for possession, is not a purely personal action, as it involves mainly the ownership of an immovable; it partakes of the nature of a proceeding *in rem*.

Hence such a suit may properly be brought in the parish where the property is situated, and in such a case non-resident defendants may properly be cited through a curator *ad hoc* without the necessity of subjecting their property under the control of the court by process of attachment.

A PPEAL from the First District Court, Parish of Caddo.
Taylor, J.

H. C. Miller, F. L. Richardson and Watkins & Watkins, for Plaintiffs and Appellants:

1. An action for the revendication of real property is properly brought before the court having jurisdiction over the property. C. P. art. 163; C. C. 56.
2. Absent defendants in such an action may be represented by a curator *ad hoc*. 6 Ann. 648.
3. If the absent defendant is not a necessary party, the suit should not be dismissed as to other defendants who have been cited and have not pleaded to the jurisdiction. *Ibid*.
4. An action for revendication of real property is not a personal action. C. P. art. 41.
5. "A curator *ad hoc* may be appointed, if the absentee becomes a necessary party to a suit between other parties lawfully in court. Field vs. Delta, 19 Ann 36.

T. T. Land, curator *ad hoc*.

Alexander & Blanchard and Wise & Herndon, for Defendants and Appellees:

1. It is now the settled jurisprudence of the Supreme Court of the United States that, except in actions affecting personal status, or in those partaking of the nature of proceedings *in rem*, like suits to partition real estate, foreclose mortgages or enforce privileges or liens, substituted service, as against a non resident, can be effectual as "due process of law," under the fourteenth amendment to the Constitution of the United States, only where, in connection therewith, property in the State is brought under the control of the court, and is subjected to its disposition by process adapted to that purpose. The question being Federal in its nature, former jurisprudence of this court on this subject must yield to the authority of the Supreme Court of the United States. 35 Ann. 1184; 36 Ann. 796; 95 U. S., 565; 98 U. S., 714; 10 L., 220, 381; 18 Ann. 682; 23 Ann. 80; 5 R. 418; Story Conf. Laws, pp. 914, 921; Bigelow on Estoppel, pp. 209, 210; *Ib.*, pp. 212, 213, 214; Cooley's Const. Lim., pp. 505, 506, 507.
 2. A probate sale cannot be annulled in a suit to which the vendee is not a party. 3 L. 523.
 3. To rescind a sale so as to place parties *in statu quo*, the parties to the sale and the rescission must be the same. 9 Ann. 75.
- A resolutive condition is implied in all communicative contracts, to take effect in case either of the parties do not comply with his engagements; in this case the contract is not dissolved of right; the party complaining of a breach of the contract may either sue for its dissolution with damages, or, if the circumstances of the case permit, demand a specific performance. R. C. C. 2046.
- Personal actions arise from contracts where one has bound himself for his own advantage, as by selling, purchasing, hiring or letting, or by any like contract C. P. 29.
- An action to annul a sale on the ground of non-payment of the purchase price is a personal action, and prescribed by ten years.

McKenzie et al. vs. Bacon et al.

4. This suit is a personal action to annul a contract, and not a petitory action against the non-resident defendants to recover a tract of land. No such action would lie against said non-residents because they are not in possession by agent, lessee or otherwise. C P. 43.
5. Neither is this suit a petitory action against the vendees of Donaldson, because no such action would lie against them before a judgment dissolving the sale from Donaldson to White was duly obtained and became final.
6. A non-resident vendor cannot be called in warranty merely by the appointment of a curator *ad hoc*, and a judgment rendered against him. Pagett vs. Curtis, 15 Ann. 451; Steel vs. Smith 9 Ann. 171.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiffs brought their action for the dissolution of a sale of an immovable for non-payment of the price, and filed it in the parish of Caddo, where the property is situated. They sought to bring the non-resident heirs of the original vendee into court by means of the appointment of a *curator ad hoc*. The other and successive vendees and their legal representatives are all residents of the State.

The curator excepted to the jurisdiction of the court on the ground, substantially, that the non-resident defendants, who own no property in this State, and against whom no attachment has been sued out, could not be cited in the mode proposed by plaintiffs, which mode does not constitute "due process of law" within the meaning of the fourteenth amendment to the Constitution of the United States.

This appeal is taken from a judgment maintaining that exception and dismissing the suit.

The principal contention of the curator involves the proposition that an action for the dissolution of a sale for non-payment of the price, having for its object the rescission of a contract, is purely a personal action, in which the respective defendants, vendees, are not sued jointly, and that therefore non-resident defendants cannot be legally brought into court by process of citation on a *curator ad hoc*.

The argument is not tenable, and finds no support in the authorities on which it is predicated.

The demand of plaintiffs is two-fold in its character; it embraces the dissolution of the sale and the possession thereunder of the property. The pith of the controversy under the issues thus tendered presents the question of the title or ownership of immovable property.

The demand for the dissolution of the sale is a necessary step required by law as a means of acquiring possession of the property by the vendor, and that feature of the proceeding cannot be invoked as solely characterizing the nature of the action. The law provides that under the effect of the resolutive condition the contract is not dis-

McKenzie et al. vs. Bacon et al.

solved of right by the failure of either of the parties to comply with his engagements; the dissolution must be judicially enforced. C. C., arts. 2045, 2046.

The legal effect of the dissolution of a sale under the resolutive condition is to place matters as though the sale had never existed; hence, it follows that the practical result of the judgment enforcing the condition is to restore the ownership and the possession of immovable property to the previous owner, the complaining vendor.

These conditions lead to the inevitable conclusion that such a proceeding is not a purely personal action as contemplated in our Code of Practice, and as understood in jurisprudence, but that it partakes of the nature of a proceeding *in rem*.

As thus defined, the present action falls within one of the exceptions recognized as instances in which a non-resident defendant can be legally brought into court without the necessity of bringing any of his property under the control of the court. It is thus clear that the authorities quoted by the curator in support of his contention do not militate against the views which we have just expressed. *Laughlin vs. N. O. Ice Company*, 35 Ann. 1184, and authorities therein cited from the Supreme Court of the United States.

We have considered the decision of this court relied on by the curator in support of his contention that a proceeding of this nature is a personal action. Those cases only go to the extent of subjecting these actions to the term of prescription, which bars all personal actions not otherwise enumerated in the Civil Code under the head of prescription. But in none of the cases was the court called to define authoritatively the precise nature of the action in reference to the classification of action in the Code of Practice.

In each of the cases the issue tendered, and the only adjudication made, involved the plea of prescription of ten years. *Jones vs. Crocker*, 1 Ann. 440; *George vs. Lewis*, 11 Ann. 654; *Hunter vs. Williams*, 16 Ann. 190.

The only reference to personal actions in either of the cases is in the decision of the 11th Annual, and we fail to draw from it the slightest inference that the court intended to classify the suit a personal action. The language used by Judge Spofford reads as follows:

"We conclude that the present action, not being an action of nullity or of rescision, is not regulated *as to prescription* (italics are ours), by art. 3507 of our Code. * * * it falls rather within the general category of personal action, limited to ten years by the article 3508."

It is clear to our minds that the question discussed was not the clas-

Prude vs. Morris and Lucius.

sification of the action, but that the only point made by the court was that, as to prescription, the action for a dissolution of a contract for non-compliance with the terms thereof must be regulated by the prescription which applies to the category of personal actions provided for in the article 3508 of the Civil Code.

We therefore conclude that the suit was properly instituted in the parish of Caddo, and that this is a case which justified and required the appointment of a curator *ad hoc*, to represent the non-resident defendants, (C. P., 168; C. C., 56), and that there is error in the judgment appealed from.

It is therefore ordered that the judgment of the district court be annulled, avoided and reversed, that the exception interposed by the curator *ad hoc* be dismissed, and that the cause be remanded to the lower court for further proceedings according to law.

Mr. Justice Watkins, having been of counsel, recuses himself.

No. 189.

JOHN T. PRUDE VS. R. C. MORRIS AND J. F. LUCIUS.

There can be no contract of sale without a fixed price. Where the consideration of a contract called by the parties a sale, is that the transferee of the property shall settle a certain debt of the vendor on the most advantageous terms, without any sum being named, and the transferee takes possession of the property and settles the debt and records his title, though the contract cannot be regarded a sale, yet a creditor of the vendor or transferor, who seizes the property, must first pay out of the proceeds to the transferee in said contract, in possession, the amount that he, the transferee, had paid in settling the debt of the transferor or vendor.

A PPEAL from the Eleventh District Court, Parish of Sabine.
Pierson, J.

Pugh & Goss for Plaintiff and Appellee.

J. F. Smith for Defendant and Appellant.

Evidence which tends to show the intention of the parties, and to show the real consideration in a contract of sale, is clearly admissible.

Although the vendor intended to defraud his creditors, if the real vendee was not a party to such fraud, the sale, as to him, cannot be annulled. 26 Ann. 467; 34 Ann. 883; 19 L. 594.

In a revocatory action it must be shown that the vendor was insolvent, or was not possessed of sufficient property to pay his debts at the time of the transfer. 28 Ann. 454.

The payment of a price less than that stipulated in the act of sale does not make the sale simulated. 19 Ann. 53.

Where the defendant in his answer avers that the purchase was made for a "good and sufficient consideration," and shows that the sale covered an actual contract to secure the payment of a just debt, the actual contract will be enforced. 32 Ann. 95; 31 Ann. 348; 30 Ann. 968.

38	767
51	476

38	767
107	406

38	767
114	823

38	767
1120	730

38	767
122	1056

38	767
1123	132

Prude vs. Morris and Lucius.

The opinion of the Court was delivered by

TODD, J. This is an action in declaration of simulation, in which the plaintiff, an alleged creditor of the defendant Morris, seeks to have declared simulated and void a conveyance of certain property described in the petition, from Morris to his co-defendant, Lucius.

There is a motion to dismiss the appeal on the ground that the matter in dispute is under the lower limit of the jurisdiction of this court.

It is true that the debt sued for is under \$2000, but the property embraced in the alleged sale, according to the pleadings and the estimates by several witnesses on the trial, exceeds that sum; and this latter fact or consideration, determines the question of jurisdiction in favor of the demand in suit.

The motion to dismiss is therefore denied.

ON THE MERITS.

The main questions involved in this controversy are purely questions of fact, to be governed by the evidence in the record.

We find that plaintiff is a creditor of the defendant for the amount claimed in the suit. The debt is evidenced by promissory notes, which plaintiff and defendant both testify on oath are unpaid.

Upon the question of simulation the evidence is, as usual in such cases, very conflicting. It, however, appears as undisputed facts, that at the time of the alleged sale Morris, the ostensible vendor, was indebted to one Johnson in the sum of \$21,000, evidenced by his promissory note. A few days after this sale, it is shown, that Lucius, the vendee named in the said alleged sale, settled this debt of Morris to Johnson, paying him \$1125. This was paid, so far as the record discloses, by him (Lucius), out of his own means.

Lucius, moreover, swore on the trial of the case, that the consideration of the alleged sale, as agreed on and understood at the time, between him and Morris, was that he should settle this debt of Morris to Johnson. If there was no such agreement, an assumption on the part of Lucius, then he paid out this amount to Johnson gratuitously, since he was in no manner bound to him for the debt apart from his alleged assumption of the debt in the act in question. In addition to this, it is shown by the testimony of Mr. Smith, the attorney for the holder of this claim, that a short time after this alleged sale, and when he was pressing Morris for the payment of the debt, he was told

Prude vs. Morris and Lucius.

by him (Morris) that under an agreement with Lucius, he (Lucius) was to pay this debt in consideration of the transfer he had made of his stock of goods, etc., to him.

We are, therefore, forced to the conclusion that, although the price expressed in the written deed from Morris to Lucius—\$1825 cash—was a mere nominal price, in point of fact, there was a real consideration for the contract, viz: the settlement of this Johnson debt.

If this was so, then the act in question was not a pure fiction.

The contract may not, in truth, have been a sale because the price was not fixed and certain; but there is a reality about it. The effect of it was to place Lucius in possession and control of the property under an apparent title in consideration of Lucius settling for Morris a certain debt.

It was one of those innominate contracts closely resembling a pledge. After Lucius settled this debt by paying Johnson \$1,125, Morris certainly could not have demanded the return of the property without reimbursing Lucius this sum and the plaintiff, as a creditor of Morris, stands in no more favorable position. Lucius is entitled to reimbursement for the amount he has paid out.

The facts of this case are almost exactly parallel with those in the case of *Wang & Cottam vs. Martin Finnerty et al*, 32 Ann. 95, and we shall so shape our decree as to conform to the precedent found in that case.

It is therefore ordered, adjudged and decreed, that the judgment of the lower court, so far as it decrees the payment by Morris to the plaintiff of the amount with interest therein specified, and maintains the attachment and orders the sale of the property seized, be and the same is affirmed and in all other respects annulled and reversed; and proceeding to render such judgment as should have been further rendered, it is further ordered, adjudged and decreed that the property described and embraced in the contract between plaintiff and R. C. Morris of date 16th January, 1885, and attacked as simulated in this suit, be and the same is decreed subject to plaintiff's judgment and seizure, but that from the proceeds of the sale of the same J. F. Lucius, defendant, be paid by preference eleven hundred and twenty-five dollars with legal interests on the same from the 24th day of March, 1885, the costs of the lower court to be paid by the defendant Morris, and of this Court by the plaintiff.

Oriol et al. vs. Moss et al.

No. 190.

38 770
113 701

JOHN G. ORIOL, TUTOR, ET AL. VS. MOUNING MOSS ET AL.

Want of notice of order of seizure and sale or of the seizure, where the defendant administrator has waived such notice, comes within the irregularities referred to in C. C. article 3543, and are cured by the prescription of five years, which runs against minors.

A purchaser at a judicial sale under an order of seizure and sale of a court of competent jurisdiction, in a proceeding against the legal representative of the person in whose sole name the property stood of record, without knowledge, express or implied, of the existence of any claim of a deceased wife in community, is a purchaser in good faith, and although the heirs of such deceased wife may recover her share of the property, they are entitled to revenues only from date of their claim, and must reimburse the expenditures of defendants, such as taxes.

A PPEAL from the First District Court, Parish of Caddo.
Taylor, J.

R. J. Looney and J. H. Shepherd, for Plaintiffs and Appellants.
Alexander & Blanchard, for Defendants and Appellees:

1. Where minor heirs claim the property of their ancestor, for alleged illegalities in the sale thereof, they must, as a condition precedent to suit, return or offer to return the purchase price of the property which enured to their benefit by going to pay a debt due by such ancestor. 21 Ann. 383, 425; 24 Ann. 324; 26 Ann. 234; 28 Ann. 269; 30 Ann. 174, 891, 1232; 3 Ann. 121.
2. All irregularities and informalities connected with or growing out of any public sale are cured by the lapse of five years, and this prescription runs against minors. C. C. 3543; 21 Ann. 584; 24 Ann. 24; 29 Ann. 534; 33 Ann. 673, 1043; 34 Ann. 205. Want of notice of seizure, want of actual seizure, want of appraisement, and waiver of notice of order of seizure and sale by an administrator, have all been expressly held to be covered by this prescription. 24 Ann. 24; 33 Ann. 1043.
3. A *bona fide* purchaser at a judicial sale is protected by the decree. He is not bound to look beyond it. 2 Ann. 466; 14 Ann. 622; 19 Ann. 353; 20 Ann. 124; 32 Ann. 292; 36 Ann. 444.
4. A purchaser in good faith is liable for rents only from judicial demand. C. C. 3453; 27 Ann. 398; 34 Ann. 127; 35 Ann. 1090; 38 Ann. 150.
5. Such a purchaser is entitled to be reimbursed for all improvements made or taxes paid by him on the property. C. C. 3453. And he is entitled to be so reimbursed, even when the title under which he holds is declared to be an absolute nullity. 34 Ann. 407, 705; 35 Ann. 1086.

The opinion of the Court was delivered by

FENNER, J. Plaintiffs sue as children and forced heirs of their father and mother, Salvator and Ellen Justi, between whom existed the community of acquets and gains, which community, in 1871, acquired, by purchase in the name of the husband, lot No. 11, of block 42, of the town of Shreveport, which is the subject-matter of this controversy.

Mrs. Justi died in 1872. Her succession was not opened, nor did the father qualify as natural tutor of the minor children.

In 1873, after the death of the wife, Justi, in whose name the title stood, granted a mortgage on the property to secure a debt created and due by himself individually, in favor of one Dalpino.

Justi died, and his succession was opened and administered by the public administrator.

Thereafter, Dalpino proceeded, in the district court, against the succession of Justi, for a foreclosure of his mortgage, by executory process. The attorney of the public administrator, and subsequently, the administrator himself, accepted service of the petition for foreclosure, and waived all other and further writs, notices and delays, and agreed that the property be sold on the sale day of August, according to advertisement.

Notwithstanding this waiver, it appears that all delays and formalities were fully complied with, excepting only the notice of seizure, which, notwithstanding the waiver, was issued, but only served on the attorney of the administrator.

At the sale, under these proceedings, defendant became the adjudicatee of the property for the price of \$500, and has since possessed the same.

Plaintiffs, as heirs of their father and mother, attack this proceeding and the sale under it, as absolute nullities, and claim the property with its revenues.

I.

There can be no doubt that, at the dissolution of the community, Salvator Justi became the owner of an undivided half of this property, and that, as against this half, his mortgage was perfectly valid.

Plaintiffs claim, however, that the mortgage was inoperative as to them, because it was not recorded until after Justi's death, and because, as forced heirs, they stand as creditors of the succession, citing *McCarty vs. Bond*, 9 La. 354; *Boyles vs. Escofier*, 2 Ann. 872; *Suc. Harkins*, 2 Ann. 923; *Suc. Rhoton*, 34 Ann. 896, and *Rev. C. C. 2264, 2266, 3342, 3347, 3363*.

This position is utterly untenable. It is true that, under the above authorities, a mortgage not recorded until after the death of the mortgagee, is without effect against his creditors; and it is also true that, in a certain sense, and for the purpose of attacking disguised donations, simulated transfers and like devices of the ancestor, to defraud them of their *legitime*, forced heirs are assimilated to creditors, and are granted similar rights.

But, as against real and *bona fide* creditors of their ancestors, they have no greater rights than other heirs, because their claim as forced

Oriol et al. vs. Moss et al.

heirs only attaches to the residue left after payment of such debts. There is no dispute of the validity and reality of the debt and mortgage of Daipino, and, even without registry, they were binding as against his succession and heirs whether ordinary or forced.

Plaintiffs next assert the nullity of the sale on the ground of certain nullities in the proceedings, viz: Want of notice of order of seizure and sale, insufficiency of waiver by administrator to cure same, issuance of notice of seizure by sheriff instead of by clerk and service on attorney instead of on the administrator.

The record does not show that the notice served by the sheriff was not signed by the clerk.

Even if it did, the very authorities cited by plaintiffs show that such defect could not be urged to defeat the title of a purchase at such sale. *Hart vs. Pike*, 29 Ann. 262; *Billgery vs. Ferguson*, 30 Ann. 86; *Suc. Sadler vs. Henderson*, 35 Ann. 806.

This, however, and the mode of service are of little consequence, because all the defects urged have been held subject to the prescription of five years under art. 3543 of the Code, which is pleaded herein. and, by the terms of the article, runs against minors. *Munholland vs. Scott*, 33 Ann. 1043; *Allen vs. Couret*, 24 Ann. 24; *Woods vs. Lee*, 21 Ann. 506.

We are not to be understood as extending this doctrine to entire absence of notice, but only to cases where there has been a waiver or the like, showing actual notice.

We conclude that the judge *a quo* has rightly rejected plaintiffs' demand so far as it affects the husband's half of the property.

II.

There is no controversy as to the right of plaintiffs to recover the share of their mother in the property.

The only question is as to the relative rights of the parties with regard to revenues and improvements.

The defendant was certainly a possessor in good faith.

She was a purchaser at a judicial sale, made under a decree of a court of competent jurisdiction, in a proceeding against the legal representative of the person in whose sole name the property stood upon the records. Nothing on the face of the proceedings or of the records suggested any other ownership than that of the debtor proceeded against; nor is there any hint that defendant had actual knowledge of the latent rights of Mrs. Justi, or even that she had ever existed.

Defendant "possessed as owner by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of,"

Enders vs. Gingras, Mulhaupt & Co.

C. C. 503, and had just reason to believe herself the owner. C. C. 3451. Hutchinson vs. Jamison, 38 Ann. 150; Barrow vs. Wilson, 38 Ann. 209; Giddens vs. Mobley, 37 Ann. 417; McCloskey vs. Webb, 4 Rob., 205.

It follows that she is only liable for rents from judicial demand, and is entitled to be reimbursed the expenses she has incurred on the thing. C. C. 3453.

The defendant claims, and was allowed reimbursement of half the taxes which had been paid on the property, and this was unquestionably correct. She was also condemned to pay rent from judicial demand.

Judgment affirmed.

No. 184.

WILLIAM ENDERS VS. GINGRAS, MULHAUPT & CO.

A party who contracts with a factory for the manufacture of certain goods, and receives a partial delivery of such without objections or complaint cannot, subsequently complain as an alleged violation of the manufacturer's obligation under the contract that the goods had not been manufactured in conformity thereto.

After the debtor has been put *in mora*, his offer to execute the contract under his engagement comes too late.

38	773
50	572

38	773
115	836

38	773
118	451

A PPEAL from the First District Court, Parish of Caddo.
Taylor, J.

Land & Land, for Plaintiff and Appellant:

1. In order to put the debtor in default, the demand that the contract shall be carried into effect must be made either by suit, in writing, by a notarial protest, or in presence of two competent witnesses. C. C. art. 1911; 30 Ann. 264; 37 Ann. 659.
2. The husband, who was agent of his wife, is not a competent witness for her or her co-defendants, all being members of the same firm and having a common interest. C. C. 2281; 1 Greenleaf, sec. 334, 335, 342; 1 Phil. Ev., sec. 83; 38 Ann. 106.
3. Though there have been repeated violations of a contract by both parties, yet if neither elects to consider it broken, and they proceed under it, neither can be considered in default. 3 Ann. 285.
4. In commutative contracts, the party desiring to put the other *in mora* must perform or offer to perform his part of the contract. C. C. 1914; and having done so must make his demand as required by Art. 1911, C. C.
5. The facts stated in an affidavit for a writ of sequestration are taken as true, *prima facie*. 15 Ann. 574. After pleading to the merits defendants cannot question the regularity of the writ in point of form, and on the trial of the merits the question of privilege is the only one that can be raised. 7 Ann. 337.
6. The prayer of defendants for "general relief" in reconvention would justify a decree dissolving the contract, though the plaintiff might not be entitled to such a decree. H. D., p. 734 (4); No. 5, 11 Ann. 69.

Alexander & Blanchard and J. H. Shepherd, for Defendants and Appellees:

1. The stipulation in the contract as to the delivery of the bedsteads on the 1st of October

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was waived by the plaintiff. He not only did not put the defendants in default, but by accepting the delivery after that time, waived this right to claim a dissolution of the contract. C. C. 1911, 1912, 1913; 8 L. 569; 18 L. 88; 1 R. 325; 4 Ann. 148, 243.

2. By the terms of the contract, plaintiff bound himself to pay for the bedsteads, at the factory, on delivery. The plaintiff having failed to do this, defendants were no longer bound to continue the delivery. 37 Ann. 835.

3. Plaintiff was regularly put in default by a formal verbal and written demand in behalf of defendants, for payment of the sum due them for furniture already delivered, accompanied by a formal tender of another lot then completed. This demand and tender was on October 13, and the plaintiff was thereby in default from that time.

Nine days after his being thus in default himself, the plaintiff attempted to put defendants in default.

"After the debtor has been put in *mora*, his offer to execute his engagement comes too late and cannot be listened to." 14 Ann. 713; 8 R. 161.

The opinion of the Court was delivered by

POCHÉ, J. This litigation grows out of the following contract:

"State of Louisiana, Parish of Caddo.—This contract, made and entered into this day between Wm. Enders and Gingras and Sellmeyer, witnesses that the said parties have entered into the following contract:

"Wm. Enders obligates himself to deliver to said Gingras and Sellmeyer 200,000 feet of beech, gum and pine lumber within one year following the date of this contract, said lumber to be of good merchantable quality, for the purpose of manufacturing into furniture and cut into such dimensions as the said G. and S. may require for the purpose of manufacturing; same to be delivered on the cars at Shreveport, in sufficient quantity to keep the factory at work, and of such kind and quality as the said G. and S. may call for. G. and S. are to pay for said lumber at the rate of \$12.50 per 1000, and agree to pay the freight on same when delivered, and deduct the amount so paid from the invoice on settlement with Enders. The said Enders agrees on his part, to take all the bedsteads or other furniture made at the factory of said G. and S. within the said year in lots as finished at factory, and pay for same at the prices agreed upon for same cuts or photographs of the kind and prices of said furniture are annexed to this contract as part of it. The furniture to be finished in a workmanlike manner in accordance with said photograph or samples, and to be paid for on delivery at the factory, as follows: Two-thirds of total amount in cash and the balance, one-third, to be credited on the lumber account for lumber furnished by said Enders until the same is paid.

"Gingras and Sellmeyer obligate themselves to make not less than 3000 bedsteads within the year, one thousand (1000) of which to be furnished by the 1st of October, 1885.

"This contract is renewable at the option of both parties at the end of the first year. Either party desiring to change or cancel same, is to give the other party sixty days notice thereof prior to the expiration of the year, otherwise this contract to remain in force for another year.."

Mrs. Mulhaupt subsequently became a member of the firm.

Plaintiff's demand is for a dissolution of the contract on account of the violation of the same by the defendants, for consequential damages in the sum of \$1386, * * and for the sum of \$732, as the unpaid balance due on the lumber furnished by him under the contract, with vendor's privilege on the same. He obtained a writ of sequestration of the lumber on hand, in kind and in process of manufacture.

The defense is a general denial, an averment of a compliance with their contract by the defendants, of the violation of the same by plaintiff, and it ends with a prayer for the rejection of his demand for a balance on furniture delivered to plaintiff, and with a demand in re-convention for damages in the sum of \$10,200. * *

Plaintiff appeals from a judgment which rejects his demand, dissolves his writ of sequestration, and condemns him to pay to defendants \$219.65 as balance on account of furniture delivered to, and accepted by him.

The district judge rejected defendants' demand in reconvention for damages, reserving their right to claim damages on account of the sequestration.

The defendants have not prayed for an amendment, hence their claim for damages, growing out of the alleged violation of the contract is eliminated from discussion.

The pivotal point of the controversy hinges upon the alleged violation of the contract by the defendants, and the consequent right of plaintiff to sue for the dissolution.

The case was very hotly contested, numerous questions of law are discussed by counsel, and the voluminous evidence in the record is sadly conflicting.

From that mass of testimony we have reached the conclusion with the district judge that plaintiff has failed to make out his case.

It is true that the defendants utterly failed to furnish the 1000 bedsteads which the contract called for, by the 1st of October, but on the other hand, the record shows conclusively that plaintiff, by his acts, unequivocally waived that feature of the contract.

He received after that date, in sundry lots, more than two hundred bedsteads, on which he made part payments without complaint or objection.

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And the record further shows that he himself then became deficient in the performance of his obligations under the contract, by refusing or neglecting to pay the balance due on the goods which had been delivered to and received by him. It was at this juncture that he was put in default by the defendant by a demand in writing, in which he was notified that some 350 bedsteads were in the factory subject to his order under the contract, which demand was made simultaneously with a demand for the payment of the balance due by him. *Landeche vs. Sarpy*, 37 Ann. 335

We note, in this connection, his contention that the furniture delivered to him had not been made in conformity to the specifications agreed upon, and that the same was not merchantable. The evidence does not bear him out. It shows some slight and almost imperceptible differences between the samples furnished and some pieces of the furniture made and delivered, but not sufficient to justify even a complaint.

And again, his own conduct in receiving the same without objection, in not contesting the correctness of the bill therefor, confirms that conclusion, and estops him from later complaints on that score.

The record there shows that some nine days after he had been formally put in default, he made the attempt to put the defendant *in mora* by serving on them a written notice to comply with their contract.

His demand for the dissolution of the contract is in the main predicated on that attempt. But it cannot avail him; it came too late.

The fact of his having himself been previously put in default debars him of the right to call for the specific performance of the contract by the defendants. *Moreau vs. Chairvin*, 8 Rob. 161; *Morrison vs. Wimberly*, 14 Ann. 713.

We note the logical suggestion of plaintiff's counsel that an affirmation of the judgment rendered below will apparently continue in existence a contract with which both parties are manifestly dissatisfied, and that more litigation will follow in the wake of such a condition of things. But courts cannot be and are not concerned with such considerations. They must decide the issues which are presented by the pleadings, and cannot go beyond those limits. In this case the issue was the right of plaintiff to demand a dissolution of the contract. We find against him, and we can adjudicate nothing else.

We note the bill of exceptions taken by plaintiff to the ruling of the

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district judge in admitting the testimony of Mulhaupt, the husband of one of the members of the firm, but as we have not considered his testimony at all, we have obviated the necessity of a discussion on an unimportant question, which we relegate to some case in which a solution of the same will be imperative.

Judgment affirmed.

No. 192.

A. R. KETCHUM FOR FRED. KETCHUM VS. TEXAS AND PACIFIC RAILROAD COMPANY.

38	777
49	500

38	777
50	204

38	777
52	1712

38	777
125	1100

A railroad company is responsible in damages for injuries sustained by a person who is run over by one of its engines at one of its crossings on the street of a city, when it is shown that the engine was being driven at a rate of speed unusual in a depot yard, and beyond the limits of speed allowed under its own regulations, and that no signals by either whistle or bell was given of the approach of the engine.

A verdict of the jury allowing \$10,000 damages for injuries caused by such an accident to a boy who lost an arm thereby, and who belongs to a laboring family, will not be disturbed on appeal. The allowance is not excessive.

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

T. F. Bell for Plaintiff and Appellee.

Wise & Herndon for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. The defendant company appeals from a judgment based on the verdict of a jury, in the sum of ten thousand dollars as damages for injuries inflicted on plaintiff's minor son by one of the engines of the company through the alleged carelessness of the engineer, one of its employees.

The main defense is the alleged contribution; negligence of the injured boy, who was eleven years of age at the time of the accident.

The law of the case is too well settled in jurisprudence to require any discussion at the present time.

The principles which defendant's counsel contend for find ample support in numerous authorities including our own reports, namely: that in damage suits the party injured cannot recover if he contributed to produce the result, or in other words, if both parties are in fault, neither can recover damages from the other, and that children who have reached the age of reason, can be guilty of imputable contribu-

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tory negligence which will bar a recovery on their part. *Childs vs. R. R. Co.*, 33 Ann. 154; *Lott vs. R. R. Co.*, 37 Ann. 337.

But the evidence in the record removes the case far beyond the domain of either of the rules; it satisfactorily establishes the following state of facts:

The accident occurred in the city of Shreveport at a railroad crossing on one of the streets, the only avenue to a large cotton oil mill, to which an average of one hundred vehicles are driven each day, and which is situated nearly opposite the defendant's main depot in Shreveport, from which it is separated by the railroad's main and two switch tracks.

The boy had gone into the mill-yard on a wagon loaded with cotton seed, and after the wagon had been emptied of its load, and was being weighed on a pair of scales under a shed adjoining the oil mill office, a short distance from the road, he undertook, at the request of the regular driver of the wagon, to drive the team across the track to the street.

Knowing that an engine was taking water at a tank at a distance of about 350 feet east of the crossing, and that it would soon pass at that point, and being prevented by buildings from seeing the engine from the place where the wagon stood, he took the precaution to go out to the track to ascertain whether the engine was moving, and as it was yet standing still, he returned to and in the wagon and began to drive out, but before he had cleared the track the hind end of the wagon was stricken by the locomotive, and he was thrown under the engine, by means of which his arm was shattered and had to be amputated above the elbow.

The testimony shows that the boy frequently rode back and forth in that wagon, with the express permission of his father and of the teamster for the purpose of learning how to drive, and that he took every precaution which even mature experience could suggest to cross the road before the engine could be on him. Hence we agree with the jury in the conclusion that no negligence can reasonably be imputed to him in the premises.

On the other hand, the preponderance of the evidence goes to show that the engine was driven at a rate of speed unusual in a town or city, and far beyond the limit prescribed by the regulations of the company; and that when the engine approached the mill, no bell was rung and no whistle was blown. The limit allowed for speed in depot yards is four miles per hour, and the engine was then running at a speed of ten to twelve miles an hour.

Tronstine & Co. vs. Ware and Munn.

Our conclusion is therefore clear that the accident is rationally attributable to these two causes and to no other circumstance. Hence it was carelessness and negligence on the part of the engineer, for which the company must be held responsible.

That conclusion is fortified by the omission of the company to introduce the evidence of the engineer who had charge of the engine at the time of the accident, which occurred in broad daylight. *Day vs. R. R. Co.*, 35 Ann. 694.

The measure of the damages is the only point left for our consideration, and we note that this question was not discussed by either counsel on appeal.

Defendant's exclusive hope of relief was apparently in the contention of contributory negligence on the part of the injured boy.

The sum allowed by the jury at first appeared excessive to our minds.

But after considering that the boy is the son of a laboring man, without property or means, and that for the balance of his life he will be deprived of the use of so important a limb, absolutely indispensable to the performance of manual labor, we do not feel justified to disturb the finding of the jury.

Judgment affirmed.

No. 178.

A. AND J. TROUSTINE & CO. VS. R. A. WARE AND G. M. MUNN.

1. Any neglect or omission to observe the rules of this court strictly, in the preparation of transcripts of the record in the court below, will subject the clerk to the cost of repairing such neglect, or omission; and a mandate will be directed to him, ordering him to perform his duty; and, in the meantime, judgment on the appeal will be suspended.
2. The appellant is protected by the full certificate of the clerk where it is not shown that he knew the transcript to be deficient and procured the certificate notwithstanding.

A PPEAL from the Second District Court, Parish of Bienville.
Drew, J.

D. H. Patterson and J. A. Dorman, for Plaintiffs and Appellants.

Watkins & Watkins and G. M. Dunn, for Defendant and Appellee:

The opinion of the Court was delivered by

WATKINS, J. An examination of this very inartificial and complicated record has fully satisfied us that no opinion we could render would be satisfactory to ourselves, or do justice to the parties to the appeal.

Tronstine & Co. vs. Ware and Munn.

It appears from certificates of the clerk in the record, that certain important documents are missing therefrom; others essential to it cannot be found in it; few of those it contains are in their proper places and order; and the index is very deficient and inaccurate.

Rule 1, paragraph 2, provides:

"The different parts of a record should be made to appear in the order of their respective filings and entries from the minutes, with exact dates."

Ib., paragraph 7, provides: "An accurate alphabetical index should be attached to, and form part of each transcript, affording reference to particular pages of the same (and with proper designations, or words of description), for the pleadings, processes and orders in the suit; for the depositions and testimony of each witness by name," etc.

Ib., paragraph 8, provides: "Any neglect, or omission, to observe this rule strictly will subject the clerk, as aforesaid, to the cost of repairing such neglect, or omission." Rules of Court, 36 Ann.; 32 Ann.

The clerk who prepared this transcript has been wholly unmindful of this rule and derelict in the performance of his duty.

"The Supreme Court, as well as other courts, possesses the powers which are necessary for the exercise of the jurisdiction given it by law, in all cases not expressly provided for by the present Code." C. P. 877.

"If the record be incomplete because the judge refuses to perform any of his duties, as to sign the exception to his opinion, or, if such imperfection proceed from a similar refusal by the clerk, the Supreme Court shall direct a mandate to such judge, or clerk, ordering him to perform the duty imposed upon him by law, or by the nature of his office, and, in the meantime, it shall *suspend* its judgment on this appeal." C. P. 899.

In *Nathaniel T. Edson vs. Morris McGraw*, 37 Ann. 294, this court says: "Where transcripts transmitted here, under certificates attesting their completeness, are materially deficient by the fault of the clerk making same, the court will not permit it then to be patched up by additional and supplemental transcripts, but will order the clerk to make, at his cost, a *new* transcript of the record below, such as he should have made at first under the rules of the law; and will eventually exercise its punitive powers, and inflict a fine." R. S. 1907.

Again: "It is apparent that the transcript was made in utter disregard of the rules of the court, and that, far from facilitating, it embarrasses an investigation of the case."

Again: "The appellant is protected by the full certificate of the

Livingston vs Scully.

clerk, when it is not shown that he knew the transcript to be deficient, and procured the certificate notwithstanding."

That opinion is aptly suited to the facts of this case. It is therefore ordered *ex proprio motu* that the clerk shall make, at his cost, a new, perfect and complete transcript of the record in the court below, such as he should have made at first, and in conformity to law and the rules of this court, on or before the next return day for appeals from that court; and that, in the meantime, this court will suspend judgment on the appeal.

Judgment suspended.

No. 180.

P. C. LIVINGSTON VS. P. SCULLY.

38	781
51	1487

1. An action for damages resulting from the *passive* violation of a commutative contract, or one containing mutual stipulations and covenants between the parties, must be preceded by putting the obligor *in mora*, as a condition thereto.
2. The want or failure of the plaintiff to put him *in mora* does not oblige defendant to except or specially deny that fact. It is the duty of the plaintiff to allege and prove it, else he cannot recover.

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

Young & Thatcher for Plaintiff and Appellee:

Although the contract be either not commutative, or, if commutative, the reciprocal obligations are not to be performed at the same time, yet the party wishing to put the other in default must be himself ready, and must offer to receive the performance at the time and place stipulated in the contract, or implied from the nature of the act to be done, etc. C. C. 1914, 1913.

In a case coming under either of the two above articles of the Civil Code, a demand on the debtor, in order to put him in delay, requires no particular form; it is sufficient if the rule be substantially complied with. 3 L. 382; 11 L. 240; 8 R. 160; 19 Ann. 85; 28 Ann. 778; 23 Ann. 107; 6 N. S. 230.

A contract may be violated actively by doing inconsistent with the obligation it has imposed. Where there is an active violation of the contract, damages are due from the moment the act of contravention has been done, and the creditor is under no obligation to put the debtor in default in order to entitle him to his action. C. C. 1931, 1932.

When an obligation has been contracted on condition that an event shall happen within a limited time, the condition is considered as broken, when the time has expired without the event taking place. If there be no time fixed, the condition may always be performed, and it is not considered as broken until it is become certain the event will not happen. C. C. 2038; 1. Ann. 424.

The condition is considered as accomplished when the accomplishment of it has been prevented by the party bound to perform it. 1 Ann. 424.

If the work be composed of detached pieces, or made at the rate of so much a measure, the

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parts may be delivered separately; and that delivery shall be presumed to have taken place, if the proprietor has paid to the undertaker the price due for the parts of the work which have already been completed. C. C. 2761.

Where the object of the contract is anything but the payment of money, the damages due to the creditor for its breach are the amount of the loss he has sustained, and the profit of which he has been deprived. C. C. 1934; 5 Ann. 221; 2 L. 332.

Alexander & Blanchard and *J. H. Shepherd* for Defendant and Appellant:

1. As a condition precedent to the recovery of damages for the passive violation of a commutative contract, the obligor must be put in *mora*, and this putting in default must be alleged and proved. C. C. 1911, 1912, 1913; 18 L. 88; 2 R. 498; 3 R. 400; 6 R. 450; 9 R. 495; 10 R. 524; 11 Ann. 300; 17 Ann. 33; 19 Ann. 130; 23 Ann. 513; 27 Ann. 176; 30 Ann. 1125; 37 Ann. 659, 835.
2. Articles 1912 and 1913 of the Civil Code specially provide that in order to recover damages for the passive violation of a commutative contract, the obligor must be put in *mora* as a condition precedent. Article 1911 provides the manner in which the debtor is to be put in default. All decisions concur in holding that this putting in default must be alleged and proved. 18 L. 88; 2 R. 498; 3 R. 400; 6 R. 450; 9 R. 495; 10 R. 524; 11 Ann. 300; 17 Ann. 33; 19 Ann. 130; 23 Ann. 513; 27 Ann. 176; 30 Ann. 1125; 37 Ann. 659, 835.
3. Even though a contract be violated by one or both parties to it, if neither elect to consider it broken, and they proceed under it, neither can be considered as having been in default. 3 Ann. 285.
4. The damage due a party for a breach of contract in the absence of fraud or bad faith are the amount of the loss he has sustained and the profits of which he has been deprived. Damages for supposed profits based on the speculative opinion of witnesses are clearly inadmissible. All damages must be given with legal certainty. Statements of items in *globo* without details, when called for, are not sufficient. 11 Ann. 300; 37 Ann. 492. Evidence of that description would open too wide a door to fraud to be received as full proof. 3 Ann. 45. One may have rights which he can enforce, but these rights may also be abandoned, waived and surrendered, by settlement without reservation. 33 Ann. 41.

It follows where either of the parties to a contract condone a breach of the same by proceeding under the contract, after the violations of conditions by the other, he waives his right to damages for previous violations.

The opinion of the Court was delivered by

WATKINS, J. Plaintiff sues for the recovery of \$5000 damages, resulting from defendant's alleged violation of his contract; \$870.62 on open account; and for the annulment of the contract.

The contract was entered into on July 1, 1882, and contains reciprocal covenants.

Plaintiff agreed "to furnish all labor, tools, cement and all other material to be used in the piers of said bridge," (the railroad bridge across Red River at Shreveport), "and set the same in the piers, to the full satisfaction of the engineer in charge, for the sum of \$8 per cubic yard.

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"He also agrees to set cut stone facings for said piers, to be furnished at railroad bridge site, and furnish all labor, cement, tools and other materials to be used in construction of same, for \$6 per cubic yard, payments of ninety per cent to be paid by said Peter Scully, on or about the 15th of each month, or as soon as received and paid by the railroad company." The remainder was to be paid upon the completion of the work and its acceptance by the railroad company.

All the work was to be done under the supervision of the engineer, in charge, and to his full satisfaction.

It further stipulated that plaintiff should "push the work, and give it his own personal attention, and finish said work on or about the 1st of January, 1883.

Under this contract defendant undertook "to furnish foundations and such tools as he may have to spare, on work, free of cost," etc.

Plaintiff alleges that Scully "made a subsequent verbal agreement with him to pay for all necessary building material contracted for, to those delivering the material, about the 15th of the month; and also, that he would furnish and deliver to petitioners all the cement needed for building said piers at \$4.25 per barrel.

He shows that he was on "hand promptly with men and material, and the necessary arrangements to do and complete the work according to contract;" and had made some contracts for materials, such as sand, brick, etc., to be furnished; and that he was put to a heavy expense therefor, and "did his part of the work in due time, and was not in default," etc.

He represents that he did "extra work that was not included in his contract, and furnished money, lumber and material, etc., to Scully," whereby he became indebted to him in the sum of \$870.25, for payment of which demand has been made.

He represents "that said Scully did not have the foundations for the piers ready, so that petitioner could do his part of the work; that owing to dissensions between said Scully and the railroad company as to who should pay for the sheet pilings, and mistake as to the amount of dredging required for the foundations, and other causes, that said Scully should have foreseen, and provided against, the work was delayed, and petitioner kept idle, and on expenses, without being able to go on with his work."

He further alleges "that in consequence of said Scully's failures to do as he had promised and agreed to, petitioner found himself delayed so long, and at such heavy loss and damage that he was unwilling to suffer it longer; and, even if he had been, that the failure of Mr. Scully to

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comply with his agreement with petitioner in reference to the brick Johnson was to furnish, and the money due, as per account, caused his debts to accumulate, and his credit to be impaired to such an extent that he found it impossible to go on with the work."

He shows "that he notified Mr. Scully about the 1st of January, 1883, that he (Scully) had forfeited his right to hold him bound to his contract, and that petitioner could claim damages," which he estimates to be \$5000, for profits of which he had been deprived.

In plaintiff's amended petition he states that Scully did not complete the foundation of pier five until September, 1882, and pier six in November, 1882, and that *between* those dates defendant "could have had other foundations ready, but that he, by positive order, peremptorily stopped all work on the foundations and piers, and did not permit it to be *begun again* until about the 1st of November following."

He avers that he made application to Mr. Alfred Noble in September, the engineer in charge, to have the foundations of piers five and six got ready, so that he could go on with his work; and, afterward he made a similar application to Mr. Patton, representing the defendant, to the same effect, "and Mr. Patton stated that he could not, and would not, do anything without orders from defendant, and that Scully's orders were that all work be stopped," and that during this time he was kept idle, and unable to comply with his part of the agreement, and that his time was worth \$10 per day for that time.

The defendant, for answer, admits the contract for the construction of the foundations for the piers for the railroad bridge as evidenced by the written agreement of July 1st, 1882, but denies that plaintiff has complied with its terms, and specially denies that plaintiff "was in any manner forced, or compelled by him to abandon his contract, and quit work, but that said abandonment was the voluntary act of plaintiff, and wilfully done, in order to injure respondent, and retard him in the construction of the bridge;" that plaintiff has thereby forfeited all rights under it, and has incurred a liability to him in damages in the sum of \$5750; and that he owes him, in addition, the sum of \$1029, on open account, for which sums he claims judgment against the plaintiff in reconvention.

We have thus analyzed the plaintiff's petitions, original and amended, and defendant's answer, because it has been made an important question in this case whether the defendant was put *in mora* as a condition precedent to the institution of this suit.

Defendant's counsel contend that it is a condition precedent to the recovery of damages, for the *passive* violation of a commutative con-

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tract, that the obligor must be put *in mora*, and that this must be *alleged and proved*.

Plaintiff's counsel insist that their petition sets out an *active*, as well as a *passive* violation of the written and parol contracts, and that the defendant was put in default antecedent to the institution of this suit.

R. C. C. 1912, provides: "The effects of being put in default are not only that, in contracts to give, the thing, which is the object of the stipulation, is at the risk of the person in default; *but in the cases hereinafter provided for, it is a prerequisite to a recovery of damages and of profits, and fruits* or the rescission of the contract."

R. C. C. 1913 provides: "In commutative contracts, when *reciprocal obligations are to be performed at the same time, or the one immediately after the other, the party who wishes to put the other in default, must, at the time and place expressed in or implied by the agreement, offer to perform, as the contract requires, that which on his part was to be performed, otherwise the opposite party will not be legally put in default.*"

R. C. C. 1931 provides: "A contract may be violated either actively, by *doing* something inconsistent with the obligation it has proposed, or passively, by *not doing* it at the time or in the manner stipulated or implied from the nature of the contract."

R. C. C. 1932, provides: "When there is an *active* violation of the contract, damages are due from the moment the act of contravention has been done, and the creditor is under no obligation to put the debtor in default, in order to entitle him to his action."

R. C. C. 1933, provides: "When the breach has been *passive* only, damages are due from the time the debtor has been put in default, in the manner directed in this chapter."

Does the plaintiff's petition, taken as a whole, charge the defendant with an *active* or a *passive* violation of their commutative contract?

Under it, the defendant bound himself to furnish the foundations for the piers, and certain tools and cement, and pay out for plaintiff's account certain moneys. Plaintiff agreed and bound himself to furnish the material and build the piers and put stone-facings on them.

He alleges that he did his part of the work in due time and was not in default.

That Scully did not have the foundations laid in proper time, and that for various causes he "should have foreseen and provided against, the work was delayed and petitioner kept idle, on expenses and unable to go on with his work * * and that in consequence of said Scully's failure to do so as he had promised and agreed to, petitioner found himself delayed, etc."

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He further represents that Scully did not complete the foundation of pier five until September, 1882, and pier six until November, 1882, and that "between those dates he could have had other foundations laid, but that he, by positive order, stopped all work on the foundations and piers, and did not permit it to be begun again until about the beginning of November, following "

These and other allegations quoted from plaintiff's petition clearly indicate that the defendant is only charged with a *passive* violation of the contract in the sense of the articles of the Code above quoted, unless it be in those last quoted; but we do not so regard them. 3 Ann. 285, McCord vs. Feliciana R. R.

In Gobet vs. Municipality, 11 Ann. 300, the Court say: "When the violation of a contract is passive, it is clear that the putting in default is a prerequisite to a recovery of damages. A violation is said to be passive by not doing what was covenanted to be done, or not doing it at the time or in the manner stipulated or implied from the nature of the contract."

In Hodge vs. Moore, 3 R. 400, the Court say: "The putting of a debtor in default is, under our law, a *condition precedent* to the recovery of damages or the dissolution of a contract. *The want of it need not be pleaded in defense, and can be taken advantage of at any time.* 6 O. S. 229; R. C. C. 1906.

In Hepp vs. Commargre, 10 R. 524, the Court say: "This putting in default being under our law, an *indispensable prerequisite to sustain an action of this kind, it was not necessary to plead the want of it specially, nor is it waived by the defense set up in the answer.*" 6 N. S. 624; 13 La. 229; 5 R. 83, Sewell vs. Wilcox.

In 6 La., 152, Stewart vs. Paulding, the Court say: "In an action by the vendor against the vendee of real estate adjudicated at public auction, the plaintiff's request of the defendant that he would comply with the terms of the sale, and the defendants refusal to do so, is insufficient to put the latter in default." 17 Ann. 32, Leeds vs. Fassman; 19 Ann. 130, Pratt vs. Craft.

In 23 Ann. 513, Dean vs. Frellsen, the Court say: "A party who brings suit for damages resulting from the non-fulfillment of an obligation on the part of the other party, must show, under the general issue, that *he has complied with all the conditions imposed upon himself by the obligation before he can be heard to urge acts of violation by the other party as a reason for not putting him in default.*" 27 Ann. 176, Eden vs. Lemandre; 30 Ann. 1125, Buard vs. Boagni.

In 37 Ann. 659, Defee vs. Covington, this Court held: "An action for damages for a passive violation of a contract, must be preceded by a putting in default of the debtor, and such a putting in *mora* must be alleged in order to justify the introduction of testimony on the question of damages.

Livingston vs. Scully.

"An allegation that the debtor was put in default by means of a formal demand on him for the damages claimed, does not conform with the modes provided by the Civil Code—and is not legally sufficient to admit of proof of damages." 37 Ann. 835, Landéche vs. Sarpy.

The only averment in the petition on this important point is "that he notified Mr. Scully about the 1st of January, 1883, that he, Scully, had forfeited his right to hold him bound to his contract, and that petitioner would claim damages."

We have carefully read all the evidence in the record and have copied the subjoined extracts from the testimony of the plaintiff and defendant.

Plaintiff says: "I failed to go on with the contract I had with Scully because he failed to pay monthly instalments as he promised."

Again: "I notified Mr. Scully that I was going to quit the work. I was forced to do so. This was about the time I should have completed my work under my contract," etc.

Again: "At the time I quit and notified Mr. Scully, there were no other foundations laid * * and I told him that my contract had expired."

Again: "I notified him that I intended to quit and claim damages."

Again: "Mr. Scully gave me money, but we had no settlement."

Scully says: "Mr. Livingston did no work on the bridge after the estimate of December 20, 1882. This estimate covers all the work plaintiff did on pier six.

"At the time of the last payment *no claim was made* by plaintiff for any other sum due him. Plaintiff did no work after this estimate was paid him, and notified me about the 1st of January, 1883, that he had quit work. He assigned no reason for quitting the work. He wrote me a note, but I did not keep it. In the note he said, I recollect, he stated that *his time had expired* in which he was to complete the work and that he had *quit it* and gone to doing something else."

The entire evidence of these two gentlemen is to this effect.

Instead of the pleadings and evidence furnishing proof of the putting of defendant *in mora*, it clearly demonstrates that such is not the case, but decidedly indicates that plaintiff voluntarily abandoned his contract.

It is therefore ordered, adjudged and decreed, that the verdict of the jury and the judgment thereon based are annulled and set aside; and it is further ordered, adjudged and decreed that plaintiff's suit be dismissed at his cost in both courts.

Judgment reversed.

State vs. Grayson

No. 174.

THE STATE OF LOUISIANA VS. ISAAC G. GRAYSON.

Parol evidence is inadmissible to prove the pendency of an indictment in a court of record.

A copy of the indictment and the minutes of the court showing its presentment and filing would be the best evidence of the fact.

A PPEAL from the Twenty-fifth District Court, Parish of Vermilion.
DeBaillion, J.

R. C. Smedes, District Attorney, for the State, Appellee.

O'Bryan & White, for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant appeals from a sentence of two years' imprisonment at hard labor for larceny.

It appears from a bill of exceptions in the record, that a witness for the prosecution was asked if there was not an indictment pending in another parish against the accused.

The question was objected to on the ground that oral testimony would not be the true evidence of the fact sought to be proved and that such evidence was therefore inadmissible. The objection was overruled and an affirmative answer to the question given by the witness, to which ruling the counsel for the accused reserved his bill.

It is certain that a copy of the indictment and of the minutes of the court showing its presentment and filing would have been the best evidence of the fact; and we know of no exception to the general and elementary rule requiring the best evidence to be produced, under which this ruling of the trial judge could be justified.

We can readily conceive that proof of so damaging a fact as the pendency of another indictment against the accused was calculated to work great prejudice against him. In criminal cases especially, where the liberty of a man is at stake, the rules touching the admissibility of evidence, should be strictly and closely adhered to. 1 Greenleaf, secs. 82, 86; Wharton Crim. Ev., 8th ed., sec. 152; 12 Ann. 349.

On account of this error we are constrained to remand the case.

It is therefore ordered, adjudged and decreed that the sentence appealed from be annulled and reversed, and the case remanded to be proceeded with according to law.

35	728
44	1118
32	728
45	970
45	1219

State vs. Tucker.

No. 173.

THE STATE OF LOUISIANA VS. JOE TUCKER.

The opinion recently rendered on a former trial of this case is reaffirmed; and it is further held that where the charges asked are applicable to the facts and contentions of counsel as recited in the bill of exceptions, the judge is not authorized to refuse the charges because, while not denying the material facts stated, he disputes the correctness of the contentions of counsel based thereon. Counsel has the right to urge his own theory as to the inferences of motive and intention to be drawn from the facts, and to impress the same upon the jury; and though the judge may take a different view, the question is to be determined by the jury, and in case the jury should concur with counsel, defendant has the clear right to have them instructed as to the law applicable in such case.

38	789
51	1109
51	1111
51	1112
51	1118
38	789
51	730

A PPEAL from the Third District Court, Parish of Union.
Young, J.

J. A. W. Lowry, District Attorney, for the State, Appellee.

G. A. Killgore, jr., and *Jas. A. Ramsey* for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. The main bill of exceptions presented in this record is, in substance, identical with the one which we copied at length and fully considered in our opinion rendered when this case was before us in May last.

We there held, quoting the syllabus: "When a bill of exceptions recites the facts which the counsel contended before the jury had been established by the evidence, and refers to the evidence in support thereof and asks for charges applicable to the state of facts recited, the judge's refusal to give the charges on the ground that they are inapplicable to the case, is error, unless the judge states that there was no evidence in the case supporting or tending to support the contentions of counsel. It is the duty of the judge to give full instructions to the jury covering the entire law of the case as respects all the facts proved or claimed by counsel to be proved, provided such claim is supported by any evidence."

We will not encumber the Reports by an elaborate statement of the facts recited in the bill at great length, but will refer therefor to our former opinion.

The material facts recited are, that defendant was discovered armed, in the early part of the night, under suspicious circumstances, at the door of Bryant's house; that Bryant, without warning, fired upon and wounded him; that defendant retreated without returning the fire; that he was pursued by Bryant and his wife, both firing on him; that, after retreating some thirty yards, he got behind some bee-gums in the yard, and from that shelter, Bryant and his wife still advancing and

State vs. Tucker.

shooting, defendant fired upon them and wounded Bryant. To this extent the facts recited are not controverted by the judge. But the counsel further contended that the evidence established that defendant was retreating in good faith, trying to get away from his pursuers without injuring them; that he stopped behind the bee-gums simply to protect himself; that he made no offensive demonstration until his pursuers were within a few steps of him; that he then shot merely because it was absolutely necessary to save his own life, and that he aimed at Bryant's legs not in order to kill him but to stop his pursuing him and shooting at him.

Counsel for defendant, under the foregoing recital of facts and contentions, asked the following charges:

1st. A man has a right to drive a party away from his premises who is there without his authority, and if the intruder should start away immediately in good faith the owner would have no right to follow him up; and while still retreating in good faith it should become absolutely necessary for him to fell his pursuer in order to save his own life, he is justifiable.

2d. That when two parties have had a difficulty, if one of them quits the combat and retreats in good faith and is pursued by the other, who continues to follow him up with violence and hostility, and should it become absolutely necessary for the one retreating to turn and fell his pursuer in order to save his own life, he is justifiable, whether he was the aggressor in the beginning of the difficulty or not.

3d. That if the jury should find that defendant shot Mr. Bryant, but should conclude from the evidence that he shot him simply to preserve his own life while he was receding from Bryant in good faith, he would be justifiable in law; and especially is this the law if they should find that Bryant was pursuing and shooting at defendant after defendant was attempting to get away.

The judge refused to give the charges, for the following reasons:

"There was not a particle of evidence on the trial that proved or tended to prove in the slightest degree any retreating in *good faith* on the part of the accused, nor was there any evidence to show that when shot by Bryant he immediately began to *run away*. The evidence, on the contrary, was that he retired very slowly, and also went to show that he got behind the bee-gums as a place of comparative security to fire from, and that he did not endeavor to leave the yard till after he had emptied both barrels of his gun and perhaps one pistol shot; the evidence showed that so far from quitting the combat, Joe Tucker kept it up until his gun and likely his pistol were emptied.

State vs. Tucker.

"The evidence did not show that Bryant and his wife were in a few steps of Tucker when he shot Bryant, and there was no evidence whatever to show that Joe Tucker retreated *in good faith* to avoid the combat, nor did the evidence show or tend to show that he made every possible effort to get away, or indeed any effort at all *to leave the premises*, until his means of offense were apparently exhausted; the evidence showed that he stopped as soon as he got behind the bee-gums, from which point he fired at Bryant. So far from the evidence showing that he shot Bryant in the legs in order not to kill him, it tended strongly to show a determined effort on his part, after the shooting began, to kill Bryant."

It will be observed that the judge does not dispute any of the principal facts set forth in the bill, viz: that defendant was fired upon and wounded without warning; that he retreated or retired; that he was pursued with repeated firing; that he got behind the bee-gums and only then fired upon his pursuers who still advanced, and wounded Bryant. He only differs with counsel as to the *speed* with which defendant retired; as to the *motive* of his retreat; as to his *intention* in stopping behind the bee-gums; and the like—all of which are not facts, but mere inferences from the facts as established by the evidence. The judge may be right and the counsel entirely wrong as to the conclusions which they respectively draw from the evidence; but the determination of such questions is remitted to the jury, whose exclusive province it is to weigh and give effect to the evidence.

Given the fact that defendant retreated, defendant's counsel had the clear right to contend that the retreat was in good faith and in an effort to escape without injuring his pursuers. Given the fact of his stopping behind the bee-gums, he had the right to contend that such stoppage was for the purpose of protecting himself from injury. Given the facts of the continued pursuit and firing, he had the right to contend that defendant's firing in return was to save his own life and necessary for that purpose. And in case the jury should concur with the counsel's interpretation of, and inferences from, the facts, he had the clear right to have them instructed as to the law applicable thereto.

While not doubting the sincerity of the respected judge's intention to comply with our former decision, we are reluctantly constrained to hold that he has erred in his construction of it and in refusing the charges asked for.

The remaining bills of exception have no merit whatever and do not require notice.

We may say that the judge was perfectly right in warning the jury

State vs. Jones.

that the opinion of this Court in the former case was not to be considered as evidence in any manner affecting the facts of the case. We have nothing to do with the facts in criminal cases. We deal with them only as hypotheses, and say, "if the jury find such and such to be the facts, then the law is so and so." But it is for the jury alone to ascertain, weigh and determine the facts, independent of judges of District or Supreme Courts. We say thus much to guard any future jury in this case against being misled in this matter.

It is, therefore, ordered, adjudged and decreed that the verdict and sentence herein be annulled and set aside, and that the case be remanded to be proceeded with according to law.

No. 177.

THE STATE OF LOUISIANA VS. JIM JONES.

38	792
50	715
51	1341

A juror who, when sworn on his *voir dire*, says that from what he knows of the character of the accused he has a little prejudice against him, but that this feeling can, in no manner, affect his verdict and that he will be governed solely by the law and the evidence, is not incompetent.

Where the mortal blow is given in one parish, but death ensues in another, the crime may be prosecuted in either parish, and it is not essential to the validity of the indictment in such case that said facts should be averred therein. The crime may be charged to have been committed in the parish where the bill is found.

Where a person, after being wounded, sends for a minister and declares to him that he expects to die, has no hope of recovery and continues to speak in this strain till his death, the condition of mind prerequisite to making a valid dying declaration, is sufficiently proved.

A PPEAL from the Second District Court, Parish of Bossier.
Drew, J.

J. A. W. Lowry and *M. J. Crain*, District Attorneys, for the State, Appellee.

J. E. Reynolds for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The defendant was convicted of murder, and appeals from a sentence of death imposed under the unqualified verdict of the jury.

1. He first complains of the ruling of the trial judge declaring one George Gilmer a competent juror.

This juror was sworn on his *voir dire* and stated, quoting: "That from his knowledge of the previous character of the defendant that he had some little prejudice against the defendant, but that he could lay this aside and try the case according to the law and the evidence re-

gardless of this prejudice and do exact justice between the State and defendant, and be governed by the law and the evidence."

We know of no law and have been pointed to none that, under the condition of mind disclosed by the juror in the above statement, would disqualify him as a juror. He was certainly competent; but while so holding we think it the wiser course in a judge to exclude from the jury every man who entertains even a little prejudice against an accused from a knowledge of his reputation, or other mere personal grounds.

2. A motion for a new trial was filed and was urged mainly, if not exclusively, on the ground that the mortal blow had been given in the parish of Bossier, where the trial was had, but the death ensued in another parish, and that these facts were not set forth in the indictment, and that it was essential they should have been so averred; and an affidavit of the judge presiding showing said facts was annexed to the motion.

Of course, it was an irregularity to seek to take advantage of such an alleged defect in the indictment and proceedings by a motion for a new trial, but inasmuch as no objection is found of record against this mode of presenting the issue, we shall consider it.

The object of setting out in an indictment the place of death, is to show the jurisdiction of the court over the offense. Under the common law, such an omission or failure might be fatal to the prosecution. Section 988 of the Revised Statutes of this State, however, provides that when a crime "shall be begun in one parish and completed in another, it may be dealt with, inquired of, tried, determined and punished in either of the parishes in the same manner as if it had been wholly committed therein."

Under this Statute the district court of Bossier, where the mortal blow was inflicted, was expressly clothed with jurisdiction over the offense and its prosecution; and in consideration of this fact, it was legitimate and competent to charge in the indictment found by the grand jury of that parish, that the murder was therein committed, as was done, and not required to set out in detail that the death occurred in one parish and the mortal wound was inflicted in another, since the place of death need only be averred, as before stated, for the purpose of showing the jurisdiction in the court. The substantial fact charged in the indictment was the murder, the place where the victim died was an immaterial circumstance, considered with reference to the law investing with jurisdiction over the crime the court of the place where the mortal stroke was given.

State vs. Jones.

The counsel for the accused cites the case of the State vs. Cummings, 5 Ann. 331, as opposed to these views. We do not so construe that decision, the facts relating to the offense and prosecution are very unsatisfactorily and obscurely set out in the opinion of the Court, but if there is anything in that case opposed to the doctrine now announced, we are not disposed to follow it. The motion for a new trial was properly overruled.

3. The counsel for the accused took a bill of exceptions to the admissibility of a statement of the murdered woman, offered and received in evidence as her dying declarations. His objection to the same was, substantially, that it was not shown with sufficient certainty that at the time of the statement the person was under an apprehension of impending dissolution. The evidence on this point, as stated by the trial judge in the bill of exceptions, is as follows:

"The witness Williams stated to the court that the deceased sent for him, a minister of the gospel, to come and pray for her, and when he reached her bed-side she told him she sent for him to pray for her, that she did not expect to live and wanted the prayers of herself and the church, and that he and some of the members of the church prayed for her; that he watched her and was with her until her death * * * that at no time did she express any hope of life, but all the time said she would not get well and that she felt and expected she would die. * * * Both physicians testified there was no hope for her recovery."

This evidence shows, we think, that the woman fully believed that she would die, and that the statement was made under a full sense of approaching dissolution. All authorities concur that, under similar expressions touching the expectation and belief of death, the statement must be regarded as a dying declaration.

The ground for the admission of such a declaration as evidence, is that in the expectation of approaching death, all temptation to falsehood either from interest, hope or fear will be renounced; and the awful nature of the situation will impress the declarant as strongly with the necessity of telling the truth as the solemn obligation of an oath. We must infer from the evidence that such was the situation of this party, and her mental condition when her declaration was made. She not only declared once that she had no hope of living, but according to the evidence, continued to do so until death came. Even if there be but one declaration of the kind, it matters not that several days

State vs. Matthews.

may elapse, as in this case, before the person dies. Whart. Crim. Ev., 8th ed., Secs. 281, 283.

This completes the view of the proceedings in the case as the record presents them, and we can find nothing therein to relieve the unfortunate accused from the impending sentence.

Judgment affirmed.

No. 186.

THE STATE OF LOUISIANA VS. HAL' MATTHEWS.

The rule that the jury is bound to accept and apply the law as laid down by the judge, and that it cannot disregard it without violating its oath and duty is reaffirmed; and it is not error to refuse a charge "that if the jury cannot conscientiously believe that the judge has charged the law correctly, they do not violate their oath in disregarding it." Such a principle would utterly emasculate and annul the rule.

It is not essential that the violence inflicted by the defendant should have been the sole cause of the death; but if it hastened the termination of life, or really contributed, mediate or immediately, to the death in a degree sufficient to be a clear contributing cause, that is sufficient

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

M. S. Crain, District Attorney, for the State, Appellee.

J. W. Jones, for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Charges of error are based on five bills of exception.

Bill No. 1 is taken to the refusal of the judge to instruct the clerk to embody in the transcript the form of the oath administered to the jury. The refusal was utterly inconsequent, because the bill of exception, signed by the judge, contains the oath in full, and it is the same which we have heretofore sanctioned as legal. *State vs. Johnson*, 37 Ann. 421; *State vs. Logan*, id. 778; *State vs. Vinson*, id. 792.

Bill No. 2 arraigns the refusal of the judge to charge that, "the jury is a co-ordinate branch of the court and your oath as jurors obligates the jury to find a verdict according to the law and the evidence of the case."

The judge did not question the correctness of the proposition, but refused because his written charge fully covered the point. The reason is good, as we find that the written charge had fully expounded the duty of the jury with reference to the law and the facts as laid down by this Court.

Bill No 3 excepts to the charge of the judge on the subject of the

88	795
110	1100
38	795
114	400

State vs. Matthews.

function of the jury with reference to the law and their duty to accept and apply the law as laid down by the court. The charge is couched in the very language of this Court in *State vs. Vinson*, 37 Ann. 792 and embraces every essential element.

Bill No. 4 is taken to the refusal of the following charge: "If the jury cannot conscientiously believe that the court has charged the law correctly, they do not violate their oath in disregarding it."

This Court has repeatedly held that, the jury is bound to accept and apply the law as laid down by the judge, and that, while it has the power to disregard it, yet in so doing, it would violate its oath and duty. *State vs. Vinson*, 37 Ann. 792; *State vs. Ford*, id. 465; *State vs. Johnson*, 30 Ann. 905; *State vs. Scott*, 12 Ann. 386; *State vs. Ballerio*, 11 Ann. 81.

The charge invoked by counsel would utterly emasculate and annul the rule thus repeatedly laid down, and the judge *a quo* rightly refused it.

The 5th and last bill challenges the judge's refusal to give the following charge: "Proof that the violence inflicted by the defendant was the cause of the death of the deceased is necessary and the evidence must connect the death with the special blow charged."

The court had already charged that, before convicting "the jury must be satisfied that defendant caused the death of deceased, either wholly or in part. If Carey had been already mortally wounded, yet if defendant struck him with a bottle and thereby inflicted a wound which hastened the termination of his life, it was a sufficient killing by defendant."

This charge is a correct exposition of the law, and defendant's counsel is quite in error in his contention that it applies only to cases of conspiracy and concurrent injuries inflicted by several persons. On the contrary, it applies to other contributing causes of death of whatever nature. Thus Lord Hale says: "If a man receives a wound not in itself mortal, but, either from want or neglect of helpful application, it turns to a gangrene or a fever, and that gangrene or fever be the immediate cause of death, yet this is murder or manslaughter in him that gave the wound." 1 Hale, P. C. 428; see also *State vs. Scott*; 12 Ann. 274; 3 Greenleaf Ev. sec. 139.

And Mr. Bishop summarizes the doctrine thus: "Whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible if death follows, he will be deemed guilty of the homicide, though the person beaten would have died of other causes, or would not have died from this one had not others operated with it; pro-

State vs. Ford.

vided, the blow really contributed mediately or immediately to the death in a degree sufficient for the law's notice." And again: "If the person would have died from some other cause already operating, yet if the wound hastened the termination of life, this is enough, as for example, if he had been already mortally wounded by another." 2 Bishop Cr. L., secs. 637, 638.

In a certain sense, every man is born and lives, mortally wounded; that is, subject to laws which inevitably doom him to death. No murder does more than to hasten the termination of life.

We conclude, therefore, that the judge has correctly expounded the law, and that the charge asked was too broad, inasmuch as, without explanation, it might have conveyed the erroneous idea that it was essential that the blow should have been the sole cause of the death.

Judgment affirmed.

No. 188.

THE STATE OF LOUISIANA VS. MAY FORD.

1. The essential elements of forgery to be charged against the accused and proved are three:—
 - 1st. A writing, in such form as to be apparently of some legal efficacy.
 - 2d. An evil intent, of the sort deemed fraudulent, in the mind of the defendant.
 - 3d. A false making of such writing.
2. A jury ought to infer an intent to defraud the person who would have to pay the instrument, if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose upon him.
3. A clerical error in writing a name in an indictment cannot be invoked as vitiating the proceeding. 32 Ann. 782; 35 Ann. 293.

A PPEAL from the First District Court, Parish of Caddo.
Hicks, J.

M. S. Crain, District Attorney, for the State, Appellee.

S. P. Watts and *M. C. Elstner* for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The accused appeals from a conviction for forgery and asks a reversal of judgment and sentence on the ground that "the State did not prove on the trial that McKellar was indebted to Frierson, or that Frierson was a creditor of McKellar."

The indictment sets out that the name of S. J. Frierson was forged to an order for \$85 in money, which the accused wilfully, falsely and fraudulently forged, counterfeited, uttered, published, and put off as genuine; and which was presented to R. N. McKellar—on whom said

28	797
44	666
28	797
120	141

State vs. Ford.

order was drawn—for payment, with intent to cheat and defraud said McKellar, said May Ford well knowing said order to be false, fraudulent and forged at time of presentation.

It appears that after the trial judge had delivered an oral charge to the jury the prisoner's counsel requested him to give them the following special charges, viz:

1st. That the jury must be satisfied from the evidence that R. N. McKellar would have paid the said order had it been genuine, before they could the defendant.

2d. That the jury must be satisfied from the evidence that the defendant forged the name of *S. J. Frierson* as charged in the bill, and not the name of *J. S. J. Frierson*, before they could convict the defendant.

I.

These special charges the trial judge declined to give for reasons assigned in the bill of exceptions reserved by accused, viz: "The first charge was refused because the court had charged the jury that if the order was a forgery, it was sufficient if it had an adaption to accomplish a fraud."

Mr. Bishop says: "The *essential elements* of forgery, to be charged against the defendant and *proved*, are three:—

1st. A writing, in such form as to be apparently of some legal efficacy.

2d. An evil intent, of the sort deemed fraudulent, in the mind of the defendant.

3d. A false making of such writing. Crim. Proc. sec. 400; 2 Crim. Law, sec. 523.

"A jury ought to *infer an intent* to defraud the person who would have to pay the instrument if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose on him, and although the object was *general*, to defraud whoever might take the instrument, and the intention of defrauding, in *particular*, the person who would have to pay the instrument, if genuine, did not enter into the prisoner's contemplation." Russell and Ryan's British Crown Cases, vol. 1, p. 291, Rex vs. Mary Mazorka; 19 Ann. 396.

"If there be, at any time, a *bare possibility* of fraud, it is enough to constitute the offense." Whar. Crim. Law, p. 338; Archbold's Crim. Plead. 346; 35 Ann. 1042, State vs. Ferguson.

The ruling of the court on this point was correct.

 State vs. Ford.

II.

The judge further assigns that the second charge was "refused because the order had been read to the jury without objection, and the jury were then the sole judges whether it proved the allegations of the indictment, as to alleged or supposed drawer or not.

If there was a variance in the name of the supposed drawer as alleged in the indictment, and that in the order, objection should have been taken when offered in evidence, and the court would have decided whether there was a variance.

"And because the court had charged that the jury must be satisfied beyond all reasonable doubt that the defendant committed the crime of forgery of the *order as set out* in the pleadings."

In 35 Ann. 293, *State vs. Morgan*, this Court say: "A clerical error in writing a name in an indictment cannot be invoked as violating the proceeding.

32 Ann. 782, *State vs. Given*: "A question of variance between the allegation, and the proof is to be submitted, under proper instructions from the court, to the jury; unless the variance is palpable; in which case it is not.

"An allegation that a banknote is payable to "A bearer," is supported by proof of a note payable to "A or bearer."

We think the instructions given by the trial judge to the jury, were sufficient, as also the reasons he assigns for refusing the charge requested.

III.

In this Court defendant's counsel assigns error apparent on the face of the record, that "the minutes of the court do not show that the defendant was present in court *when the verdict of the jury was rendered*. T. p. 10.

The minutes referred to as not *affirmatively* showing the presence of the accused in open court at the time when the jury delivered their verdict in open court is as follows, viz:

"SHREVEPORT, La., Friday, September 24, 1886.

"Court met pursuant to adjournment, his Honor, A. W. O. Hicks, judge, presiding.

"Minutes of yesterday read and approved in open court.

"STATE OF LOUISIANA } versus MAY FORD.	}	Forgery and Uttering.
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"Case called for trial. The *defendant, May Ford*, in open court, having been duly arraigned and pleaded thereto not guilty. Now comes

State vs Ford.

the district attorney who prosecutes on behalf of the State of Louisiana, and *the prisoner at the bar in his own proper person* represented by P. S. Watts and M. C. Elstner, Esqrs., who announced themselves ready for trial. Whereupon came the following named jurors drawn from the regular panel, to-wit: * * * making in all twelve good and lawful men of the parish of Caddo, duly empanelled and sworn who, after hearing the evidence, argument of counsel and charge of the court, retired to consider of their verdict, and on returning into open court do, upon their oaths, say: 'We, the jury, find the prisoner guilty.'

LOUIS LEVY, Foreman."

All of these proceedings were had upon one and the same day, and without any adjournment of the court. The prisoner was present in open court when the trial commenced and must have been at the close when the verdict was rendered.

The repetition of that recital in the minutes would have been, under the circumstances detailed, unnecessary. Had there been an adjournment of the court after the jury retired, or had the verdict been rendered upon a subsequent day, that recital in the minutes would have been necessary and its omission fatal.

Judgment affirmed.

CASES
ARGUED AND DETERMINED IN THE
SUPREME COURT OF LOUISIANA,
AT NEW ORLEANS,
IN
NOVEMBER. 1886.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice.*

HON. FÉLIX P. POCHÉ,
HON. ROBERT B. TODD,
HON. CHARLES E. FENNER,
HON. LYNN B. WATKINS,

} *Associate Justices.*

No. 9761.

GEORGE L. BRIGHT VS. ADAM THOMPSON ET AL.

Where the amount in dispute is really under the lower limit of the jurisdiction of this Court, though in the averments and prayer it be greater, the claim will be considered as fictitious and the appeal dismissed.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Geo. L. Bright and H. L. Edwards for Plaintiff and Appellant.

T. Gilmore & Sons for Defendants and Appellees.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The plaintiff complains that a line of posts erected along Margaret Place and Camp street are a nuisance which ought to be abated; that they will injure to the extent of \$2500 his property, which is some three squares from the "Place;" that he has so far sustained \$200 damages, and is entitled to recover \$300 for attorney's fees, for the prosecution of this suit.

Kent vs. Brown & Learned.

From a judgment in favor of defendants this appeal is taken.

We have considered the evidence adduced below, and have failed to find any testimony or proof supporting the complaint and the damages claimed.

When on the stand, the plaintiff himself does not undertake to verify his allegations, and when asked about the damages, answers: "It is hard to fix the damages of a thing of that kind," and he proves none.

Far from showing that any injury has been inflicted on the petitioner, or any one else, or will be caused to any person or thing, the proof in the record is to the effect, that the posts complained of are an ornament, in every way beneficial to the public.

We even notice an ordinance of the city on the subject, which declares, "that for the purpose of adding to the usefulness of Margaret Place, as well as enhancing its beauty, and enlarging its area, for the recreation and pleasure of its visitors," the portion of the ground on which the posts have been erected was declared part and parcel of said Margaret Park, and dedicated by the city for that purpose.

A long line of precedents is to the effect that, where the matter in dispute is really under the lower limit of the jurisdiction of the appellate court, although on the averments and prayer it be greater, the claim must be considered as fictitious and conferring no jurisdiction, and the appeal must be dismissed.

Following that well established and conservative rule, we have no other alternative left than to apply it to the present litigation.

It is therefore ordered that the appeal in this case be dismissed at appellant's costs.

38 802
46 408

No. 9688.

MRS. KATE S. KENT AND HUSBAND VS. BROWN & LEARNED.

In testing the validity of sales for taxes, the courts of this State are guided by the same rules which prevail in judicial sales.

A monition which relates to informalities in the decrees under which judicial sales are made, and to irregular and defective proceedings connected with the sales, will cure the same defects which are reached and set at rest by the prescription of five years under the provisions of Art. 3543, Civil Code, and both remedies may be invoked to cure informalities in the assessment and in the sale for taxes.

In an assessment not absolutely void, a monition will cure a defect in the description of the property, in listing the same on the resident instead of non-resident rolls, an omission to extend State and parish taxes on separate assessment rolls, and other errors not necessarily fatal to the assessment.

A complaint that the taxes for which property was sold are excessive, comes too late after

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the sale is completed; it may be a good ground for an injunction but not for a suit in nullity.

A judgment rendered by a court of competent jurisdiction imparts absolute verity, and has the force of the thing adjudged until set aside in a direct action of nullity; it cannot be attacked collaterally.

A PPEAL from the Ninth District Court, Parish of Concordia.
Young, J.

Dagg & Mason and Montgomery & Ransdell for Plaintiffs and Appellants:

The tax title pleaded by defendants is void for the following reasons:

- 1st. There was no sufficient description of the property. R. S. §§ 3266, 3273; Act 42 of 1871, sec. 32; Bur. 330-1; Blk on Tax Titles, pp. 136, 137 (a) 148; 13 L. 210; 6 Ann. 542; 8 Ann. 19; 9 Ann. 540; 32 Ann. 235; 33 Ann. 556, 1164; 37 Ann. 61.
- 2d. The rolls were not signed and sworn to by the tax collectors and board of assessors, as required by law. R. S. §§ 3274, 3278; Acts 1871, No. 42, sec. 39, Blackwell, 122-3-4-9, 281; Burroughs, 274, 296; 9 Neb. 397; 6 Neb. 236; 33 Ann. 1165-6.
- 3d. The assessment in 1867 was in name of Geo. F. Sanderson instead of estate of G. F. Sanderson. See 23 Ann. 526; 35 Ann. 1086; Blackwell, pp. 150, 280.
- 4th. The property was placed on resident, when it should have been placed on non-resident roll. R. S. § 3251; Acts 1870, No. 23, §§ 19-32; Acts 1871, No. 42, § 18; Cooley, 277; Blk. 150-60; 34 Ann. 126.
- 5th. No parish taxes were extended on assessment rolls as required by Acts 1870, § 44. Nor were there any separate rolls as required by Act 42, sec. 43, of 1871; 34 Ann. 126.
- 6th. The parish taxes for the years 1870, 1871 and 1872 were illegal, being in excess of the State tax. 34 Ann. 126, and authorities there cited.
- 7th. The tax title shows that the property was sold to pay taxes which the assessment rolls and the delinquent lists, as recorded in the mortgage books, did not show to be due.
- 8th. A portion of the taxes for which the property was sold appear to have been paid.
- 9th. Lands sold at tax sale, under Act 47 of 1873, should not have been divided into lots.

The judgment is void for the following reasons:

- 1st. The Carroll court was without jurisdiction to appoint Mrs. Sanderson tutrix, as she, at the time, was a resident of New Orleans. C. C. 307, 335; C. P. 944, 948-9-50; 2 Ann. 71. The nullity appears on the face of the proceedings. 32 Ann. 891; see also Cooley's Con. Lim. 503 (407); 11 How. 437.
- 2d. If legally appointed, Mrs. S. had forfeited her tutroship by marrying again without provoking a family meeting. C. C. 254; 3 M. 346; 5 Ann. 596; 32 Ann. 51.
- 3d. The co-tutor was not a party to the judgment.
- 4th. The Carroll court was without jurisdiction *ratione personæ* to render judgment. The consent of the tutor does not give the court jurisdiction over the minor. C. P. 91.
- 5th. The judgment was by confession. The attorney who gave the confession was without authority from the tutrix. 29 Ann. 600; 6 Ann. 115; 3 L. 203; 7 Ann. 440. The tutrix herself could not have given the confession. 15 Ann. 226; 31 Ann. 389; 32 Ann. 906.
- 6th. The interests of the tutrix and her ward were in conflict. The latter should have been represented by an under tutor. C. C. 275; 2 L. 142; 11 R. 120; 21 Ann. 712; 23 Ann. 617.

Percy Roberts, Hiram R. Steele and J. N. Luce for Defendants and Warrantors.

Miller & Finney, Conner & Conner and W. T. Martin for the Citizens' Bank, one of the Warrantors:

The judgment of a court of competent jurisdiction appointing a tutrix cannot be attacked collaterally. Irregularities in the constitution of a family meeting cannot be urged collaterally against the appointment of a tutrix made by decree of a competent court in

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purseance of authority conferred by a family meeting. 36 Ann. 831; 35 Ann. 592; 32 Ann. 955, 398, *et passim*.

Where there is no administrator appointed, a tutor has the right to stand in court in a suit brought to enforce a debt against the succession. 36 Ann. 744; 35 Ann. 296, 591, 836, *et passim*.

A tax title based upon a proper assessment conveys a valid title. 37 Ann. 357; 35 Ann. 894; 32 Ann. 707; 31 Ann. 662.

If a tax title can be set aside at all, the owner thus dispossessed will be entitled to be maintained in all the rights he may have against the succession of the owner of the property. 32 Ann. 295, 296; 31 Ann. 839.

The opinion of the Court was delivered by

POCHE, J. Plaintiff, as the sole heir of her deceased father, G. F. Sanderson, claims ownership of the "Panola" plantation, in the parish of Concordia, which was the property of her father at the time of his death, in 1863, and which is alleged to be now in the possession in bad faith of the defendants, as owners thereof.

The defendants claim title to the property by right of purchase from W. A. Peale for three-fifths, and from the Citizens' Bank, and Mrs. Georgia Miller Smith for one-fifth each, and they call their vendors in warranty.

The warrantors, defending the title of their vendees, claim to derive their former ownership from a tax sale of the property made in December, 1873.

In amended pleadings the defendants set up a judgment which they hold by transfer from W. A. Peale, against the succession of G. F. Sanderson in the sum of \$38,628.01, with interest of 8 per cent per annum from January 1, 1867, until paid, subject to a credit of \$15,000 of that date, for which they claim judgment in reconvention against plaintiff, as the sole heir of her father, whose succession she has accepted.

Alleging their possession in good faith, they also claim reimbursement of the sum of \$9722 on account of taxes on the property paid by them, and for valuable improvements placed thereon by them, during their possession thereof, in case of eviction.

On trial plaintiff assailed the tax sale as a nullity by reason of numerous illegalities and irregularities, both in the assessment and in the sale for taxes, and she also urged the nullity of the judgment against her father's succession on innumerable grounds to be hereinafter considered.

After plaintiff had developed her attack of the tax sale as a nullity, the defendants and warrantors pleaded the exception of *res adjudicata* in bar thereof, resting on a judgment rendered by the district court of Concordia on the 24th of November, 1874, confirming and homologat-

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ing said tax sale, in conformity with monition proceedings which had been previously instituted and published, according to law, by the purchaser at said tax sale.

The district judge declared the sale to be null, but recognizing the validity and binding force of the judgment pleaded in reconvention by the defendants, which he considered to be in excess of the real cash value of the property in suit, he refused to adjudicate the nullity which he declared to have been established by the law and the evidence of the case, and he rendered judgment in favor of the defendants rejecting plaintiff's demand for the ownership of the property.

Plaintiff has appealed, and defendants pray for an amendment looking to a formal recognition of their title.

The grounds of nullity alleged against the tax sale are as follows :

1st. That the assessments for the years 1867 to 1872 inclusively, for which years' taxes the property was sold, is invalid, because the assessment rolls for those years are not properly signed, sworn to or filed.

2d. That the assessment for 1867 is invalid because the property for that year is assessed to George F. Sanderson, and not to his succession.

3d. That the description of the property in 1867 as "Panola" is insufficient.

4th. That the property is assessed for all of the above years on the resident portion of the rolls.

5th. That all the taxes, State and parish, are not extended on the assessment rolls.

6th. That during the years 1871 and 1872 State and parish taxes are not extended on separate assessment rolls.

7th. That the tax for general parish purposes is in excess of four mills for the years 1869, 1870, 1871 and 1872.

8th. That the taxes for which the property was sold, according to the tax deed, do not correspond in amount with the taxes as shown by the assessment rolls, delinquent lists and recorded delinquent lists.

9th. That proper notices of the sale were not given.

I.

In support of the first ground of nullity, plaintiff introduced in evidence, over defendants' objection, certain assessment rolls which had been found in the recorder's office, several of which are open to the objections contained in that ground.

Defendants' counsel then introduced in evidence certificates from the Auditor's office, showing the existence in that office of assessment rolls

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for the same years, which were in form, and they offered testimony to show that the rolls relied on by plaintiff were not those on which the tax collectors had acted, and that the correct rolls, which were triplicates of those found in the Auditor's office, were missing from the recorder's office of Concordia. From the preponderance of the evidence, and in consideration of the legal presumption that the officer had done his duty, we conclude that defendants' contention is correct; and that the genuine rolls originally left in possession of the recorder, if produced, would have agreed in their tenor, signature and recitals with the triplicate copies now on file, as returned in each consecutive year, in the Auditor's office.

This presumption is more than confirmed by our knowledge of the conscientious ability of the attorneys, Mayo and Spencer, who, as counsel for the Citizens' Bank, Peale and Miller, warrantors herein, and at that time judgment creditors of the succession of Sanderson, conducted all the proceedings which resulted in the tax sale now under consideration. We must decline to accept the theory which rests on the supposition that these attorneys would have risked the funds of their clients, amounting to \$5,564 56, the amount of their bid at the sale, on the faith of proceedings which lacked the foundation prescribed by law.

II.

The main question presented by the second ground of nullity involves the existence of any information in the records of Concordia touching the death of Sanderson, when the assessor made the rolls for the year 1867.

We gather from the record that his domicile was in the parish of Carroll, several hundred miles above the parish seat of Concordia, and that he died in the State of Georgia in the year 1863, his own wife being unable to give the precise date or month when his death occurred, and that his succession was opened only in the year 1866, in Carroll.

We must take judicial cognizance of the state of war in which the country was then engaged, of the closing of the courts during several years, of the difficulty, and at times, of the impossibility of communicating between the parishes of Concordia and Carroll, and from the record it appears that no positive information could be had from the records of Concordia of the whereabouts of Geo. F. Sanderson, or of the fact as to whether he was dead or alive. From the only sources of knowledge within the reach of the assessor, he had no alternative but to list the property in the name of that owner, to whom it had been

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assessed, and who had paid the taxes thereon for years past. Those circumstances, which are entitled to great weight, entirely remove this question from the rule or scope of the two decisions mainly relied on by plaintiff's counsel.

In Stafford's case, 33 Ann. 520, it was in proof that when the assessor listed the property in the name of "L. A. Stafford," he had been officially informed of his death by the very persons to whom he had sent notices of assessment as the agents of L. A. Stafford.

In Hickman's case, 35 Ann. 1086, the record showed that the property had never been assessed in the true owner's name, Mrs. Marie Emma Blanchard, from the time she had acquired it in 1860, to the time when it was sold for taxes in 1872, as the property of Mrs. E. A. Blanchard.

The correct solution of that point is confirmed by the case of Congreve et al. vs. City of New Orleans, 33 Ann. 816, in which it was contended that the assessment of property to the "Estate of Mrs. R. Jennings," when it should have been assessed to her heirs, who had been put in possession of the property as such, was a fatal error. The Court held that, as there was no proof of such transfer in the records of the parish where the property was situated, there was no irregularity in the assessment. See also, 28 Ann. 240, City of New Orleans vs. Ferguson.

III, V, VI, VIII.

The discussion of the errors charged in the objections numbered 3, 5, 6 and 8, can be properly considered and disposed of under one subdivision of the subject.

In our opinion, these few grounds present questions of relative nullities, and not matters of substance or radical defects.

Hence, we conclude that these errors, if shown to exist, would be covered by the prescription of five years, and that they have been corrected by the judgment of the court on the monition applied for by the purchasers at the tax sale.

Under our discussion of the first two grounds of nullity, urged by plaintiff, and in our disposition hereinafter of the seventh ground, we think that the conclusion is justifiable that the assessment is not radically defective.

Now, the record shows that the property in suit has been designated and known as the "Panola" plantation, in the parish of Concordia, for more than forty years; hence, it follows that the description, although defective under the requirements of the law, was sufficient in fact to inform any and all parties in interest of the nature and locality of

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In the case of Rougelot vs. Quick, 34 Ann. 124, we held that a defect in this particular contributed with other informalities to the nullity of the assessment, but in that case we had no monition to deal with, and our opinion is authority to the extent only that a non-compliance with the legal requirements as to resident and non-resident rolls, in the absence of monition or of the plea of prescription, will vitiate the assessment and the sale made thereunder. In our examination of the present case, we took the pains of re-examining the record in Rougelot's case, and we find that the only defense was a general denial followed by a demand for reimbursement of taxes paid and improvements made on the property by the defendant in the suit, purchaser at the tax sale.

VII.

The complaint that the tax for General parish purposes for the years 1869, 1870, 1871 and 1872 was in excess of the limit of parochial taxation, is met by the defendants by the contention that it comes too late after the sale.

The same point was presented and discussed in the case of Shannon vs. Lane and husb., 33 Ann. 490, in which this Court said:

"We think, however, the defendant has let go by the *utite tempus* within which she might have successfully urged defenses against these excessive taxes and she cannot now set it up against this plaintiff." The point made in that case was that the complaint of excessive tax would have been good as a ground of injunction against a proposed sale, but that it could not avail as a means of assailing the sale after it had been completed.

The contention derives strength from reason and logic as well as from law and jurisprudence.

Proceedings for the assessment and collection of taxes are placed on the same footing as matters involving their validity as judicial proceedings. It is elementary that a judicial sale could not be set aside on the ground that the execution was for a larger amount than was actually due by the defendant. It is now settled that a writ of seizure and sale cannot be enjoined *in toto*, on the ground of an excessive demand; the injunction is restricted to the amount alleged to be in excess of the debt due by the defendant.

We note that a similar complaint was favorably entertained in Rougelot's case hereinabove referred to, but as stated, the point of its being too late was not made by the defendant in that case, in which the issue was simply a general denial.

IX.

The objection of the alleged want of notices of sale is not pressed on appeal, and is, therefore, considered as abandoned. It is at all

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events answered by the tax-deed itself, which contains the recital, uncontradicted by any evidence, that all the notices required by law were given, and which includes fees paid to the curator appointed to represent the non-resident tax debtor.

A very thorough and a very prolonged and laborious consideration of all the points of attack levelled by plaintiff at the tax sale in this case has satisfied us that they are unavailing and the sale must be sustained.

We therefore conclude that W. A. Peale, Mrs. Georgia Miller Smith and the Citizens' Bank in their respective proportions acquired a just and legal title to the "Panola" plantation at the tax sale made thereof, on the sixth of December, 1873, and that such was the title acquired from them by the defendants, Brown and Learned, on the twenty first of September, 1880, through the authentic act of sale of that date.

We thus reach the same judgment which was rendered below, but fortunately by an entirely different route, and through the very reverse of the reasons of the trial judge.

By the same process, however, we have reached the same conclusions followed by the district judge on the question of defendants' re-conventional demand, which involves the validity of the judgment obtained by Henderson and Peale against the succession of George F. Sanderson on the ninth of October, 1867.

In their eagerness to obtain a judicial declaration of its nullity, plaintiffs' counsel have surrounded that judgment with a dense cloud of blunders and errors. But in directing their multifarious attacks against the judgment, they seemed to have lost sight of the relative positions of the parties under the pleadings in this case, and that their present resistance of that judgment does not place their client in the legal attitude of a plaintiff in action of nullity. Hence their present attack must be restricted to absolute alleged nullities resulting from radical defects, omissions and irregularities apparent on the face of the record.

When sifted through that criterion, which is elementary in jurisprudence, the discussion of this attack is of necessity restricted to one or two points only.

Plaintiff alleges want of jurisdiction in the court of Carroll parish in the matter of the appointment of her mother as her tutrix, for the main reason that her mother was at that time a resident of the city of New Orleans, and had then abandoned her former domicile in the parish of Carroll.

But in her petition for the tutorship, she alleges her residence in the

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parish of Carrell. To this, however, the plaintiff herein, her daughter, and the tutrix herself both deny the authority of the counsel who appeared as her attorney in that petition as well as in all other proceedings in that court connected with the succession of George F. Sanderson, and with the judgment herein set up in reconvention.

That counsel was Edward Sparrow, the father of Mrs. Kate Sanderson, now Mrs. Foster, and the grandfather of the plaintiff. The record shows that in his day Gen'l Sparrow was one of the lights of the Louisiana bar, and an advocate whom honesty and delicacy of purpose were only equaled by the enviable reputation which he enjoyed throughout his whole career.

Were the record barren of evidence touching his professional authority to represent his daughter in the judicial proceedings now under consideration, we would hesitate to believe the charge of his officious intrusion in a court of justice without warrant or authority from the party whom he sought or pretended to represent. *Mason vs. Steward*, 6 Ann. 736.

But the evidence in the record is overwhelming in favor of the proposition that in all these proceedings he was the employed counsel of Widow Sanderson, and that in addition he was empowered to represent her completely and absolutely in all legal and other business and matters by a general and special power of attorney, which was of record in the parish of Carroll.

It follows, therefore, that the judicial declarations made by him for his client are binding on the latter, and that Mrs. Foster is thus estopped from denying her residence in Carroll parish at the time that she was appointed and qualified as natural tutrix of her then minor daughter, the plaintiff herein. She would be estopped by the very oath which she took, and which is contained in the record, in order to be qualified as tutrix.

These considerations lead to the double conclusion that the District Court of Carroll parish was the proper and the only tribunal for the purpose of the tutorship, and the only tribunal in which the suit of Henderson & Peale against the succession of G. F. Sanderson could be legally brought; and also that the appearance in that suit of Mrs. Sanderson, through her counsel, as the legal representative of the succession, cured all the alleged defects of citation in the premises, now alleged by plaintiff.

Under this showing, it appears that the judgment in question was rendered by a court of competent jurisdiction *ratione materiae et personae*, after issue joined, and it follows as a legal corollary that, until

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set aside in a direct action in nullity, it imparts absolute verity and has all the force and effect of the thing adjudged

That proposition finds unqualified support in an unbroken line of decisions of this Court, and its effect is to absolutely shut the door against the innumerable irregularities which plaintiff's counsel have marshalled in their collateral attack of the validity of the judgment.

"No principle of law has received greater and more frequent sanction, or is more deeply imbedded in our jurisprudence, than that which forbids a collateral attack on a judgment or order of a competent tribunal not void on its face *ab initio*." State ex rel. Mestayer vs. Judge, 36 Ann. 831; Stackhouse vs. Zuntz, 36 Ann. 533; Duson vs. Dupré, 32 Ann. 896, and authorities therein cited.

Another contention made by plaintiff must be noted in this case: it is the alleged want of evidence of the ownership of the judgment by W. A. Peale, who claimed in his sale to defendants to hold the same under a transfer from Henderson and Peale. That objection does not lie in the mouth of the judgment debtor. We are referred to no adverse claim set up in the premises by either member of that firm, or by their legal representatives or other assigns; and the defendants, claiming under them, have a proper standing in court until they are met by objections from parties claiming better rights than theirs. Bothick vs. Greves, 34 Ann. 907; Citizens' Bank vs. Moreau, 37 Ann. 857.

Understanding that in his decree the district judge maintained the defendants' title on the exclusive ground of the validity of the Henderson & Peale judgment, we reach the conclusion that although his reasons were bad, his decree was correct.

The judgment appealed from is therefore affirmed at the costs of plaintiff and appellant in both courts.

Mr. Justice Todd concurs in the decree.

 No. 9650.

STERLING P. CARROLL ET AL. VS. M. A. COCKERHAM ET AL.

A judgment of separation between husband and wife as to third persons, only proves *rem ipsam*. No legal presumption of its correctness arises from the mere signing the decree.

Where such judgment is charged fraudulent and simulated and proof has been administered going to sustain such charge, it is incumbent on those interested in maintaining such judgment, that its reality and the validity of its consideration should be established by evidence *aliunde*.

Where a husband makes a transfer to his wife without any valid consideration and such transfer exceeds the disposable portion of his estate, his forced heirs after his death

38	813
47	733
38	813
105	558
38	813
104	121
38	813
110	364
38	813
119	690

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may, by suit, demand that the transfer be annulled in excess of the disposable portion even though the property has passed into the hands of third persons, and can be brought back into the succession of the transferor or donor free from all charges created by the transferee or donee. C. C. 1516.

Contracts between husband and wife are restricted to the exceptions in C. C. 2446, and all those outside of the limits therein prescribed are null and void.

A probate sale, made in pursuance of an agreement between the executor of the estate to which the property belongs and his partner in business, by which such partner is to buy the property in his own name but for the benefit of his firm, is void.

A plea of estoppel cannot be maintained where it appears that the party against whom the plea is directed was ignorant of the true facts relating to the matter which formed the subject of the plea. *Watkins vs. Cawthorn*, 33 Ann. 1194.

A party is not estopped from prosecuting a claim because the same claim was urged in a previous suit on which he took, seasonably, a voluntary non-suit.

A PPEAL from the Tenth District Court, Parish of Red River.
Hall, J.

L. B. Watkins and S. A. Hull for Plaintiffs and Appellants :

I.

A partial history of this case may be found in the following opinions of this Court, viz: 32 Ann. 141; 34 Ann. 423; 35 Ann. 281.

II.

Of the exception of no cause of action. This is an action of reduction of an excessive and inofficious donation brought by two forced heirs against a third person, for the recovery of two-fifths of two-thirds of certain real estate that was donated by their father to their mother, "contrary to natural duty," and in disparagement of their legitimate and which immovable was alienated by said donee or her executors. R. C. C. 1502. 1504, 3545; 11 R. 302; 30 Ann. 726; R. C. C. 1516, 1517; 32 Ann. 637.

The doctrine announced in 35 Ann. 35, 281, to the effect that in such a suit plaintiffs must be regarded as creditors, must be controlled by R. C. C. 1504.

III.

Act No. 5, approved June 17, 1884, is a remedial statute, and amends R. C. C. 2239, and repeals by implication R. C. C. 2236, *vide* 24 Ann. 25; 26 Ann. 584; 15 Ann. 110; 29 Ann. 608; 17 La. 476; 7 O. S. 8; 12 Ann. 554.

IV.

A judgment of separation between husband and wife only proves *rem ipsam*. 9 Ann. 100; 2 Ann. 27; 20 Ann. 204; 5 Ann. 401; 4 Ann. 435; 19 Ann. 94. *Bogan vs. Finley*.

V.

30 Ann. 966, *Brown, Administrator, vs. Brown*, cited by the judge *a quo* in his opinion, is not in point. In that case the parties to the *dation* assailed were father and daughter; while in this they are husband and wife. In the former, both parties were *sui juris*; but in the latter they are not.

In 15 Ann. 64, *Carter vs. McManna*, the *dations* complained of were executed by a father to his son, and suit was brought to revoke them under R. C. C. 2444.

VI.

Transactions between husband and wife are restricted to the exceptions provided in R. C. C., 2446. All those outside of the limits therein prescribed are absolutely null and void 4 Ann. 65; 1 Ann. 305; 2 Ann. 483; 7 Ann. 92; 11 Ann. 265; 31 Ann. 466; 4 La. 421.

VII.

The husband is restricted in making conveyances to his wife to such as shall have a legitimate cause. R. C. C. 2446.

The true value of the property conveyed must not exceed the amount of the debt of the

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husband to his wife. It is not sufficient that a part of the price was real. Interest antecedent to judgment cannot be allowed. 19 La. 581; 3 Ann. 611; R. C. C. 2386, 2409. There must be an adequate consideration. 30 Ann. 750, Lehman, Abraham & Co., vs. Levy, 5 Ann. 494; 23 Ann. 439; 29 Ann. 585; 4 R. 117.

VIII.

The wife, nor one holding title under her, can be allowed to show a wholly different consideration for a *dation* from the one that is expressed in the instrument. 34 Ann. 689, Chaffe, Syndic, vs. Scheen; R. C. C. 1900.

IX.

No legal presumption of the correctness of a judgment of separation arises from the mere signing of the decree. 12 La. 303; 7 N. S. 400; 6 Ann. 730; 12 Ann. 193; 15 Ann. 33; 11 La. 33; 10 Ann. 691; 6 Ann. 647; 12 R. 98; 4 La. 419; 10 Ann. 85; 11 La. 534.

X.

If the vendor continues in possession after the sale, and to act and hold himself out to the world as owner, there is reason to presume the sale is simulated, and the burden of proof is on the purchaser to establish the reality of the sale, and the payment of the price. R. C. C. 2480; 8 Ann. 506; 11 Ann. 163; 12 Ann. 666; 15 Ann. 553; 15 Ann. 616; 16 Ann. 284; 23 Ann. 258; 13 Ann. 340.

XI.

A probate sale made in pursuance of a written agreement entered into between an executor and his partner in business is an absolute nullity, and no title passes to the purchaser, notwithstanding he is the holder of a first mortgage against the property sold. 37 Ann. 275, Stanbrough vs. McClellan; 33 Ann. 748, Heirs of Wood vs. Nicholas; R. C. C. 1146; 16 Ann. 135; 31 Ann. 219, Linn vs. Dec.

XII.

The registry of a judgment only operates as a judicial mortgage against all the immovables which the debtor actually owns or may subsequently acquire. R. C. C. 3228, 3390.

"The eviction by the mortgagor by a better title than that of the vendee which he holds, relieved the property from all liens acquired or granted under the impression that the title was good." 8 R. 485, Beaulieu vs. Furst.

XIII.

The possession of a purchaser under a title translatif of property, is essential to the validity of a mortgage acquired against property held under a simulated conveyance; the continued possession of the vendor of such a title would put the mortgagor on notice, and deprive him of all equity and place on him the burden of proof. 29 Ann. 607, Hunter vs. Buckner; 11 Ann. 407, Foster vs. Foster.

The special mortgage occupies the same situation as a title.

XIX.

Under the textual provisions of the Civil Code, "Immovable property that is brought into the succession through the effect of reduction, is brought into it without any charge of debt or mortgages created by the donee." R. C. C. 1516.

The action of reduction is assimilated to that of collation in matters of partition; where the property alienated by an inofficious donation, is brought back it is "united to the mass of the successions free from all charges created by the donee." R. C. C. 1264; 33 Ann. 637.

But in this case the mortgage creditor of the donee would still retain his mortgage on other property of the donee. R. C. C. 1265.

XX.

The failure of J. H. Scheen and M. A. Cockerham to appear and testify to the reality of the sales attacked as simulated, and without consideration is convincing evidence of the truth of plaintiffs' charges of fraud and simulation. 33 Ann. 1057, Atkins vs. King, Administrator.

Carroll et al. vs. Cockerham et al.

XXI.

No estoppel is raised on the law. 30 Ann. 1309, Chaffe & Bro. vs. Morgan; 22 Ann. 368, Abbott vs. Welbur; Bigelow on Estoppel, p. 293.

It is a well settled principle that coverture disqualifies a woman from contracting, and her deed does not operate as an estoppel. An infant or minor, not being *sui juris* will not be estopped by his deed during infancy nor afterwards, unless he ratifies it. Bigelow on Estoppel, p. 276; 34 Ann. 288; Gillespie vs. Twitchell, 4 Ann. 231; 6 Ann. 397; 16 Ann. 213; 7 Ann. 293; 13 Ann. 4; 12 Ann. 852; 14 Ann. 169; 23 Ann. 647.

Estoppel as to married women applies alike as to minors.

XXII.

The tutor for plaintiffs, when they were minors, had a perfect right to take a voluntary nonsuit in Beone & Cockerham vs. Carroll, 35 Ann. 281. That constituted no abandonment of their claims. It preserved them from the fate of the intervenors in that suit. That suit did not form *res judicata* even as to intervenors. They did not have a hearing on the merits.

The plaintiffs' plea of no cause of action was sustained.

The right of plaintiff was clearly and undeniably left open, and at large to be prosecuted herein. 33 Ann. 1194, Watkins vs. Cawthorn.

Egan and Pierson for Defendants and Appellees:

1. A suit by them to be recognized as owners by inheritance of property conveyed by the ancestor is not a suit to enforce or protect the legitime of such heirs.
2. Forced heirs have only the right to reduce donations made in violation or to the prejudice of their legitime. C. C. 1502.
3. Forced heirs may bring the revocatory action against the acts of their ancestors only to the extent of their legitime and for the purpose of protecting same. Kerwin vs. Insurance Co., 35 Ann. 35; Ib. 284.
4. To the extent of their legitime children are not considered as heirs but as creditors, and as such may resort to the revocatory action to enforce and protect their legitime. Maples vs. Mittie and Sarah, 12 Ann. 759; 4 Ann. 509.
5. To sue to enforce or protect the legitime the heir must allege the aggregate of all the property of the donor at the time of his death, and the value of the property disposed of by donation and the amount due by the deceased donor at the time of his death, to form a basis upon which the court can estimate the legitime of the forced heir. C. C. 1505.
6. No amendment can be allowed to the pleadings after an exception of no cause of action has been sustained by the court. 35 Ann. 281; 34 Ann. 393; 37 Ann. 417.
7. The prayer by the forced heir to be recognized as owner by inheritance of an undivided interest in property disposed of by the ancestor cannot be sustained to enforce or protect the legitime of such heir. The court cannot determine what interest in the property claimed will equal the amount of reduction such heir is entitled to enforce or protect his legitime.
8. In a suit to revoke the act of the ancestor by the forced heir to protect or enforce the legitime, the succession should be made a party where the amount of the legitime has not been previously liquidated by a judgment in favor of the heir. C. C. 1972.
9. Third persons acquiring a mortgage or a title to property upon the faith of the public recorded titles of the persons from whom they acquire cannot be affected or impaired in their acquired rights upon or to such property by any latent or secret equity existing between their authors and other persons. Nor can such acquired rights be evicted for any matter not apparent upon the fact of the records. Schepp vs. Smith, 35 Ann. 6; Hunter vs. Buckner & Bro., 29 Ann. 697.

The opinion of the Court was delivered by

TODD, J. The plaintiffs, as forced heirs of Madison Carroll, sue to annul a *dation en paiement* of a plantation described in their petition, made by the said Madison Carroll to his wife, Mrs. E. A. Carroll, in 1866, and also subsequent conveyances of the same, judicial and conventional, by or through which it passed to the defendant and present claimant. Madison Carroll died shortly after the dation was executed and plaintiffs base their action on the ground that this disposition of the property was without consideration and infringed on their *legitime* as forced heirs of their father, the said Madison Carroll, who died intestate.

The facts are briefly these:

Plaintiff, a brother and two sisters are the issue of the marriage of Madison Carroll and Mrs. E. A. Carroll.

On the — of March, 1866, Mrs. Carroll obtained a moneyed judgment against her husband, M. Carroll, for \$2500 with legal interest from 1856.

Mr. Carroll died in January, 1867, and Mrs. Carroll in 1876.

On the death of the former, the Home plantation, the subject of this controversy, was not placed on the inventory of his succession. It was inventoried after the death of Mrs. Carroll as the property of her succession.

Mrs. Carroll left a last will, of which Julius Lisso and her son Madison Carroll, Jr. were the executors.

On the 17th of October, 1877, the Home plantation was sold at probate sale at the instance of Lisso, executor, and adjudicated to J. H. Scheen.

On the 4th of March, 1878, Scheen sold the property to Madison Carroll, Jr.

On the 17th of February, 1883, the property was sold under a judgment against J. H. Scheen in favor of one John Cockerham, to enforce a judicial mortgage on the land, resulting from the recordation of said judgment of date December 1, 1877, and was adjudicated to the defendant, M. A. Cockerham, who claimed to be the owner of the judgment and the judicial mortgage by transfer from the executors of John Cockerham's estate.

1. There was exception filed to the suit of no cause of action, which was disposed of by the court *a qua* in these words, quoting: "Peremptory exception tried and sustained, unless the plaintiffs amend their petition in three days, setting forth the amount of debts of Madison Carroll at his death, and the amount of their *legitime*."

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No objection was made at the time by defendants' counsel to the terms of the ruling and the condition expressed therein; but in this Court it is charged that it was unwarranted to the extent that it allowed plaintiffs the privilege of perfecting their petition by an amendment. In the absence of any objection to the order, seasonably made, and the failure to retain any bill to the ruling, we are inclined to the opinion that his complaint now urged here for the first time, cannot avail him. Be that as it may, however, we think the ruling was a proper one. The exception in effect charged that the allegations of the petition were insufficient to justify the relief sought, inasmuch as they did not afford the information by which the amount of the legitime could be determined. We think, under the circumstances, the ruling was a proper one and the defendant was not prejudiced thereby.

It was not an absolute dismissal of the suit, but a dictation or suggestion of the court that it would be dismissed unless an amendment supplying the alleged omissions was filed in the delay granted therefor.

The defendant cites in support of his contention several decisions of this Court. They are not in point, they only go to the extent, that after there has been an unqualified dismissal of the suit on an exception of no cause of action, plaintiff cannot be permitted to amend. Besides and behind all this, the fixing or measuring the amount of the legitime of a forced heir, is a matter of evidence, and since the legitime was distinctly claimed in the original and amended petition and the property fully described—the transfer of which was sought to be annulled to make up their legitime—and its value given, and it was averred that all other property left by the decedent had been disposed of and applied to other purposes: Such allegations sufficed to authorize the admission of all the proof required and subsequently offered to adjust and determine the amount of the legitime. In other words, the judge *a quo* was in error in sustaining, even conditionally, the exception urged.

This last consideration will also meet another exception of the defendant, the one made to the amendment fixed by the plaintiffs under the requirements of the order of the court referred to, to the effect that it was not fixed in time, and should have been rejected, that is, that it was not presented within the three days allowed. This further exception comes within the well-established rule, that in this instance the time presented was not of the essence of the order on the subject treated of therein, and therefore the order could be complied with

even after the term elapsed, in the absence of any pleading or plea interposed by the opposing party before filing.

Besides W. A. Cockerham, the party in possession of the land in controversy—Julius Lisso and Madison Carroll, executors of Mrs. E. A. Carroll's succession and the syndic of Lisso & Scheen, insolvents, who held the notes of Madison Carroll, Jr., purporting to be secured by mortgage on the land in question, were made defendants in the suit—Cockerham alone answered; the others making default.

Besides the general issue, Cockerham specially denied the nullity of the *dation* and judgment attached—averred that they were both founded on a just and valid consideration—further, that the property was sold at succession sale to pay the debts incurred by Mrs. E. A. Carroll subsequently to the death of her husband—that the said sales and the subsequent ones were valid and legal.

He further pleaded an estoppel against the plaintiffs, based upon the following alleged facts: He averred that, after the probate sale of this property and its adjudication to Scheen, an account of the succession of Mrs. E. A. Carroll was filed by Lisso, executor, upon which was placed for distribution the amount of said adjudication. That this account was opposed by the plaintiffs, then minors, through their tutor, in which a ranking privilege was claimed on the proceeds of said sales. Further, that in the suit to enforce a mortgage against Madison Carroll, Jr., the alleged purchaser of this property from Scheen, these plaintiffs, through their tutor, had intervened in that suit, in which intervention they set up the same claim to this land as in the present action, and urged that by these proceedings plaintiffs are now estopped from again prosecuting their demand.

He further averred, that he and his vendors were not parties to the suit in which the judgment of Mrs. Carroll against her husband was rendered, nor to the act conveying the property in controversy to the former, in satisfaction of said judgment, and that the said acts and proceedings being regular in form, he nor his vendors were bound to look beyond the decree of the court.

The plaintiffs are appellants from the judgment dismissing their action.

Two matters of inquiry demand our attention, since upon their solution mainly hinge all the other subjects of controversy embraced in the case. The first is whether the *dation en paiement* assailed in point of fact, is subject to annulment or reduction as having infringed upon the *legitime* of the plaintiffs as forced heirs of their father; and next, if it did, was it made without a legal consideration.

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To determine the amount of the legitime, the property alienated must be fictitiously brought back into Madison Carroll's succession—collated, as it were, with the active mass, as forming part of same at the time of his death. The debts are deducted and the disposable quantum is calculated on the balance, taking into consideration the number of heirs. C. C. 1504. Thus:

Amount of inventory, 1867	\$ 6,721 68
Home plantation (returning) value.....	6,000 00
Total	<u>\$12,721 68</u>

CR.

By succession debts.....	<u>3,000 00</u>
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Net value	<u>\$ 9,721 68</u>
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The disposable portion (one-third) is.....	<u>\$3,240 56</u>
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Amount disposed of in transfer of Home plantation, valued at.....	\$6,000 00
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From this deduct the disposable portion.....	<u>3,240 56</u>
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Amount of excess over disposable.....	\$2,759 44
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Share of each heir therein, one-fifth.....	551 28
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Share of the two plaintiffs.....	1,102 56
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There is some dispute as to value of the Home place at the time of its transfer in 1866, and the testimony on this point is conflicting. The value given in the above statement is fairly deducible from the evidence, and is a medium between the highest and lowest estimates of its value found in the record.

From this statement it is to be seen that the disposition made of this property by the *dation en paiement* did encroach upon the legitime of the plaintiffs at least to the amount above set forth.

The next question for determination is whether or not the act or transfer was founded on a real and valid consideration. It purports, as before stated, to have been passed in satisfaction of a moneyed judgment obtained by Mrs. Carroll against her husband. The act recites this judgment as being for the sum of \$2500, with legal interest from 1856, this judgment being rendered on January 25, 1866, and the interest allowed thereby accruing during ten years before the filing of the suit, and amounting to \$1240. Of course interest could only run legally from the institution of the suit, since a husband could not be liable for interest on a debt owing the wife during the existence of the community. The dation purports to have been made for the sum of \$3740, which was the aggregate of the principal and interest of the judgment, computed as above, and the property was appraised at this sum.

Therefore, from the face of the act it appears that, at least to the extent of \$1240, there was no consideration for the dation. The judgment which this dation purports to satisfy must be viewed as a part of the act, or of the title passed thereby, and is next to be examined.

The proceedings [of the suit are before us. They do not contain the evidence adduced in support of the judgment rendered. The evidence was not reduced to writing. We note that the petition and answer, the waiving of citation by the defendant, and the judgment, are all in the handwriting of the plaintiffs' attorneys therein. It is apparent on the face of the proceedings that the judgment was a consent judgment. It was attacked in the instant suit as being without consideration and void, and testimony was offered by the plaintiffs to strongly support these allegations, yet no evidence was offered by the defendants in rebuttal or with a view to show that the judgment was founded on a real or genuine consideration.

As to third parties or creditors, the production of this record only proved *rem ipsum*. Landry vs. Fullen, 8 Ann. 100; Remy vs. Municipality, 8 Ann. 27; Erwin vs. Bank, 5 Ann. 3.

To sustain the judgment in view of the attack upon it, it was incumbent upon those interested to maintain it, to administer proof of its correctness and the reality of the consideration on which it was founded. Bogam vs. Finley, 19 Ann. 94; also 5 Ann. 135; 6 Ann. 46; 10 Ann. 87; 28 Ann. 546.

The judge *a quo* maintained the judgment, his reasons therefor being substantially: out of consideration for the character of the judge who signed the judgment and the presumption in favor of his judicial acts, and also on account of the good reputation of two witnesses then deceased, who were said to have testified in the case, and whose names as witnesses were indorsed on the petition, but whose testimony was not taken down as stated. The judge was in error, the consideration of the judgment should have been established *aliunde*, by proper proof, and, in the absence of such proof, we are forced to conclude that the judgment was without consideration and void.

This conclusion might seem sufficient to determine the case, in view of the declarations of the Code, as follows:

"Immovable property that is brought into the succession through the effect of *reduction*, is brought into it *without any charge of debts or mortgages created by the donee*. R. C. C. 1516."

"The *action of reduction*, or revindication, may be brought by the *heirs* against *third persons* holding the immovable property which has been alienated by the donee, in the same manner and order that it

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may be brought *against the donee himself*, but after discussion of the property of the donee." R. C. C. 1517.

The suit of Hadder vs. Shepherd, 1 L. 506, is stated in the language of the court, to be a suit against a *third possessor by a forced heir for two undivided thirds of a plantation and slaves being the legitimate, or portion of which the deceased could not dispose.*"

The plaintiff's right of action in that case was distinctly recognized, though the court held that it was premature because the property of the donee had not been discussed, a question that does not arise in this case.

The claim of the defendant, to the property in question is founded on alienations made thereof and mortgages given thereon subsequently to the death of Madison Carroll, Sr., and its purported acquisition successively by Mrs. E. A. Carroll and her transferees; and such claims might seem to be fully met by the words of the case above quoted; but, as these parties assert rights thereto protected, as they claimed, by their ignorance of any equities in favor of plaintiffs to the land, it is proper that we should investigate their pretensions.

Scheen, as stated, purports to have bought this property at probate sale, as belonging to the succession of Mrs. E. A. Carroll.

It is in proof that he paid nothing for the land. He and his partner, Julius Lisso, then composing the firm of Lisso & Scheen, held several judgments against Mrs. Carroll, and Lisso was the executor of her estate, and it was believed by them that Scheen could buy in the property and the amount bid therefor could be applied to the payment of the judgment and mortgages held by that firm against Mrs. Carroll's succession; therefore the amount of the adjudication was not paid in by Scheen.

Besides, it is shown that there was an agreement before the sale, in writing, by which the property was to be bought in for the benefit of Lisso & Scheen, and that as Lisso, being the executor, could not purchase for himself or his firm, it was to be struck off to Scheen.

This agreement was plainly in contravention of a prohibitory law, touching the purchase by executors, and others in a like capacity, of succession property under their administration, and it is obvious that this sale, though thus disguised or planned to evade the law, was in direct contravention of it, and therefore void for this reason.

This case comes clearly within the spirit of the decisions of the Heirs of Wood vs. Nicholls, 33 Ann. 748; Chaffe vs. Farmer, 34 Ann. 1017; Stanborough vs. McClellan, 37 Ann. 275, rendered by the present court. Moreover, it appears that Scheen never went into possession

of the property, but that it was occupied by Madison Carroll from the time of his mother's death till a short time before the institution of this suit, when the defendant Cockerham took possession of it under his purchase.

Shortly after the adjudication of this property to Scheen, he confessed a judgment in favor of one Cockerham, which was recorded, that it might operate as a judicial mortgage on this and other immovables of Scheen. After the death of Cockerham the executors of his estate transferred this judgment to his son, M. A. Cockerham, defendant herein, and he enforced the judicial mortgage resulting from its recordation against Madison Carroll, Jr., then in possession of the land, under a purchase from Scheen; and at the sheriff's sale Cockerham bought it in his own name.

This Cockerham was the son-in-law of Scheen, and it was shown on the trial that the alleged acquisition of this judgment by Cockerham and the purchase under it at sheriff's sale was at the instance and for the benefit of Scheen, and that Cockerham was merely a person interposed, and has since the institution of this suit conveyed the property to L. E. Scheen, the son of J. H. Scheen.

What is confirmatory of this fact as well as the facts relating to the pretended purchase by Scheen and of other matters pertaining to all transactions of these parties recited above, is the circumstance that, though Scheen and Cockerham, the executors of Mrs. Carroll's estate, Julius Lisso and Madison Carroll, Jr., and the syndic of Lisso & Scheen were all made parties to the suit, none of them appeared and answered save Cockerham; and what is still more significant, is that though the testimony, especially of Scheen and Cockerham might have thrown a blaze of light on these alleged damaging facts and irregularities charged in the petition, and with respect to which they were distinctly challenged as to the proof—the trial of the case was conspicuous for their silence on these matters, and their failure to go on the witness stand! They come clearly within the rule laid down in *Atkins vs. King*, 33 Ann. 1007; *School Board vs. Trimble*, Ib., 1072.

As before mentioned, it is charged, however, that plaintiffs are estopped from asserting their claim and making these contentions in support of it, because of the opposition of their tutor to the account filed by Lisso, executor of Mrs. Carroll, wherein claim was set up to a privilege on the amount of the price purporting to have been paid by Scheen for the property at the probate sale, and because of their intervention and its withdrawal in the suit to enforce the judicial mortgage by Cockerham under the judgment against Scheen.

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It is questionable whether a minor, any more than a woman or others laboring under a like incapacity, can be subject to this rule of estoppel resulting from pleadings, admissions, or the like; but be that as it may, a knowledge of the real facts or of the true nature of the conditions pertaining to or involved in the question of estoppel on the part of one against whom the plea is directed, is essential to its maintenance. *Watkins vs. Cawthorn*, 33 Ann 1194.

In this instance we have the testimony of the tutor who filed the opposition, that when it was made he was not informed with respect to plaintiffs' claim to the property, that he did not know that Scheen had paid no part of the price bid at probate sale for the Home plantation, but believed that there was an actual fund derived from this sale to be distributed, and did not know that this feature of the account was a mere fiction. If these minors could be estopped by any pleadings or averments that their tutor might be pleased to make in their behalf, certainly under the conditions named they could not be thus affected.

In the intervention mentioned, again through their tutor, they asserted their claim to the property in question as in this suit, accompanied by corresponding allegations to same extent. Their intervention was excepted to, and the tutor took a voluntary non-suit. Even had the plaintiffs been of age at the time and thus withdrew their suit before trial, they would not be precluded from again asserting by a subsequent suit the same claim.

There is, therefore, no estoppel on this last ground.

We have thus reviewed all the issues presented by the pleadings, and are satisfied that plaintiffs have made out their case. The only question still to be considered relates to the decree to which they are entitled.

Art. 2446 of the Civil Code prohibits all contracts between husband and wife save in the three following cases:

1. When one of the spouses makes a transfer of property to the other who is judicially separated from him or her in payment of his or her rights.
2. When the transfer made by the husband to the wife, though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.
3. When the wife makes a transfer of property to the husband in payment of a sum promised to him as a dowry.

Outside of these exceptions, such contracts are void. Such is our conclusion respecting this contract in question—this act of *dation en paiement* entered into between Madison Carroll and his wife on the 7th

September, 1866. It must, therefore, be annulled, at least to the extent that plaintiffs were prejudiced thereby, which is to the amount that it encroached upon their *legitime* in the succession of their father, and which amount appears from the statement heretofore submitted in this opinion. Had this disposition of the property mentioned been by a gratuitous donation, plaintiffs could not complain of it except in so far as it exceeded the disposable portion, so in this instance the nullity declared must be limited and measured by their interests, and they cannot legally demand that the act be annulled in toto.

The authorities cited by the plaintiffs' counsel as favoring such extreme demand were cases where the wife, as part of the consideration of the *dation*, assumed the payment of her husband's debts, which she was legally forbidden to do, though we express no opinion as to the correctness of these decisions.

Besides the claim of the plaintiffs asserted to as upon the "Home plantation," they claim also two-fifths interest in three other pieces or tracts of lands, known and designated respectively as the Coushatta bayou lands, the Coushatta town lots and the Child's seventy acre tract.

The Coushatta bayou land was sold by Madison Carroll, Sr., to one A. H. Stalhart for \$4600, on which, before his death, he had obtained a judgment which appears in the inventory of his succession. This judgment was executed by Mrs. Carroll in 1869 by the seizure and sale of the plantation, on which a mortgage had been retained. At this sale she purchased said property for herself and in her own name, and the amounts of the several adjudications were credited as stated, she became the debtor of the succession for the same, and the heirs have no interest in the property, but their recourse is against their mother and tutrix, for the price.

The remaining tract—the Child's seventy acre lots—was included in the *dation* made by Carroll to his wife, and as part of the Home plantation. It was never embraced in any of the subsequent sales, and the plaintiffs' rights thereto cannot be extended beyond their claim heretofore recognized in the Home plantation on account of their *legitime*.

It is therefore ordered, adjudged and decreed that the judgment of the lower court so far as it rejects plaintiffs' claim to the lands described in the petition as the Coushatta bayou plantation, the Coushatta town lands and the Child's seventy acre tract be, and the same is hereby affirmed, and that in all other respects the judgment be annulled, avoided and reversed, and that the *dation en paiement* entered into between Madison Carroll and Mrs. E. A. Carroll on the 6th of

New Orleans vs. Mülé.

September, 1866, be and the same is hereby annulled to the extent the same infringes on the *legitime* of the plaintiffs as forced heirs of Madison Carroll, deceased, which is hereby recognized, and the amount of the plaintiffs interest in the said excess over the disposable portion being the sum of \$1102.56, and which sum, with legal interest from judicial demand is hereby recognized as a legal charge against the lands conveyed in said *dation* of the 6th September, 1866.

And it is further ordered, adjudged and decreed that the following acts and proceedings relating and purporting to affect the lands embraced in said *dation* of the 6th of September, 1866, and described in the petition be and the same are hereby declared null and void, viz:

1. The sale to J. H. Scheen (probate sale), of date the 17th of October, 1877.

2. The judicial mortgage of date the 1st of December, 1877, resulting from the recording of the judgment against J. H. Scheen in favor of John Cockerham, so far as it purports to operate on said land.

3. The sale by Scheen of said lands to Madison Carroll, Jr., and the special mortgage given thereon by the latter of date March the 4th, 1878.

4. The sheriff's sale to the defendant of 17th of February, 1873.

It is further ordered and decreed that defendants pay costs of both courts.

No. 9614.

CITY OF NEW ORLEANS VS. J. MÜLÉ.

Under Article 206 of the Constitution, the power granted "to levy a license tax" is discretionary and not mandatory. The State or city may abstain from taxing, or may exempt from license, any occupation or calling, subject to the restriction that, if a particular calling is taxed, the tax must conform to the constitutional rules.

The contrary rule with regard to property taxation results from the provision of Article 203, that "*all property shall be taxed according to its value,*" and of Article 207, "*the following property shall be exempt from taxation, and no other.*"

There are no equivalent constitutional provisions relative to license taxation, requiring *all* occupations or *all* persons pursuing any occupation to be taxed, or declaring that *no other* than certain occupations shall be exempted.

Hence, the city has the right to abstain from taxing, or to exempt, any particular calling or business, and, having by the terms of her ordinance expressly exempted the business of defendant, there is no legislative authority for collecting such tax, and the city's demand must be rejected.

A PPEAL from the First City Court of New Orleans.
 Rozier, J.

Walter H. Rogers, City Attorney, and Branch K. Miller, Assistant City Attorney, for Plaintiff and Appellee.

B. E. Forman for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Our jurisdiction arises under that clause of Article 81 of the Constitution which extends it to "all cases in which the constitutionality or legality of any tax, toll or impost * * * imposed by a municipal corporation shall be in contestation."

The fifth section of the City Ordinance No. 1048, imposes a license tax upon "wholesale mercantile business," and also upon "every business of selling at retail," said license graduated in classes according to gross amount of annual sales." The section, however, contains the following proviso:

"Provided, that butchers, fish dealers, vegetable vendors and others occupying stalls or stands in any of the public markets belonging to the city are exempt from the operations of this ordinance, so far as the business carried on in the market is concerned."

Although the city judicially admits that defendant is a "butcher occupying a stall in a public market belonging to the city," yet, in the teeth of the prohibition just quoted, she claims in this suit a license tax on that very business.

Amongst other defenses, defendant opposes this clause of the ordinance as a bar to the action, and we consider it conclusive.

The language of the clause establishes beyond controversy that the city has not imposed, or intended to impose, any license tax on the business pursued by defendant. Hence, there is no legislative authority for the collection of such a tax. *State vs. Forman*.

The terms of Article 206 of the Constitution leave no doubt that the power to "levy a license tax" conferred upon the General Assembly, or the like power delegated by the latter to political corporations, is discretionary and not mandatory, and that the Assembly or corporation may validly abstain from imposing a license tax upon all callings or upon any particular calling, subject only to the restriction that if any particular calling is taxed, the tax must conform to the constitutional rule. Hence, any calling may be exempted from license taxation.

The contrary rule with regard to property taxation results from the language of Article 203, that "*all* property *shall* be taxed according to its value," and of Article 207, "the following property shall be exempt from taxation, *and no other*." Hence, it follows that legislative exemptions of property from taxation are null and void, because violating the Constitution. But there are no equivalent constitutional provisions touching license taxation. The Constitution nowhere says that *all* oc-

State vs. Cendo.

cupations shall be taxed, nor does it say that *no other* than certain ones named shall be exempted. It contents itself with saying that "the General Assembly *may* levy a license tax," and that "all persons, etc., *may* be rendered liable to such tax, except" certain persons and occupations named in Articles 206 and 207.

We, therefore, hold that the city has the right to exempt any calling from license and to abstain from taxing it, and that she has so exempted the defendant. Whether butchers, fish dealers, etc., pursuing their occupation elsewhere than in the public markets may resist the payment of any license which may be demanded from them under this ordinance, is a question not before us.

We content ourselves with saying that the legislative authority of the city has imposed no license tax on defendant, and, therefore, it cannot be recovered.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and that the demand of the city of New Orleans be rejected at her cost in both courts.

No. 9621.

THE STATE OF LOUISIANA VS. M. CENDO.

In a license suit, the clerical error of charging defendant with pursuing, without a license, "the business of vegetables" in a public market of the city, instead of the business of *dealing* in or *selling* vegetables, will not be considered when first raised in this court, because no other "business of vegetables" could be conducted in a public market except that of selling or dealing in them, and because, in absence of any note of evidence, *non constat* that evidence received without objection might not have remedied the deficient allegations.

Defendant's contention that he was exempt under art. 206 of the Constitution because following "an agricultural pursuit," is not sustained by any evidence in the record showing that fact.

A PPEAL from the Second City Court of New Orleans.
Voorhies, J.

John McEnery and W. B. Sommerville, for the State, Appellee.

B. B. Forman, for Defendant and Appellant:

The opinion of the Court was delivered by

FENNER, J. This is a proceeding by rule under the State license law to recover a license of five dollars from the defendant.

The rule is prepared on a printed form used in such cases, with

State vs. Buisseau.

blanks left to be filled up in writing, according to the requirements of each particular case.

It happens here that, through evident carelessness and clerical error, the rule charges "that M. Cendo is conducting *the business of vegetables* in the Ninth Street Market without any license from the State of Louisiana, and that his gross annual receipts exceed the sum of one thousand dollars."

There was no exception on this ground in the court below, and the omission of the words *selling or dealing* in vegetables is too insignificant to be considered when urged for the first time in this court. What other business of vegetables "except that of *selling or dealing* in them could be conducted in a public market of the city, is not suggested, and, moreover, there appearing no note of evidence in the transcript before us, for aught that we know, evidence received without objection may have remedied the deficient allegation.

The only points raised in the court below as to the legality or constitutionality of the license, were that "defendant is following an agricultural pursuit and is exempt from all license tax under art. 206 of the constitution, and because the license law of 1881 does not impose any license tax on this defendant."

The license act of 1881 does impose a license upon "every business of selling at retail," and a vegetable dealer in the markets undoubtedly conducts such a business. It is equally clear that such business is not necessarily an agricultural pursuit. Whether defendant was engaged in agriculture and in selling only vegetables raised by himself, is a matter of evidence which the record before us affords no means of solving, and whether such facts, if proved, would exempt him from the license claimed, is a question of law which we are not called upon to decide.

We can discover no reason for disturbing the judgment.

Judgment affirmed.

No. 9622.

THE STATE OF LOUISIANA VS. F. BUISSEAU.

In this suit for license on the business of "selling at retail," the defendant is described as "conducting the business of butcher in the Ninth Street Market, whose receipts exceed \$1000." Objection to this variance cannot avail, in absence of any note of evidence in the transcript, because we know that butchers in public markets do sell meats at retail, and it may have been proved that defendant followed such a business.

A butcher, in so far as he slaughters and dresses animals, may possibly be classed as a la-

 Succession of Commagere.

borer or mechanic, but as such branches of his business cannot lawfully be pursued in the public markets of New Orleans, and as we have no note of the evidence received below, we cannot apply the exemption invoked under art. 206 of the Constitution.

A PPEAL from the Second City Court of New Orleans.
Voorhies, J.

John McEnery and *W. B. Sommerville* for the State, Appellee.

B. B. Forman for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Defendant was sued for a license of five dollars under allegations that he "is conducting the business of butcher in the Ninth Street Market without any license, and that his gross receipts exceed \$1000."

He opposed the rule on three grounds:

1. That it disclosed no cause of action.
2. That the license law imposed no license upon a butcher.
3. That defendant is a laborer and follows a mechanical pursuit, and is exempt under art. 206 of the Constitution.

The law imposes a license upon "every business of selling at retail." A person conducting the business of butcher in a public market, ordinarily sells meat at retail.

In absence of any note of evidence found in the transcript, it may well be that testimony offered without objection, may have satisfied the court that defendant was pursuing the very kind of business contemplated by the statute.

A butcher may be, in certain circumstances, a laborer or mechanic. in so far as he slaughters and dresses the meat of animals, but as such business cannot be lawfully conducted in the public markets of New Orleans, and as butchers may and do conduct the business of selling meats in such markets, *non constat* that the evidence may not have established to the satisfaction of the court below that defendant was engaged in the latter business in such manner as to be liable for the license.

Judgment affirmed.

 No. 9532.

SUCCESSION OF EUGÉNIE COMMAGÈRE.

Where on appeal by an opponent it appears that he has not been heard at all but was refused hearing on a stated ground, and a judgment dismissing his opposition was entered, it is not necessary that the inventory and a mass of documents that have no relation to the issue presented by the appeal should be copied in the transcript, and a motion to dismiss

Succession of Commagers.

for the absence of these unnecessary and irrelevant documents will not be sustained if the pleadings, bills of exception, and other matter needful for a proper presentation of the issue to be decided, are in the transcript.

After judgment has been rendered homologating an executor's account so far as not opposed, other opponents cannot come in and attack the account. The delay fixed by law must have elapsed before an homologation can be made, and they who have permitted it to pass without preferring their complaints are shut out thereafter.

But where an opposition contesting generally the whole account has been filed in time, this opponent may supplement her opposition by specifications and amplifications of the original after the homologation has been made. The judgment qualified by the words "so far as not opposed" reserved her rights.

An opponent-heir who alleges that she signed a receipt to the executor in full settlement in error, and that the real estate of the succession has been bought by the executor through an interposed person, and so seeks to annul the sale and bring the property back into the succession, is not required to make tender of the sum she has received before she can be heard to impugn the settlement or attack the sale.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lasarus, J.

Jonas & Nixon and G. Fernandez for the Executor, Appellee.

M. Voorhies for Opponents and Appellants:

The spirit of our legislation is to lend every facility to examine into the conduct of administrators, and technical objections opposed to such investigation are entitled to little favor. 4 Ann. 123; 36 Ann. 416.

A judgment homologating an account so far as not opposed will not bar a supplemental opposition, specifying the items opposed, when the first opposition, previous to judgment, opposed the items generally. 26 Ann. 610; 13 Ann. 113.

A decree homologating an account so far as not opposed, without proof, is a nullity. 27 Ann. 667.

Tender, or the putting in *mora*, is not a prerequisite to an opposition to the final account of an administrator. The doctrine, as set forth in the Civil Code, arts. 1012 [1906] *et seq.*, applies exclusively to commutative contracts.

Where an administrator has purchased property belonging to the succession, sold on the petition of creditors, and employed the purchase price for the payment of its debts, he cannot claim previous tender of the price, but must recover the sum in due course of administration. 36 Ann. 235; 34 Ann. 1017.

Even in a commutative contract, the rescission of which would require a liquidation between the parties, tender is not a prerequisite. 15 Ann. 518. *A fortiori* must this be the doctrine in settlement between heirs and an executor who holds a fiduciary trust.

An opposition to a final tableau by an heir who has been cited cannot be dismissed on a mere objection made, on the trial of the case, of want of tender, based upon a private anterior settlement, which is not before the court.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

MANNING, J. The motion is based on the absence from the record of the inventory and other documents, and the failure of the appellant to have the transcript completed, and the fact that an unsigned

Succession of Commagere.

judgment of May 6th, which the mover says is the one appealed from, is not appealable.

No reference is made by page to the transcript to guide us in finding this unsigned judgment of May 6th, and we do not propose on a motion to dismiss to grope our way through the record to find it, and the more since there is a judgment of May 26th, signed and in its proper place, and that judgment dismisses the opposition of Cheval the appellant and continues the other opposition indefinitely.

The clerk certifies that he cannot find the inventory and other documents though diligent search has been made, but they are not needed for the purpose of this appeal. The mover seems not to apprehend the condition of the case.

No trial has been had on the merits. The opponent was denied hearing at the outset. When she offered her first witness, the executor objected to any hearing whatever on the ground that he held the opponent's receipt for a sum paid her in settlement of the claim which she was then renewing and pressing in her opposition, and that she could not be heard until she tendered to the executor the sum thus received. The opponent having announced that she would not tender that or any other sum, the court sustained the objection and dismissed her opposition.

The issue to be tried by this appeal is presented in an assignment of errors and bills of exception, and is whether the opponent has a right to be heard and whether a tender was necessary, not whether her claim is just and well-founded. So far from the transcript not having documents enough, it has far too many. The bulk of it is not needed for the trial of the issue now presented.

The motion is denied.

ON THE MERITS.

The executor of this succession filed his final account in August 1884 which was opposed by Mrs. Cheval one of the heirs, and the account was then homologated so far as not opposed. About five months afterwards two other heirs filed oppositions, and these were stricken out on the motion of the executor, and these opponents reserved a bill and appealed.

The judge was right. After judgment of homologation has been entered neither heirs nor creditors can be heard in opposing the account. The delay fixed by law must have passed before an homologation can be made, and if parties affected by the account permit it to pass without preferring their complaint, they must suffer for their own laches. A different rule would indefinitely protract the trial and homologation of a succession-account. *Suc. Macarty*, 3 Ann. 384.

Mrs. Cheval made a supplemental opposition about the time these

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other heirs filed their original oppositions, and the same objection is made to her supplemental opposition that was made to their originals, but it is not good.

She had filed an opposition in time contesting all the items of the account generally and she can afterwards supplement it by specifying more in detail the several grounds of her complaint. The judgment of homologation expressly excepted her opposition from its operation, and there is no reason why she should not afterwards amplify her objections to the account that had already been made. *Suc. Cabrol*, 26 Ann. 609.

On the trial the executor offered all his proof and when Mrs. Cheval began to offer or was about to offer hers, the executor objected to the reception of it because she and he had had a settlement full and final and he had paid her one hundred and ninety dollars in discharge of whatever she was entitled to. His objection was that she could not be heard until she had tendered or paid him this sum thus received, and the judge sustained the objection and Mrs. Cheval appealed.

This ruling is error.

The executor seeks to apply a principle here that belongs to a wholly different state of things, and cites *Pugh v. Cantey*, 33 Ann. 786, where the court say, "the party demanding the rescision of a contract must return or offer to return the consideration received by him. * * This is a condition precedent to being heard."

There is no contract here to rescind. The allegation of the opponent is that her signature to the receipt was given under protest and through compulsion and in complete ignorance of her rights. Whether true or false, the allegation of error entitles her to be heard in attacking the settlement.

Another allegation is that the real estate of the succession was bought by an interposed person ostensibly but really by the executor, and one of the objects of the opposition is to have that sale annulled and the property brought back into the succession. We have more than once held that a tender was not necessary to enable an heir to begin such an attack. *Stanbrough vs. McClellan*, 36 Ann. 234, and cases there cited.

It is therefore ordered and decreed that the judgment of the lower court dismissing Mrs. Cheval's opposition is avoided and reversed, and the cause is remanded for further proceedings therein, and in all other respects it is affirmed, the costs of Mrs. Cheval's appeal to be paid by the executor.

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ON APPLICATION FOR REHEARING.

WATKINS, J. Mrs. Althée Tomlinson and Mrs. Elvina Vigné, heirs of deceased, opponents and appellants, pray the amendment of the former judgment and decree of this court sustaining the judgment of the court *a qua* dismissing their oppositions.

They claim that, on the final account opposed, there are no funds to be distributed to creditors; and they make no opposition to any creditor's claim. They claim that the account purports to dispose of the entire assets of the succession, leaving in favor of the executor a balance of \$1737.07; and that a final judgment of homologation "would be tantamount to a judgment against the heirs, in favor of the executor, for said balance."

This succession was opened by the death of the testatrix on the 15th of August, 1879, and during the same month letters testamentary were issued to the executor, Charles Louque.

On June 13th, 1884, opponents were recognized as heirs of the deceased.

The account opposed states the assets of the estate to be \$5968, and its liabilities \$7705.07, showing a balance in favor of the executor, as stated above, of \$1737.07.

Mrs. Cheval opposed this "account in full" on the grounds that it was vague and indefinite, and did not set out the assets and liabilities fully; because therein no mention is made of the real estate belonging thereto, as described in the inventory; and because the property of the succession has been adjudicated to the executor, through a person interposed, and which still belongs to the succession.

She opposes specially several items, and particularly the balance in favor of the executor; and, generally, "every item of said account as presented."

On motion of the executor the account was thereafter duly homologated, so far as not opposed.

The account was tried in the absence of counsel for opponent, Mrs. Cheval, and upon a proper showing, a new trial was ordered on November 28th, 1884.

No further proceedings were taken until the 25th of March, 1885, when Althée and Elvina Commagère filed additional oppositions to the executor's account, embracing, among others, many of the items of the account opposed previously by Mrs. Cheval.

On the same date Mrs. Cheval filed an amended opposition, in which she reiterates all of the objections previously urged to the account; and she further charges that all the moneys this account shows to have

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been disbursed by the executor, were by him derived from another succession to which she, and the other opponents are the *sole* heirs.

On motion of the executor the opposition of Mrs. Tomlinson and Mrs. Vigné are stricken from the docket "as having been filed too late," i. e., subsequent to the judgment of the court homologating the account, so far as not opposed; and to this ruling opponents reserved a bill.

I.

Were the oppositions presented in due season to entitle those opponents to a hearing thereon?

Should the opinion of this court be reversed in such way as to afford them an opportunity of making proof of same?

In succession of Cabrol, 26 Ann. 609, the court say: "On the 4th of August there was judgment homologating all the items not opposed.

"As the original petition opposed, in *general* terms, the homologation of *all* the items of the account except the law charges and costs, it follows that only these items were homologated by the judgment.

"The supplemental petition of the 9th of August supplies, so far as the items therein specified, the deficiency complained of in the original petition of opposition.

"Our conclusion is that the court erred in dismissing the opposition."

In the succession of Michael Schaffer, 13 Ann. 113, the court say: "It may be conceded that an *unqualified* homologation, after due advertisement and delays, of a curator's account, and statement of debts, is binding upon the heirs, in the absence of fraud.

"But here it appears that the items in controversy have not been passed upon. The account was homologated only in 'so far as not opposed.'

"The oppositions of *Michel* and *Gilmore* attacked the items now in questions.

"Those items having been opposed, *are not covered by the terms of the decree.*"

Counsel for the executor places reliance on the doctrine that is announced in succession of Macarty, 3 Ann. 383, and the quotation it makes from *Lang et al. vs. Their Creditors*, 14 La. 237, which is that:

"The law fixes the delay within which opposition to a tableau of distribution is to be made. This delay is not, however, fatal, as long as proceedings are *suspended*; but when judgment of homologation is pronounced, creditors who deem themselves injured by it cannot be relieved otherwise than by a new trial; and this cannot be obtained

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by a party who has neglected to file his opposition *until the judgment of homologation be pronounced.*"

In the case at bar the proceedings have been kept suspended by the opposition of Mrs. Cheval. On the same day that she filed her supplemental opposition, the original oppositions of present appellants were filed, upon almost the identical grounds thereof.

The judgment homologating the executor's account *so far as not opposed* did not pronounce upon the items of the account that are embraced in, and covered by Mrs. Cheval's oppositions, original and amended.

There is no conflict between these decisions. On the other hand, they are perfectly harmonious.

"The right to do what is ordered to be done within a given time exists so long as *no action of the court, or the opposite party*, has intervened to conclude that right. * * So, too, opposition may be made to an account of administration at any time before its homologation. * * *

"There are many cases, however, when this rule ceases in consequence of *special provisions of law.*"

Hen. Dig., p. 1580, No. 11, and authorities cited therein.

We have no hesitancy in saying that the opponents are entitled to a hearing upon their oppositions as filed; but we express no opinion upon various questions argued by counsel, appertaining to the trial of the same on the merits.

It is therefore ordered, adjudged and decreed, that the former opinion of this court herein rendered, be and the same is hereby amended in so far as to reverse the judgment of the lower court striking said oppositions as having been filed too late; and it is further ordered, adjudged and decreed that said oppositions are reinstated for trial and further proceedings according to law, and that the executor be taxed with the costs of appeal.

Judgment amended.

No. 9569.

MRS. ANNIE HUYGHE VS. HENRY BRINKMAN.

Where a motion to dismiss the appeal is made on the ground of the deficiency of the transcript as shown by the clerk's certificate, and the transcript is completed and the missing evidence supplied, and the certificate converted under a *certiorari* from this court before the case is submitted, and no delay is occasioned by the steps taken for the completion of the transcript, the appeal will not be dismissed.

When in a possessory action the parties urge claims and counter claims which necessarily

38	886
45	127
38	836
47	847

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involve the question of title, and are clear incidents of ownership, an issue which can not be tried in such an action, the parties will be relegated to the petitory action as a necessary step to a proper adjudication of such claims.

Courts cannot be required to decide controverted by piece-meals—a decision of the fundamental question must precede a discussion of rights incident thereto.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Alfred Goldthwaite for Plaintiff and Appellant.

Bayne & Denègre and Braughn, Buck, Dinkelspiel & Hart for Defendant and Appellee.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

TODD, J. This motion is grounded on the deficiency of the transcript through the alleged fault of the appellant.

Before the case was submitted, the documents alleged to be missing were supplied under a writ of *certiorari* from this court. Furthermore the defective certificate of the clerk accompanying the transcript when filed, was supplemented and corrected, and this new certificate showing a full and complete transcript was by the permission of the court filed on the motion of the appellant.

Finding, then, a perfect transcript before us, containing all the evidence, documents and proceedings had in the lower court, and no delay having been caused by these efforts of the appellant to complete the transcript, we see no reason whatever to dismiss the appeal.

The motion to dismiss is, therefore, denied.

ON THE MERITS.

WATKINS, J. This is a possessory action instituted by plaintiff for the recovery of an improved lot on First street in this city, coupled with a claim for rents and revenues, to which was urged a general denial and a special defense by the defendant to the effect that "he had, through himself and his vendors, held peaceable and undisturbed possession of said property for fully ten years prior to any claim set up by the plaintiff * * * and he alleges that, as possessor in good faith, he is entitled to all rents and revenues of said property; or if condemned to pay such revenues he is entitled, as possessor in good faith, to be reimbursed the *taxes* and *expenses* incurred for said property."

Suit was filed on October 22, 1879, and petitioner alleges the disturbance of her possession on the 2d of November, 1878, and she demanded rents at the rate of \$40 per month from that date with interest.

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This Court decided that the plaintiff was entitled to recover the possession of the property and rents at \$30 per month since the 2d of November, 1878, with interest, and that the case be remanded to receive proof of "the cost of taxes and *whatever else* he can properly plead in offset of the plaintiff's demands." This court further said: "We do not determine the question of his possession in good faith, but it is fair that he should have an opportunity to show it."

In the court below the plaintiff filed a plea in which she elects and requires the demolition of the constructions and works made by defendant on the premises sued for.

From a judgment in favor of the defendant for \$1900, with interest, the plaintiff appealed.

The record discloses that defendant purchased the property in controversy at a partition sale between the heirs of Robert Huyghe, former husband of plaintiff, who continued in possession after his death.

The partition proceedings were duly homologated, notwithstanding plaintiff's opposition thereto.

Defendant purchased, at public auction, on June 1, 1878, and on the 17th of that month, a formal title was executed therefor by Octave Morel, notary.

He then procured a writ of ejectment and dispossessed the plaintiff; and she sued him for damages resulting therefrom. 34 Ann. 832, 1179.

The title of defendant is perfect in form, and recites all the necessary elements of a sale; and he paid a large part of the price of the adjudication. It is notarial in form, and three of the heirs of the deceased signed it. It possesses all the *insignia* of a *joint* title in the sense of R. C. C. 3484 *et seq.*

The plaintiff was a party to the partition proceedings, and some of the heirs were of full age and seem to have acquiesced therein. The inventory of succession of Robert Huyghe taken on the 3d of March, 1877, was valued at \$15,770.44.

Conceding, for the argument, that the Second District Court had no jurisdiction *ratione materiae* to order a partition of succession property: it had jurisdiction of the succession itself. If such a sale be a nullity, it is a *relative* one only.

One who has just reason to believe himself master of the thing which he possesses, is a possessor in good faith. R. C. C. 3451.

He is a possessor in bad faith who assumes that quality well knowing that he has no title to the thing, or that his title is vicious and defective. R. C. C. 3452.

In no one of the various suits and proceedings *pro* and *con*, has this

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title been tested or put at issue. Brinkman has, to all appearances, full confidence in his title, and his testimony supports that belief.

The doctrine announced in *Walworth vs. Stephenson*, 24 Ann. 251, to the effect that "a purchaser under a judicial sale is in bad faith, and liable for rents and damages, if the judgment under which he purchases is absolutely void," etc., has not been followed by this Court. *Hickman vs. Dawson*, 35 Ann. 1036; *Eldridge vs. Tibbits*, 5 Ann. 380; *Carroll vs. Cabaret*, 7 O. S. 406; *Frique vs. Hopkins*, 4 O. S. 224; *Dufour vs. Camfranc*, 11 O. S. 715; *Roberts vs. Brown*, 14 Ann. 985; *Giddens vs. Mobley*, 37 Ann. 417.

In the briefs of counsel in the last case *Walworth vs. Stephenson* was pressed upon this Court's attention without avail.

In those cases pleas of prescription and demands for reimbursement for improvements made and taxes paid, were urged. Their allowance depended upon the proof disclosing the possession of defendants in good faith.

In *Hickman vs. Dawson*, a large sum was allowed for improvements, and in *Giddens vs. Mobley*, the plea of ten years' prescription was sustained, notwithstanding this Court, in the former case, held the title absolutely null and void.

We conclude that defendant was a good faith possessor at the commencement of his possession, and that good faith has necessarily continued. 9 Ann. 171, *State vs. Smith*; 14 Ann. 605, *Robert vs. Brown*; 33 Ann. 441, *Hickman vs. Dawson*; 34 Ann. 705, *Wederstrandt vs. Fuyher*; R. C. C. 3482.

Plaintiff places reliance on R. C. C. 503, as supporting the plaintiff's theory of defendant's possession in *bad faith* since suit.

It reads as follows, viz: "He is a *bona fide* possessor, who possesses as owner, by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of.

"He ceases to be a *bona fide* possessor from the moment these defects are made known to him, or are declared to him by suit instituted for the recovery of the thing by the owner."

We understand that to mean a petitory action, or an action in nullity of the possessor's title.

A possessory action cannot accomplish that result.

In *Kibbe vs. Campbell*, 34 Ann. 1163, this Court held correctly that, after the good faith possessor has been dispossessed by one holding a better title than himself, the former has a right of action for compensation for improvements and taxes which enured to the benefit of the soil, or enhanced its value.

Huyghe vs. Brinkman.

We are of the opinion that under the express provisions of R. C. C. 508, plaintiff was not in the attitude to compel defendant to demolish, or remove the buildings constructed on the property in dispute, because defendant was not a bad faith possessor.

It reads : " Nevertheless, if the plantations, edifices and works have been made by a third person evicted, but not sentenced to make restitution of the fruits, because such persons possessed *bona fide*; the owner shall not have a right to demand the demolition of the works, plantation, or edifices, but he shall have the choice either to reimburse the value of the materials and the price of workmanship, or to reimburse a sum equal to the enhanced value of the soil."

This election plaintiff has not made. There has been no proof administered as to the enhanced value given the soil by reason of the improvements, for which reimbursement is claimed; but there has with regard to the value of the materials and the price of workmanship, and we shall predicate our opinion upon it, as it may be fairly assumed that plaintiff was content with the election the defendant had made.

The defendant claims "for improvements and to reimbursement for the same; for removal of old stables, building material for and repairing the roof of the house, etc., \$188.28; for painting, material and labor employed in the construction of a new stable, \$270; carpenter's work, brick, mortar, lumber, painting and hardware, \$960.90; and other items aggregating \$210.

He also claims for State and city taxes paid during seven years, a little over \$400, and other small items, aggregating \$405.02—\$2374.20.

There are introduced in evidence by defendant a statement of his tax assessments from 1878 to 1884, and sundry receipts from carpenters, journeymen, lumber-dealers and dealers in paints, oils, glass, etc.; receipts for insurance premiums, for taxes paid, etc., and for and during the years 1880 to 1885 inclusive.

The defendant, as a witness, states that he paid a large part of the purchase price, the taxes, repairs and cost of improvements, during the time he occupied the property as owner, and the insurance premiums since 1878.

He says that when he went into the house it was dirty and in need of repairs, and that he had it thoroughly repaired and cleansed, painted and calsomined.

He says that the roof was bad, the keys lost, and window panes broken, and an entirely new fence was necessary, and same was built.

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He states that he paid the various bills that were introduced in evidence, and had the repairs made that are charged for.

His statements are in great part supported by the evidence of Otto Knows, H. Hillevig and J. Barney, but they are opposed in part by plaintiff, who says, that the house on the premises was comparatively new, and was in need of no repairs, but she did not know what improvements he had made.

Her statement is supported by Fred. Wing, in a general way, and by Wm. Seymour; but their testimony has no significant bearing on the case.

In the well-considered opinion of the district judge he says:

"In view of the judgment against defendant for rent at \$30 per month since November, 1878, it is fair that he should be allowed, in compensation, all that he has expended for the preservation and improvement of the property." In this view we concur.

The evidence of the defendant is not as clear and satisfactory as it should be, in some particulars, and for some items charged for.

The aggregate amount of his claim is \$2,450.97, and same was by the district judge reduced to \$1900, which, he "thinks, will fairly reimburse all expenditures properly chargeable to plaintiff," which sum was held to offset and compensate *pro tanto*, the judgment in plaintiff's favor for rent.

A careful examination of the record fully satisfies us of the correctness of the judgment of the district court, and it is therefore affirmed with cost.

ON REHEARING.

POCHÉ, J. A careful consideration of the consequences which might flow from our last decree in this very complicated litigation has decided us to retrace our steps, and to make an effort to bring the parties into line so as to open the way to a logical solution of the many difficulties which the record, in its present shape, forces on the judicial mind.

In our previous opinions in some of the branches of this controversy we have more than once intimated that the vital question involved in it, namely, the question of title or ownership, had not been presented in any of the pleadings. And yet, in the present case, we are called on to adjudicate on important questions which are necessary incidents of the ownership of the property, or, in other words, to treat and dispose of effects before considering the essential causes of the same.

Thus we are expected to attach effects to the alleged good faith of

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the defendant's possession as a test of his right to recover his taxes, and other expenses in repairing and preserving the property, in anticipation of an eventually possible judgment which may decree him to have been all along the true and lawful owner of the property.

In our opinion in the case between the same parties, in 37 Ann. 240, we settled the character of this suit to be the possessory action. We allowed rents to the plaintiff possessor for the time that she was and remained ejected, and remanded the cause for trial of the defendant's claim for reimbursement of his taxes and for the value of his improvements.

Now, in the present appeal, and especially on this rehearing, the argument of counsel is almost exclusively directed to the validity of Brinkman's alleged title. In point of fact, the good faith of his possession is intimately blended and inseparably connected with the validity of the partition sale, at which he became adjudicated of the property.

As argued by counsel, if the court ordering the sale had jurisdiction, a question which he was bound in law to examine, his possession is in good faith, but to reach that conclusion it is inevitably necessary to hold at the same time that his alleged title is good, and *vice versa*.

Hence, we have to confront this state of things—the question of ownership, which is not presented in the pleadings, is at the threshold of the discussion of the defendant's alleged possession in good faith—and a correct solution of the latter must in law and in logic be preceded by a decision of the former.

We therefore conclude that the right of defendant to recover his taxes and other expenditures, depending on his good faith, cannot be adjudicated at the present stage of the litigation, and that it must of necessity and in justice be relegated to the trial of the question of title or ownership, as soon as the parties make up their minds to present that issue under proper pleadings.

In a petitory action, and in such action alone, all the vexed questions which bristle in this controversy, can be properly discussed and logically disposed of.

A judgment in such an action will take up the whole series of adverse claims, of title, of rents and revenues, and the incident right of compensation for alleged necessary disbursements. Courts cannot be required to entertain controversies by morsels or piece-meals as the caprices of parties may dictate.

The fundamental question must underlie the discussion of legal incidents and consequences naturally flowing therefrom.

State vs. Cole et al.

It is therefore ordered, that our previous decree herein, rendered on the 17th of May last past, 1886, be annulled and set aside. It is now ordered, adjudged and decreed that the judgment appealed from, allowing to defendant, Brinkman, the sum of \$1900, on account of taxes paid and improvements made by him on the property in suit, be annulled, avoided and reversed, at the costs of defendant in both courts, under the reservation of defendant's right to claim the amounts set up by him in this litigation, in a future proper proceeding, his right to ultimately recover the costs, which he is herein condemned to pay, in case of a final decision in his favor either on the question of title or in the recovery of his claim aforesaid—and all other claims growing out of the question of his alleged ownership.

ON PETITION FOR MODIFICATION OF DECREE.

Defendant prays that our last decree in this case be modified so as to restrict the execution of the judgment previously rendered in favor of plaintiff for rents, to any excess of such judgment over the sum of \$1900, for which defendant had obtained judgment in the lower court, which judgment we have just reversed.

The relief prayed for is equivalent to an order partially suspending the execution of a final judgment rendered by this Court since March of last past, more than eighteen months ago.

It is apparent that the judgment which is the property of plaintiff, is absolutely beyond our control, and that we are powerless to grant the relief which defendant asks in this proceeding.

It is therefore ordered, that the petition of defendant be dismissed, and that the relief which he prays for be denied.

No. 9764.

THE STATE OF LOUISIANA VS. GOODRICH COLE ET AL.

1. Under the Constitution and laws of this State, district attorneys are vested with full discretion, not under the control of courts, to prosecute offenses *not capital* either by indictment or by information, as in their judgment the interest of the State or the ends of justice may require—and the discretion thus vested in them cannot be affected by the fact that the grand jury may be in session at the same time and in the same parish.
2. In criminal cases the order to separate witnesses is not one of right, and its modification by the judge within reasonable grounds must be left to his discretion. Hence, the ruling of a trial judge in rejecting the testimony of a party who had obtained admission in a court room, on declaring that he was not a witness, and who was thereafter tendered as a witness by the accused, will not be disturbed on appeal. No fixed rule can be adopted in such matters. Judges must be guided by the peculiar circumstances surrounding the offer of such testimony.

28	843
45	841
38	843
47	1200
38	843
48	135
88	843
110	1100
38	843
122	526

State vs. Cole et al.

3. This Court will not interfere with the orders made by trial judges concerning the discipline of their courts. Hence, a complaint that a judge called a particular case out of its order as fixed on the trial docket, will not be entertained on appeal. Parties should consider that the district judges in this State are not mere ministerial officers, or much less children, whose every step must be traced and controlled by superior authority, but that their courts have certain inherent powers.
4. After charging the jury, as the Constitution requires, that they are the judges of the law and of the facts in criminal cases, it is proper that the judge should instruct them to the effect that they are the sole judges of the facts, but that, as regards the law of the case, they should be governed by the charge of the judge thereon. Affirming *State vs. Ford*, 37 Ann. 465; *State vs. Vinson*, 37 Ann. 792; *State vs. Hal Mathews*, recently decided at Shreveport.

A PPEAL from the Ninth District Court, Parish of Tensas.
Young, J.

M. J. Cunningham, Attorney General, and *Hugh Tullis*, District Attorney, for the State, Appellee:

1. Where witnesses are sequestered by order of court, and the order is disobeyed by one of the witnesses who had been warned by the sheriff not to come into court, and who was fully cognizant of the order, it is discretionary with the court *a quo* to exclude the disobedient witness's testimony, particularly when it does not appear that his evidence was material to the prisoner's defense. 36 Ann. 149; 34 Ann. 383; 15 Ann. 79; Archbold's *Crim. Plead. and Prac.*, Pomeroy's notes, Vol. 1, p. 539; Bishop *Crim. Pro.* Vol. 1, §§ 1192, 1088.
2. The appellate court will not interfere with the discretion of the lower court in matters pertaining to the separation of witnesses. 27 Ga. 387; Bishop *Cr. Pro.* Vol. 1, §§ 1086, 1087, 1088; 34 Ann. 383.
3. Prosecutions may be by indictment or information. 14 Ann. 367; 33 Ann. 1223; Const. art. 5; R. 8, § 977.

Elam & Luce for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. In support of their appeal from a sentence of six years to hard labor, under a conviction of robbery, the defendants, three in number, rely on six bills of exception.

1st. In a motion to quash the information, they denied the legal power or authority of the District Attorney to proceed by information when the grand jury is actually in session, and they contend that under such circumstances an indictment would have been the exclusive mode of proceeding under the offense charged against them.

The argument is not sound; it is effectively answered by the very text of the constitution and laws of the State on the subject-matter.

Article 5 of the Constitution reads: "Prosecutions shall be by indictment or information; provided that no person shall be held to answer for a capital crime, unless on a presentment or indictment by a grand jury." * * *

Containing a pre-existing similar provision, Sec. 977 of the Revised Statutes of 1870, is in the following language: "Prosecutions for offenses not capital may be by information, with the consent of the court first obtained."

It has been judicially determined that, except in extreme cases, not likely to occur, the judge cannot withhold his consent to that mode of prosecution of offenses not capital. State ex rel. State vs. Judge, 83 Ann. 1223.

We understand, and we therefore hold, that in proper cases, the District Attorney is clearly vested with the discretion, not subject to the control of courts, to proceed by information in the prosecution of offenses not capital, and that his discretion in such matters is not affected by the fact that the grand jury may be in session for the same parish and at the same time.

2d. They next complain of the refusal of the judge to allow a certain party to testify in their behalf. The refusal was made on the objection of the District Attorney under the following circumstances: The judge had made an order to separate all the witnesses in the case, and one Riley, whom the sheriff attempted to exclude from the trial on the ground that he was a witness in the case, had answered the officer that he was not, whereupon he had been admitted in the courtroom, where he had been for an hour, when defendants' counsel offered his testimony, with the view of proving an *alibi*. The judge, knowing that he was the father-in-law of two of the defendants, rejected his testimony. Under these circumstances we are not prepared to rule that the judge abused the discretion which is vested in him by the law touching this subject-matter. An interference with his discretion in such rulings would open the door to practices which would entirely defeat the very object to be attained by the order sequestering the witnesses in any and all cases. State vs. Ford, 87 Ann. 463; State vs. Rivells, 84 Ann. 383; State vs. Gore, 15 Ann. 79.

3d. Their next two bills are levelled at the ruling of the judge in allowing questions to witnesses to show that, on the day the robbery was committed, one of the defendants was seen in the act of putting certain goods in a sack. Their counsel contend that the defendants had been charged with the robbery of money alone, and that it was therefore irrelevant to prove anything connecting them with the robbery of goods; and, further, that the party charged to have been robbed had testified that no one was present except himself and the defendants themselves. Their main argument is that the robbery was charged to have occurred at 1 o'clock, and that the testimony admitted

State vs. Cole et al.

went to show that the goods were seen in the possession of the accused two hours before, which was impossible. This very argument affords a correct solution of the objection; clearly it went to the effect and not to the admissibility of the proffered testimony. The bill shows that the party robbed was a peddler, whose bundle of goods had been ransacked, while the robbery of his money was being perpetrated.

The testimony was intended as corroborative evidence. Whether it was so or not, truthful or not, possible or not, were questions for discussion before the jury. Hence the objection could not be sustained in law.

4th. Defendants' counsel find fault with the judge's charge to the jury in so far as he told them that they were the judges of the facts and of the law in the case; that they were the sole judges of the facts, and that, as regards the law, they should be governed by the charge of the judge thereon.

The instructions substantially comply with the rules established in our jurisprudence. Counsel can find no support for their contention, in our opinion, in *Vinson's case*, 37 Ann. 792, on which they rely exclusively. In that case we said: "The relation which the jury bears to enunciations of law delivered to them by the judge, is very similar to that which the judge bears to valid and unambiguous statutes. The judge is bound, under his oath, to accept and apply the statutes, but that does not prevent him from being the judge of the law. So the jury is bound to accept and apply the law as declared by the court, but that does not prevent their being 'judges of the law.'"

In *Ford's case*, 37 Ann. 465, this Court sustained the judge who had instructed the jury that while they were the judges of the law as well as of the facts, it was their sworn duty to follow the law as given to them by the court. In that connection the court said: "The best judicial authority is that the declaration to the jury that they are the judges of the law and of the facts must be followed by an explanation similar to that contained in the charge now under consideration." The same views were expressed by this Court in the recent case of the *State vs. Hal Mathews*, decided at Shreveport, and not yet reported.

We must, and we shall, adhere to a rule which finds its sanction in logic and reason, as well as in law and jurisprudence, and which affords even-handed justice and equal protection to society as well as to individuals.

We entertain a reasonable hope that it will henceforth be accepted as the settled doctrine of our jurisprudence on the question of the powers of juries in criminal cases.

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5th. Defendants finally complain that their case was called out of its fixed order on the trial docket. It appears from the bill that at the end of the jury week the judge ordered that cases in which the defendants were in actual custody should be advanced over those in which the parties were out on bond. The order finds ample commendation in the feeling of humanity which prompted it, as a boon to those who are now loudest in its condemnation. And we shall certainly not disturb such an order in the very case which illustrates its wisdom. The verdict of the jury affords the only rational explanation of the marked aversion of these defendants to a trial which came earlier than their wishes.

Surely, counsel cannot be serious in trying to induce an appellate tribunal to interfere with trial judges in the administration of the discipline and order of business in their own courts. They must understand that district judges are not mere ministerial officers, or much less children, whose every step must be traced and controlled by superior authority. The order complained of was manifestly within the limits of the judge's legal discretion. *State vs. Duck*, 35 Ann 764; *State vs. Ford*, 37 Ann. 459.

We find no error to the prejudice of the accused during the whole course of their trial.

Judgment affirmed.

No. 9644.

EDWARD G. SCHLIEDER VS. L. B. MARTINEZ—J. REXACH ET AL., INTERVENORS.

An appeal lies from a judgment dismissing interventions, the object of which is to claim the ownership of the effects seized and to subject them to money claims, where the property, which is the matter in dispute, is shown to be worth more than two thousand dollars.

Parties deeming themselves aggrieved by a judgment may, when appealing therefrom, join in one motion and furnish one bond.

The motion and the bond should be filed in the proceeding in which the judgment appealed from was rendered. It would be irregular to offer them in a different proceeding, though the interventions were filed therein.

A bond in favor of "the clerk of the court," satisfies the law. The name of that official is utterly insignificant.

Plaintiffs seized certain movables as the property of their debtor. A third person intervened claiming title and possession under transfer before sale and asked for judgment decreeing him to be the owner. Plaintiff answered alleging his title to be in fraud of creditors and simulated. Before trial, intervenor moved to strike out all the allegations except those showing simulation and to restrict the issue to simulation *vel non*. The case was so tried.

38	847
47	715

Schlieder vs. Martinez.

Held, that after thus accepting and submitting this issue to the decision of the court, intervenor cannot now dispute plaintiff's right to raise this issue otherwise than by a direct action in declaration of simulation, even if otherwise the objection was tenable as to alleged simulation of sales of movables, on which it is unnecessary to express an opinion.

In such a proceeding the allegation that the sale attacked embraces all the property of the debtor, is a sufficient allegation of injury to the creditor.

On the facts of the case, the evidence sustains the conclusions of the judge.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

A. J. Lewis and Hornor & Lee for Plaintiffs and Appellees:

The separation of witnesses is subject to the discretion of the trial judge, who may order the defendant to withdraw, when the case has been closed as to him, and when he is to be a witness as to the issues between plaintiff and the intervenors, particularly when the defendant makes no objection, which is urged solely by counsel for the intervenors. *State vs. Harrison*, 38 Ann.

The ruling of the lower judge at the outset and before testimony is heard that the action is *en declaration de simulation*, establishes definitely and finally the nature of the cause.

Third parties may prove simulation by presumptions, by circumstances out of the usual course of business, by the acts of the parties, their intimacy and close and long connection in business and as partners. 11 L. 969; 13 Ann. 207; 10 Ann. 39; 30 Ann. 359.

A notarial act of sale *omnium bonorum* between such persons is a presumption of simulation where the vendor is insolvent. *Mackesy vs. Schultz et al*, 38 Ann.; 2 Ann. 267. It is not necessary to treat such instrument as a reality, and it may be shown to be itself a mere sham and conspiracy to defraud creditors. 7 Ann. 614; 15 Ann. 177, 553; 31 Ann. 902; *Johnson vs. Kingsland & Ferguson Mfg. Co.*, 38 Ann.

Such presumption of simulation arises the more readily where the alleged vendor is shown to have resorted to such methods previously. 12 Ann. 666; 29 Ann. 4; 36 Ann. 684; 37 Ann. 795, 165; *Collins vs. Harper*, No. 5747, N. R.

The ownership asserted by Lloveras of Key West cigars worth \$196, and of a mirror worth \$50, although urged herein by way of intervention and third opposition is really a separate demand. C. P. 398; 10 L. 518. This Court has no power to review the judgment dismissing that demand. Const. 1879, art. 81; 26 Ann. 591; 32 Ann. 603, 1190; 33 Ann. 1055; 37 Ann. 541.

Besides, there had been no delivery to Lloveras and the mirror was in the possession of Martinez when seized. C. C. 2247, (2243); 37 Ann. 472.

A sale being proved simulated, notes used to represent part of the pretended price are void. Third persons who participated in the confectio of such sale, or who were fully cognizant thereof, or who had every opportunity of informing themselves of the truth, are not innocent holders in good faith. There being no sale, there can be no vendor's privilege, and there can be no concursus. 30 Ann. 625; 34 Ann. 891; 33 Ann. 1055; 32 Ann. 603, 1190.

F. D. Chrétien, E. Sabourin and Albert Voorhies for Defendants and Appellants.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by
BERMUDEZ, C. J. On a claim of some \$800, the plaintiff sequestered

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and attached, as belonging to the defendant, the contents of a cigar store.

Rexach, Estera & Lloveras intervened, the former claiming the ownership of the property seized, the other two seeking each payment of a sum less than two thousand dollars, with lien and privilege.

After trial, there was judgment for plaintiff, but dismissing the interventions.

The intervenors appeal.

The plaintiff asks that the appeal be dismissed:

1st. Because this Court is without jurisdiction *ratione materiae*, the amount in dispute being less than \$2000;

2d. Because of irregularities in the motions and bonds of appeal;

3d. Because the transcript was filed too late.

I.

Rexach claims to be the owner of the property seized.

Estera & Lloveras sue for separate amounts, which aggregate \$1438.

It is apparent that the only judgment which can be rendered is one touching the ownership of the property seized and its liability and subjection to the money claims which are said to be secured by lien thereon.

The property seized is the matter in dispute and, as it is shown to be worth more than \$2000, this Court has jurisdiction.

II.

The objection to the motion of appeal and to the bond that they bear the title of the consolidated cases in which the judgment was rendered; that the bond is payable to John Clark, clerk of the Civil District Court, when the clerk thereof at the time was W. J. McGeehan, has no force.

The judgment appealed from was rendered in the consolidated cases, among which the suit of Schleider. It was not only not irregular, but proper, that the motion and the bond should be made in those cases. It would not do to file them in a case in which the judgment was not rendered.

There is no provision of law or rule of practice which requires that each party dissatisfied with the judgment rendered should separately appeal and give a distinct and separate bond. They can all well join in the same motion and furnish one bond, in the case in which the judgment appealed from was rendered.

The bond contains the name of McGeehan and not that of Clark. Even if it did, it would be a clerical error. It is sufficient that it be

Schlieder vs. Martinez.

made payable to the clerk of the court. His name is a matter of utter insignificance in such an instrument.

III.

The transcript was filed within the thirty days allowed in extension of the return day; therefore, *in time*.

It is therefore ordered that the motion to dismiss be overruled.

No. 9644.

EDWARD G. SCHLIEDER VS. L. B. MARTINEZ; S. HERNSHEIM BROS.
VS. SAME; C. E. SARRAZIN & CO. VS. SAME; WM. DEMESTH VS.
SAME; LEWIS SYLVESTER & CO. VS. SAME.

(CONSOLIDATED.)

ON THE MERITS.

FENNER, J. The various plaintiffs brought these suits against their common debtor, Martinez, accompanied by writs of attachment and sequestration, under which were seized the contents of a certain cigar store in this city, which, up to two days before the seizure, had been owned and conducted by Martinez.

John Rexach intervened, claiming ownership of the entire property by virtue of a notarial act of sale passed on November 5, 1885, two days before the seizure and on the very day when one of the notes sued on by the principal plaintiff matured. By this act Martinez proposed to transfer to Rexach "all and singular the contents and stock in trade of a certain cigar and tobacco store, established at No. 71 Camp street, together with the counters, fixtures and furniture therein contained, and all other matters and things thereto belonging, etc., as the whole is fully brought down on the inventory thereof attached to and identified with the act of sale."

The accompanying inventory was minute, with valuations attached to each item and footing up the sum of \$4,040, which was fixed as the price of the sale, in payment of which the act recites that Rexach "turned over unto said vendor a certain note drawn by Martinez for the sum of \$2,000, dated July 1, 1885, and payable on demand; paid in cash the sum of seventeen hundred dollars; and for the balance of said price furnished to said Martinez three certain notes dated November 5, 1885, one for \$240 payable three months after date, and the two others each for the sum of \$500, payable at four and five months after date"—the notes being identified with the act of sale by the paraph of the notary.

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Subsequently, Benito Lloveras and Francis Esteva intervened, claiming to be holders for valuable consideration before maturity of the last mentioned notes, and to be entitled to a vendor's lien on the property seized.

Plaintiffs filed answers to these interventions, attacking the alleged title of Rexach as fraudulent and simulated, and charging fraud and collusion on the part of Lloveras & Esteva.

I.

The intervenor, Rexach, claims in argument in this Court, that inasmuch as he held under an authentic title valid upon its face and accompanied by possession, the plaintiffs were not authorized to disregard such title and possession and proceed by direct seizure, even upon allegations of simulation, but were bound to resort to a direct action *en déclaration de simulation*.

Whatever be the merits of this proposition, as applied to transfers of movable property, on which we express no opinion, we consider that intervenor has precluded himself from urging it by his proceedings in the court *a qua*.

It will be observed that Rexach had intervened after the seizure, had set up his title and prayed "that he be decreed the true and *bona fide* owner of the property."

Plaintiffs, thus invited, joined issue as to his claim, and charged that his title was simulated and in fraud of creditors.

When the case was called for trial, before any testimony was offered, the minutes show the following proceedings: "On behalf of defendant and intervenors a motion is made to strike out from the answers which have been filed to the interventions the demand for the revocation of the act of sale made by the defendant Martinez to the intervenor Rexach, and to strike out all such pleadings, *except those that go upon the pure simulation of the contract averred*. Furthermore, they file now this demurrer to the reception of any evidence upon this branch of the case, which is in the nature of a revocatory action."

Ry this proceeding Rexach restricted his objection to the revocatory feature of plaintiff's attack on his title, recognized their right to set up its simulation, and voluntarily submitted to the court the issue of simulation *vel non*. Upon that issue the case has been tried and decided, and it is now too late for Rexach to claim that the court below should have declined to entertain it.

II.

It is next contended that plaintiffs' proceedings are defective because

Schlieder vs. Martinez.

not charging the insolvency of Martinez, or that he had no other property for the satisfaction of their claims. But their pleadings do allege that this sale "includes almost the entire property of defendant," which, in connection with the considerable debts due these various plaintiffs, certainly implies inevitable injury to them, if the sale were sustained.

III.

A vast amount of oral testimony was taken in the case, and the judge reached the conclusion that the pretended sale from Martinez to Rexach was a mere sham and simulation.

We have reviewed the evidence with great care. The fact that this was a sale *omnium bonorum* by Martinez, and entirely out of the usual course of trade; the intimate and peculiar relations which had existed between him and Rexach; the utterly improbable and absurd story by which Rexach attempts to establish his possession and custody of large amounts of money which never went into bank, but were carried on his person, or concealed in the most exposed and uncommon places; his conduct at and after a fire, in which his pretended treasures were exposed to destruction; the unbusinesslike readiness with which he professes to have lent Martinez \$2000 of his hoard on a mere demand note without security; the utter carelessness exhibited by him in the matter of the sale, in which he accepted nearly \$500 of accounts at a fixed value without the slightest inquiry as to their validity or solvency, and in which he bought the good will of the store without any transfer of the lease, and without any examination or inquiry as to the character and amount of the business; the many inconsistencies, contradictions and absurdities of the evidence given by the parties—these, with their own statements to third persons and many other suspicious circumstances, all combine to impress our minds with the belief that the transaction, with all its carefully arranged pretenses of reality, was nothing more than a mere simulation.

Even if we had doubts upon the subject they would not authorize us to reverse the conclusion of the learned judge *a quo* who saw and heard the witnesses.

IV.

We concur likewise in the conclusion of the judge that Esteva and Lloveras were not real or *bona fide* transferees of the notes presented by them. Esteva was a witness to the sale and, we are satisfied, a confederate in the fraud. He pretends to have acquired the note shortly after the sale, by paying money in cash therefor, which he had in ready notes, without the necessity of drawing on a bank.

Schlieder vs. Martinez.

Lloveras also is called on by Martinez at a late hour of the evening, and, at his request, pretends to have paid him \$725 in cash for two of the notes, which, likewise, he happened to have in hand and did not need to draw a check for. He does not pretend to have made any examination of the act of sale with which the notes were identified, and seems to have been content to advance this considerable sum of money on Martinez's simple assurances, though the latter was then already in his debt.

All the circumstances are unnatural and suspicious, and we cannot reverse the conclusion of the judge *a quo* that the transactions were unreal and fraudulent.

V.

Lloveras filed a separate and independent intervention, in which he claimed the ownership of a certain lot of cigars valued at \$198, and of a mirror worth \$50. Over this demand we have clearly no jurisdiction, and it was not considered in our opinion on the general motion to dismiss filed herein, and is not concluded thereby.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

POCHÉ, J. In our opinion on the merits of the cause, we declined jurisdiction of the claim of Lloveras to the ownership of a mirror and of a lot of cigars, included in the attachments sued out by plaintiffs, but through inadvertence we omitted to dismiss his appeal, and affirmed the judgment in its entirety. We can and we shall correct that error without granting a rehearing.

Appellants' counsel suggest that we should make a similar correction in our decree as to the claim of Esteva and the other intervention of Lloveras, but in this they are in error. As to those claims, which were for portions of the proceeds of the property attached, the test of our jurisdiction was in the amount of the fund to be distributed, without regard to the amount therein claimed. (Const., art. 80.) Hence, we investigated the merits of that branch of the controversy, and disposed of it finally.

We reaffirm our conclusions in that respect, as well as on the merits of the main action, which a second examination has proved to be supported by the evidence in the record.

It is therefore ordered that our former decree herein be amended so as to make it conform with the conclusions announced in the opinion, and in so far as it purports to affirm the judgment rendered on the intervention of Lloveras in his claim for the mirror and the lot of cigars, whose appeal in that respect is hereby dismissed; and that in all other respects our former decree remain undisturbed.

Rehearing refused.

Succession of Sterry.

No. 9533.

SUCCESSION OF JOHN L. STERRY.

The law authorizes oppositions to accounts rendered by succession representatives to recognized heirs, ordered to be put in possession of the estate.

Such oppositions may be made either by the heirs themselves or "other claimants," under the express provisions of the Code of Practice.

The court before which the succession proceedings have been instituted is seized of jurisdiction from the inception to the termination thereof and is competent to pass upon such oppositions.

It appearing from the unambiguous language of a written compromise made the basis of a judgment, that the terms thereof did not embrace the thing demanded in a subsequent suit, the plea of *res judicata* is overruled.

Amount of attorney's fee fixed according to the circumstances of a particular case.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Ambrose Smith and H. C. Cage for the Executor and Heirs, Appellants:

1. Judgment recognizing heirs as entitled to a succession and putting them in possession thereof, closes and terminates the succession, and the rights and obligations thereof are thereby transferred to the heirs. C. P. 1000 *et seq.*: 24 Ann. 114; 25 Ann. 56, 220; 28 Ann. 372; 30 Ann. 93, 140; 31 Ann. 506; 33 Ann. 827.
2. The account rendered by the executor to the heirs under the judgment putting them in possession of the estate, is not subject to opposition by pretended creditors of the estate. Such account is not required to be advertised, as are tableau of distribution: and no notice whatever to creditors, if any, is contemplated. C. P. 100-3-4.
3. When the heirs have been so put in possession of an estate, and the same and its administration thereby ended, all actions for debts due from the succession must be brought by direct action before the ordinary tribunals against the heirs themselves, or their legal representatives each for his virile share. C. P. 995, 996; C. C. 1422 *et seq.* and citations in No. 1.
4. Division A, of the Civil District Court, was incompetent to entertain or determine the demand of opponent as presented in or distinct from the succession proceedings proper. Its right to take cognizance of the claim as a probate matter had ceased when the heirs were, by its own judgment, previously put in possession of the estate. Jurisdiction as an ordinary tribunal never legally attached in the mode and by the assignment and allotment prescribed by law. The court was, therefore, without jurisdiction. C. P. 996; 25 Ann. 225; 27 Ann. 686; 28 Ann. 372, on rehearing; art. 130. Const.
5. The judgment rendered on June 14, 1884, amending the tableau of June 4, under the agreement herein between the opponent and heirs constitutes *res adjudicata* as to the demand of opponent. C. C. 2285-7, 3078.

The agreement herein clearly covered and included compensation for all services performed and to be performed by opponent and must be so interpreted. C. C. 1945 to 1962, inclusive.

Compensation for services performed by opponent, if to be borne by the estate, must be estimated and fixed according to the real value of said services. The amount allowed opponent is largely excessive and should be reduced accordingly. 9 L. 264; 2 R. 406; 3 Ann. 503, 578; 8 Ann. 65; 21 Ann. 687; 29 Ann. 748.

Andrew J. Murphy for Opponent and Appellee.

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49 1740

38 854
50 799
50 834

38 854
1117 198

Succession of Sterry.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The opponent prays to be placed on the account rendered by the executor, under a judgment of court, to the heirs of the deceased.

His claim is for services rendered that functionary in a suit brought against him and the heirs, by one alleging herself to be the widow in community of the deceased.

Exceptions were filed to his opposition, resting mainly on two grounds :

1. Want of jurisdiction in the court.
2. *Res judicata*.

The exceptions were overruled, but with a reserve to urge them on the merits.

After trial, the court sustained the opposition, ordering the opponent to be placed on the account for the amount claimed.

The parties concerned appeal from that judgment.

I.

The court was vested with jurisdiction over the subject-matter of the succession of the deceased and all subjects growing out of it, from the moment that the case was allotted to it, in furtherance of constitutional requirements, and that jurisdiction continues exclusively in it from the inception to the final winding up of all proceedings necessary for a liquidation and transmission of its assets, if any, to the heirs. Const. art. 130.

In the present instance, it is true that the heirs have been recognized and ordered to be put in possession, but it is equally true that the executor has not been discharged and is still acting in his official capacity.

The accounts which he has rendered and which is opposed, is that which the court directed him to submit to the heirs under the provisions of art. 1003, C. P.

That account, under the very terms of the following article, is open to opposition not only on the part of the heirs, but also of "*other claimants*." The word is broad enough to include all creditors, as well those of the deceased as those of his succession.

The opponent does not pretend to be a creditor of the heirs, for he does not aver that he was employed by them to defend the suit of the alleged widow in community. He distinctly asserts that he was employed by the executor, who was a party to the suit and that he appeared and defended it in the name of that official, who was and has not ceased to be the succession representative.

The rights which parties may have against such representatives are

Succession of Sterry.

probate in character and determine only where the latter cease to have any legal existence and become *functi officio*.

Such is the clear spirit and meaning of the several articles of the Code of Practice under the title of "*settlement of successions*," ranging from article 983 to article 996.

The exception to the jurisdiction was, therefore, properly overruled.

II.

It appears that the executor first filed a provisional account, on which he placed the attorney of the succession for \$2500, on account for his professional services; that the account was then opposed by the attorney, who, on averment of his services and of their value, prayed to be placed thereon for \$13,000; that the controversy, having been compromised by the executor, the heirs and the opponent, the latter was recognized as entitled to \$10,000, and was by judgment of court ordered to be put on the account, but only for that sum.

It is that judgment which is invoked in support of the plea of *res judicata*.

An examination of the written compromise and of the surrounding circumstances satisfies us that the allowance of the ten thousand dollars to the attorney was designed to be in full compensation for all his services, rendered and to be rendered, to the executor, with the exception of those in the case of *Howard vs. Sterry*, for which provision was already made in the account.

The evidence establishes that, at the date of the compromise, the opponent knew that the suit of the alleged widow would to all appearances be instituted. It shows also that the services which he rendered in that case to the executor, who was a nominal party to it, as it was brought against the heirs, consisted in merely filing what is practically nothing but a denial of her pretensions, as having been the wife of the deceased, coupled with the assertion that, if she was ever such, she has ceased to be such because of the dissolution of the marriage, in due course of law, more than thirty years prior to the death of Mr. Sterry. It further shows that the suit was compromised and therefore was never tried, the services ending with the answer.

The compromise and the judgment on the opposition to the first account debar the opponent from setting up the claim urged by his opposition to the final account rendered to the heirs.

The defense of *res judicata* should have been maintained.

It is therefore ordered and decreed that the judgment appealed from be avoided and reversed, so far as it maintains the opposition thereto

Succession of Sterry.

and orders that the opponent be placed on the account for the amount claimed; and

It is now ordered and decreed that the exception of the *res judicata* to said opposition be sustained, and the said opposition be rejected; the said judgment in other respects to remain undisturbed, and the opponent to pay costs in both courts.

ON REHEARING.

FENNER, J. The point upon which we have reopened this case is the ruling on the plea of *res adjudicata*, based on a judgment of the Court enforcing a transaction or compromise which had been entered into between the parties.

The executor of the succession, in due course of administration, had filed a tableau of distribution, on which his attorney, the present opponent, had been placed as a creditor for \$2,500, on account of services. The attorney filed an opposition to this account, claiming \$13,000 for his services and praying that the tableau be accordingly amended.

Thereupon the opponent, the heirs and the executor entered into the following written compromise:

"SUCCESSION OF JOHN L. STERRY, ETC.—It is agreed herein the account of the testamentary executor herein be amended so as to place W. S. Benedict, attorney for the executor thereon, for the sum of ten thousand dollars (\$10,000) instead of '\$2,500 on account,' as same now stands; said fee to embrace services rendered said estate to date, excluding case of Howard vs. Sterry, for which a separate charge appears on said account, and to include services to discharge said executor on final decree placing heirs in possession."

On filing this agreement, judgment was rendered amending the tableau in accordance therewith and homologating it as thus amended.

Subsequently one Mary H. Parker, claiming to have been the lawful wife of the deceased, brought a suit against the executor and the heirs, asserting that the entire estate, valued at nearly half a million of dollars, belonged to the community subsisting between herself and deceased, and praying for a judgment putting her in possession of the whole property as owner of one-half and as usufructuary of the other half.

It is for alleged services in this suit that opponent urges his present claim, against which the above compromise and judgment thereon are opposed as *res judicata*.

Amidst the conflicting statements of the parties concerned as to the objects and purposes intended to be embraced in the written compro-

Succession of Sterry.

mise, and as to the oral statements attending its confection, the judicial mind can find repose only in adhering to the plain language of the writing itself. The literal terms exhibit unambiguously the services embraced therein to be: 1st, "services rendered said estate *to date*;" 2d, "services to discharge said executor on final decree placing heirs in possession."

It is very clear that services rendered in a suit such as that above described, only instituted *after* the date of the compromise, and having no connection with the usual proceedings "to discharge an executor on final decree placing heirs in possession," are not included within either of the above categories. It follows that the plea of *res judicata* must fall for lack of the essential element of identity of the thing demanded with the object of the compromise and judgment. C. C. 2286.

II.

This necessitates a consideration of the merits of opponent's demand. The heirs of Sterry, as well as the executor, were made parties to Parker's suit, and were represented by their own attorney. The estate was very large and owed no debts except expenses of administration. Manifestly the heirs were the only persons interested in the suit, and they appeared and defended in their own behalf.

The evidence satisfies us that the executor did not intend to assume the defense of the suit or to charge his attorney with the responsibility thereof, but intended to leave that matter to the heirs. When the papers were served on him in the latter part of June, not anticipating that an answer would be due before the succeeding November term of the Court, he did not deliver them to his attorney or consult him on the subject. Learning, however, that a default had been taken in the case in October, he called at his attorney's office and, not finding him, left a written memorandum directing him to file an answer of general denial and to notify the heirs to defend the suit. The answer was filed accordingly and the executor had no further consultations with and gave no other directions to his attorney about defending the case. These statements are specifically made by the executor and opponent has not contradicted them. No further proceedings were had in court, the heirs having effected a compromise of the claim for \$15,000, against the advice of opponent. It appears, however, that opponent knew of the bringing of the suit and considered himself as employed under his general retainer, even before he received directions to file the answer. It further appears that before, at the time of, and after filing answer, the attorneys for the heirs had sundry consultations with him touching the case. These attorneys, who were opponent's juniors in the profession

Succession of Townsend vs. Sykes et al.

and occupied seats in his office, claim that these consultations were of slight importance and only such as they would have felt at liberty to have with him touching any business whatever confided to their charge. The view of opponent was different.

On the whole, the evidence satisfies us that the services actually rendered by the opponent were not laborious or important, and it appearing that it was not the intention of the executor or heirs to charge him with the responsibility of attending to this weighty suit, we think, under the peculiar circumstances of this case, that a fee of five hundred dollars will satisfy his just claim.

It is, therefore, ordered that our former decree herein be annulled and set aside; and it is now ordered, adjudged and decreed that the judgment appealed from be amended by reducing the amount allowed to opponent therein to five hundred dollars, and that, as thus amended, said judgment be now affirmed, opponent to pay costs of this appeal.

No 9728.

SUCCESSION OF KATE TOWNSEND VS. TROISVILLE SYKES ET AL.

The testamentary executor of the will of a decedent, who has been judicially recognized, and who has qualified as such, and who is also universal legatee under the will, cannot at his option shift his position without the sanction or authorisation of the court and assume or exercise rights of ownership of the property of the succession.

Hence a sale of succession property made by such executor under such circumstances, transfers nothing and no rights to the purchaser, and is null and void.

The holder of the property under such a title must account for rents and revenues of the same during the whole time of his possession.

38	859
49	85
38	859
50	557

A PPEAL from the Civil District Court for the parish of Orleans.
Monroe, J.

Breaux & Hall for Plaintiff and Appellee.

H. O. Cage and *A. J. Murphy*, for Defendant and Appellant.

The opinion of the Court was delivered by

POCHE, J. This is an action by the dative testamentary executor for the purpose of annulling and setting aside the sale of a valuable piece of immovable property, which has ostensibly been sold by the defendant Sykes, who had been appointed testamentary executor and universal legatee by the last will of the deceased.

The purchaser, who had called Sykes and his mother in warranty, and the warrantors have taken this appeal from a judgment which

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annuls the sale, and decrees the property to belong to the succession, as though no sale thereof had been made or attempted.

The record shows that Kate Townsend died on the 3d of November, 1883, and that her last will was presented for probate by Sykes on the 6th of the same month; and that on the 12th of the month the will was ordered to be probated by the court.

The order contained the following qualification or restriction: "It is further ordered that no application on the part of Troisville Sykes to be put in possession of the estate of the decedent be granted until after a petition and citation be served on the attorney of absent heirs and public administrator, and a due hearing of the matter before this court be had."

Acting on the order as an entirety, Sykes qualified as executor, and continued his functions as such until the 27th of April, 1885, when he was removed from the executorship by a decree of this court. 37 Ana. 405, succession of Kate Townsend.

In the meantime Sykes appeared before Andrew Hero, Jr., a notary public, and declared his intention of accepting purely the legacy contained in the will of the decedent, in his favor, and proceeded to take possession of all the property depending upon the succession.

This act, which was executed on the 29th of November, 1883, had been preceded by another act before the same notary, under date of November 6th, in which Sykes had made a transfer of all the immovable property left by Kate Townsend to his mother, in consideration of \$1000 * * and of the love and affection which he entertained for her. It then appears that on the 27th of November, Sykes and his mother joined in an act, before the same notary, for the purpose of transferring one of the pieces of immovable property, inventoried in the succession of Kate Townsend, to Leon Lamothe, the principal defendant in this suit.

From the foregoing recital of the salient facts and proceedings which have a direct bearing on the issue presented by the pleadings, it appears that Sykes has never applied for, or obtained from the court, any order recognizing him as the universal legatee of the decedent and placing him in possession of any of the property of the succession.

It therefore appears that his only connection with the succession, under judicial orders, was as testamentary executor, and that, without seizin of the property, as shown by the restriction contained in the decree which ordered the probate of the will of the decedent, and recognized him as testamentary executor.

We must note that in this suit, the right of Sykes to be recognized

Succession of Townsend vs. Sykes et al.

as universal legatee is seriously contested for reasons which we need not enumerate here, as that issue was not tried, and is not decided in the judgment now on appeal.

The issue which we must consider is thus restricted to the question of the right of Sykes, who had accepted the trust of, and had qualified as executor, to dispose of the property of the succession as universal legatee under the will, for his own advantage, regardless of the condition, rights or *status* of the succession.

It is elementary in our law and jurisprudence that the duly qualified executor under a will, becomes the officer of the court, for the administration of the property of the succession, and that he can perform no legal or binding acts touching such property, without the sanction of the court having jurisdiction over the estate; and that an executor who has accepted the trust, and qualified as such, and who is at the same time universal legatee, cannot, at will, and without the sanction or authorization of the court, shift his position, abandon the trust, accepted at the hands of the court, and assume the character and exercise the rights of owner, as universal legatee. C C. 3480, Bird vs. Succession of Jones, 5 Ann. 643; Succession of Frazier, 35 Ann. 382; Succession of Kate Townsend, 37 Ann. 405.

In the last case quoted, the very issue herein presented was discussed in connection with the removal of Sykes as executor of this succession, and our disposal of it in the following language :

“ As to his defense that he is the universal legatee of the deceased; that he has taken possession as such of the assets of the succession, which was thereby so effectually closed that the court ceased to have any further jurisdiction over the matter, it suffices to say that it is untenable.

“ An executor who has qualified, and who is, at the same time, universal legatee, cannot, by any act purely his own, cease to be executor and represent himself as the sole heir. He cannot be permitted to deny his capacity as executor by setting up that he has accepted unconditionally as universal legatee and holds the estate, not as executor, but as owner.”

These considerations lead to the conclusion in this case that Sykes had no legal right or authority to dispose, as he attempted to do, of the immovable property of the succession of Kate Townsend, and that Leon Lamothe acquired no title or ownership to the property in suit, which has never ceased to belong to, and to form part of, said succession.

Plaintiff had joined to his action a demand for the rents and reve-

Succession of Townsend vs. Sykes et al.

nues of the property from the 14th of December, 1883, until it be restored to the succession, and the record shows that the property rents for \$75 a month.

The district judge allowed rents at that rate from the date stipulated, but only to the date of the institution of this suit.

But the rents, which in the meantime continue to run, are surely the property of the succession, hence appellee's motion for an amendment of the judgment in that particular, must be favorably considered, as a decree conforming thereto will obviate the necessity of a separate and additional suit for the recovery of rents from the 4th of May, 1883, when this suit was instituted, up to time at which the succession will be restored to its lawful possession of the property.

It is therefore ordered that the judgment appealed from be amended so as to condemn the defendant Lamothe to pay to the succession rent at the rate of \$75 a month from December 15, 1883, until he delivers the property to the succession, and that as thus amended, said judgment be affirmed with costs in both courts.

No. 9729.

SUCCESSION OF KATE TOWNSEND VS. TROISVILLE SYKES ET AL.,

AND

CLARK & MEADER VS. THOMAS DUFFY, CIVIL SHERIFF, ET ALS.

[Consolidated.]

Syllabus—Same as in case No. 9728, in the main action.

Pending an action involving the title of immovable property, which is rented under a previous contract of lease, the tenant, from whom the rents are adversely claimed by the parties, may be authorized to deposit the same as they mature, subject to the final decision of the cause, in a bank selected as judicial depository.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Breaux & Hall and *J. Ad. Bozier* for Appellees.

A. J. Murphy, H. Renshaw, B. McCloskey and *W. S. Benedict* for Appellants.

The opinion of the Court was delivered by

POCHÉ, J. The object of this action, instituted by the dative testamentary executor, is to annul and set aside a sale of a piece of immovable property inventoried in the succession of Kate Townsend, purported to have been made by Troisville Sykes, the universal

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legatee under the will, at the same time that he was administering the estate as testamentary executor with the approval of the court, under whose order he had qualified as executor.

The pleadings, the facts and other incidents as well as the judgment appealed from, contained in this record, are substantially the same as in the case of the Succession of Kate Townsend vs. Troisville Sykes et al., No. 9728, this day decided by this Court.

Hence the conclusions reached and the judgment to be rendered must be the same, under the law which alike governs both cases.

In this case Clark & Meader, the tenants of the property in suit, filed an action against the Civil Sheriff et als., for the purpose of screening themselves from a suit or suits for rent, and from the payment of interests on their notes, for a lease of five years, falling due monthly. Alleging that, as the same rents were claimed by the sheriff, the dative testamentary executor and the ostensible owner of the property holding under his purchase from Sykes, they stated that they had made a monthly deposit in bank intended to cover the amount due each month on their notes at their respective maturity.

In his judgment the district judge decreed that the ownership of the notes followed that of the leased premises, and that they were the property of the succession, which was entitled to the funds which were ordered to be deposited in a designated bank as judicial depositary until the final decision of the cause.

We think that the order of the judge is wise and legal, and understanding that on the affirmance of his judgment in the main cause, he will order the payment of the funds thus deposited to the legal representative of the succession, we approve of his order and ratify that feature of his judgment.

It is therefore ordered, that the judgment appealed from be affirmed in all particulars with costs in both courts.

No. 9713.

G. JACQUET VS. HIS CREDITORS.

Delivery of the thing pledged is essential to the validity of the contract of pledge.

What constitutes delivery depends on the nature of the object pledged and on the circumstances of the case.

The pledgee need not always have manual corporeal possession of the thing pledged.

A third person may be detainer of it by agreement between the parties. C. C. 3162.

The pledgor may have possession of the thing pledged for account of the pledgee. He occupies then the position of trustee or possessor *ad hoc*.

Under a cession of property the creditors of the insolvent do not acquire a right of owner-

38	863
46	1008
46	1042
46	1067

38	863
47	902
47	268

38	863
118	167

38	863
1124	1031

Jacquet vs. His Creditors.

ship in the property surrendered, but only the right of possession and the power of administration. The ownership remains in the insolvent. C. C. 2178, 2182.

If among the assets of the insolvent there be a thing pledged, the possession of it does not pass to the creditors, being vested in the pledgee. No man can transfer a greater right than he himself has.

The obligation of pledge is contractual. It vests in the creditor the right of possession and of privilege on the thing pledged. The right of detention being as much a part of the security as the things pledged are a part of the guaranty, the creditor cannot be deprived of same by the voluntary act (bankruptcy) of his debtor nor by the insolvent laws of the State. The obligation of contracts cannot be impaired.

Notwithstanding the pledgor's insolvency, the pledgee can proceed to sell the pledge in the way stipulated by the contract.

A power of attorney, coupled with an interest, is not revoked by the death or bankruptcy of the principal. Article 3027 of the Civil Code applies to a gratuitous mandate.

A PPEAL from the Civil District Court for the Parish of Orleans.
Bightor, J.

T. J. Semmes & Legendre for Plaintiff and Appellant:

Delivery of the thing pledged is essential to the validity of the contract of pledge.

What constitutes delivery depends on the nature of the object pledged and on the circumstances of the case.

The pledgee need not always have manual corporeal possession of the thing pledged.

A third person may be detainer of it by agreement between the parties. C. C. 3162.

The pledgor may have possession of the thing pledged for account of the pledgee. He occupies then the position of trustee or possessor *ad hoc*.

Pothier Pandectes, V. VIII, p. 360; C. N. 2076; Story on Bailments, 209; 96 U. S. 476; 32 Ann. 1252; 33 Ann. 973; Jones on Pledges, §§ 35, 37.

Under a cession of property the creditors of the insolvent do not acquire a right of ownership in the property surrendered, but only the right of possession and the power of administration. The ownership remains in the insolvent. C. C. 2178, 2182; 3 Ann. 387; 4 Ann. 49.

If among the assets of the insolvent there be a thing pledged, the possession of it does not pass to the creditors, being vested in the pledgee. No man can transfer a greater right than he himself has. 5 Ann. 274.

The obligation of pledge is contractual. It vests in the creditor the right of possession and of privilege on the thing pledged. The right of detention being as much a part of the security as the things pledged are a part of the guaranty, the creditor cannot be deprived of same by the voluntary act (bankruptcy) of his debtor nor by the insolvent laws of the State. The obligation of contracts cannot be impaired. U. S. Const., Art. 1, sec. 10; State Const., Art. 155.

Notwithstanding the pledgor's insolvency, the pledgee can proceed to sell the pledge in the usual way, 94 U. S. 73, *Jerome vs. McCarter*; 16 Wallace, 557; 85 U. S. 764, *Yeatman Savings Bank*; 1 Ann. 31, *Rasch vs. His Creditors*; 67 Ala. 168.

A power of attorney, coupled with an interest, is not revoked by the death or bankruptcy of the principal. Article 3027 of the Civil Code applies to a gratuitous mandate. Story on Agency (ed. 1862), secs. 164, 173, 477, 483, 489; Livermore on Agency (ed. 1818), sec. 30; 1 Bell's Comm. on Agency, sec. 413 (4th edition); Addison on Contracts, Vol. 2, p. 609 (ed. 1876); 34 N. Y. 24, *Hutchins vs. Hibbard*; 54 Maine, *Goodwin vs. Burden*; 91 U. S. 521, *Eyster vs. Galt et al.*; 8 Wheaton, 174, *Hunt vs. Rousmanier's Adm's*, the leading case on the subject; 60 Tex. 680, *Bray vs. Aiken*; 118 Mass. 354, *Hall vs. Bliss*; 34 Ann. 1187; 2 Ann. 694.

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A creditor cannot have the contracts of his debtor annulled unless he proves fraud or injury. Courts will not annul the title of property when the party seeking their interposition cannot possibly take relief from the granting of the remedy invoked. *N. O. Ins. Ass. vs. Labranche*, 31 Ann. 840; *Copeland vs. Labatut*, 6 Ann. 61; *Barrett vs. Emerson*, 8 Ann. 503; *Bay vs. Roseberry*, 8 Bls. 102; 9 Ann. 539; 11 R. 533; 9 Ann. 602; 6 Ann. 361

A. J. Murphy for Defendant and Appellee.

The opinion of the Court was delivered by

TODD, J. The facts of this case are briefly these:

E. B. Curtis was a creditor of Jacquet & Vallette for \$1,400. As security for this debt they executed a pledge by private act on the 21st of June, 1884, of certain machinery used for the manufacture of tobacco, at No. 44 St. Peter street, of this city, consisting of boilers, engines, cutters, etc.

By the terms of the contract, the pledgee was specially authorized to sell the property if the debt was not paid at its maturity. It was not paid, and on the 8th of April, 1885, the property was sold at public auction after proper advertisement, and bought in by William P. Curtis.

On the 30th of March, 1885, Jacquet & Vallette went into insolvency. On the 18th of May, 1885, the syndic of the insolvents obtained an order for the sale of all the property belonging to the estate, and among the property advertised for sale was the machinery, etc., pledged to E. B. Curtis as stated. W. P. Curtis, the purchaser of the property, on the 8th of April, as mentioned, enjoined the sale, claiming that the property belonged to him under his said purchase.

The answer of the syndic embraced substantially the following defenses to the action:

1st. That the property at the date of the cession of the insolvents belonged to them, and by the effect of the cession the title thereto passed to their creditors.

2d. It was denied there was a legal pledge of the property, for the reason that it remained in the possession of the insolvents until their surrender.

3d. The sale to W. P. Curtis was charged with nullity on the ground that no legal sale could have been made after the cession, except under the order of the court.

There was judgment in favor of the syndic, dissolving the injunction and dismissing the suit, and W. P. Curtis has appealed.

We find in the record no reasons assigned by the district judge for his judgment, and we have not been favored with any argument, oral or written, by the appellee's counsel.

Jacquet vs. His Creditors.

I.

That the title of the property at the date of the surrender was in the insolvents, is true, but it is not true that the effect of the cession was to convey their title to the creditors. On the contrary, by positive provision of our law the insolvent debtor "preserves his ownership of the property surrendered." The possession passes to the creditors when there is no legal obstacle to its transmission. C. C. 2178, 2182; 3 Ann. 387; 4 Ann. 49.

II.

The contract of pledge stipulated that the property pledged was placed in the possession of one Joaquin Polet, as the agent of the pledgee, and he (Polet) intervened in the act for the purpose, as expressed, "of accepting the trust;" and it is shown by the evidence that to him was delivered the key of the building containing the machinery, etc., pledged. He (Polet) testified that he exercised control over the property for about ten months, and took care of it and cleaned the machinery. He was paid for his services as keeper. It is shown that by permission of the keeper and consent of Curtis, Jacquet & Vallette used the machinery at times in their tobacco business, and that Polet was one of their employees. We do not think, however, that these facts derogated from the validity of the pledge. The possession of the property by the pledgee, as shown, was sufficient. C. C. 3162; Weems vs. Moss Company, 33 Ann. 973. In fact, the property pledged may be left in the possession of the debtor himself, provided his possession is precarious and clearly for account of the creditor. Conger vs. City, 32 Ann. 1250.

III.

Was the pledgee authorized to sell the property pledged after the cession of the insolvents?

It is true, as a general rule, that a mandate is terminated by the death or failure of the principal. C. C. 3027. Where the mandate is gratuitous this is undoubtedly so, and a mandate is presumed, under our law, to be gratuitous unless the contrary appears by the terms of the mandate.

In this instance the contract of pledge, under which the authority of the pledgee is granted to sell the property if the debt was not paid, shows that the mandate was coupled with an interest—that is, that the mandatory was put in possession of the property to secure a debt owing him, and authorized to sell and receive the proceeds of sale to pay the debt.

In the case of Rasch vs. His Creditors, 1 Ann. 31, it was expressly held that a pledge is left intact by the insolvency of the debtor, and

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the right is still possessed by the pledgee to cause the sale of the property pledged and the proceeds applied to the extinguishment of the debt. See, also, Hoey on Agency, secs. 164, 173, 477, 483, 489; Hunt vs. Ronsmanier's Adm., 8 Wheaton, 174. In the case of Jerome vs. McCarter, 94 U. S., it was decided that, after the assignment of the debtor and pledgor, the pledgee could proceed and sell the pledged property in accordance with the terms of the contract.

We think this is the correct doctrine, and hence it follows that the sale made by Curtis, the pledgee of the property in this instance, was a legal one, and that the plaintiff acquired the ownership of same under his purchase at said sale.

It is, therefore, ordered, adjudged and decreed, that the judgment of the lower court be annulled, avoided and reversed, and that the plaintiff, William P. Curtis, be declared owner of the machinery at No. 44 St. Peter street, in the city of New Orleans, consisting of boilers, engines, cutters, etc., bought by him at auction sale on the 8th of April, 1885, and that the injunction taken out by him be perpetuated, and that Jno. C. F. Waldo, syndic of the insolvent estates of G. Jacquet and E. M. Vallette, pay costs of both courts.

No. 9740.

J. J. HEALY vs. REV. P. F. ALLEN.

1. The appointment of plaintiff as sexton of St. Patrick's cemeteries was a contract for personal service. The position has no feature of a franchise or public office, and even if assimilated to a private office such as held by an officer of a corporation, those officers are ordinarily regarded as servants or agents and subject to discharge for cause.
2. Injunction is not allowed as a remedy to enforce, or prevent the breach of, contracts for personal service.
3. To authorize the application of injunction, in any case, to prevent the breach of a mere personal contract, the following are essential conditions: (1) that the injury apprehended should not be susceptible of adequate compensation in damages; (2) that the contract should be clearly established, its terms free from doubt, and plaintiff's construction of it clear and certain; (3) that plaintiff should show complete performance on his part of his obligations under the contract.

These conditions are not established to our satisfaction by the evidence in this case and, without precluding the parties as to any questions in a proper action, the injunction is set aside and the parties are remitted to ordinary remedies.

APPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

James Timony for Plaintiff and Appellee.

T. Gilmore & Sons for Defendant and Appellant.

The opinion of the Court was delivered by
FENNER, J. The substantial allegations of plaintiff's petition are to

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the effect "that on October 2, 1876, he contracted orally with Rev. Patrick F. Allen, for the price and sum of two thousand dollars, that he, petitioner, was to be appointed sexton of St. Patrick's cemeteries Nos. 1, 2 and 3 of this city ; * * that, by virtue of the stipulations of said contract, petitioner was to have and enjoy said office of sexton for the period of twenty-five years or during his natural life ; that he entered upon the duties of said office of sexton, and has faithfully discharged all the duties and enjoyed all the emoluments and privileges of said office ever since, and has paid the two thousand dollars as agreed ; that said Rev. Patrick F. Allen has lately attempted to deprive petitioner of said office and has appointed another, viz : one Patrick Philbin to said office, and that petitioner believes that said Allen will employ force and fraud to eject him from said office and to deprive him of its privileges and emoluments, to his irreparable injury if not prevented by a writ of injunction," for which he accordingly prays against both Allen and Philbin.

The preliminary injunction was accordingly issued.

Defendants moved to dissolve the injunction on the ground, amongst others, that the petition disclosed no cause of action ; and, reserving the benefit of this rule, defendant Philbin answered by general denial ; and defendant, Allen, in addition to such denial, specially denied the contract set up and payment alleged, and averred " that he hired the services of plaintiff as a laborer and mechanic of the cemeteries, to do the work usually done by a sexton, but that said Healy so neglected the same and so misconducted himself on divers occasions towards respondent and persons owning lots in said cemeteries that respondent found it necessary to discharge him."

The rule to dissolve having been dismissed, the case went to trial on the foregoing issues, and judgment was rendered in favor of plaintiff perpetuating the injunction.

From no point of view, under the evidence in this case, can the relation between the parties herein be regarded as other than a contract for personal service. Plaintiff is not the owner nor the lessee of the cemeteries ; he is simply charged with certain duties in the administration thereof, for the proper performance of which he is necessarily answerable to his superior. The position of sexton is not a franchise which can only emanate from governmental authority ; nor is it a public office, which must have a like origin.

Even if it were assimilated to a private office, such as an office of a corporation, that would not exempt the holder of it from the character of being an employee or destroy the right of the employer to dis-

Healy vs. Allen.

charge him for cause. Such officers are ordinarily subject to the direction and control of the corporation, and hence are regarded as their servants or agents and subject to amotion for cause. We have heretofore considered this question and maintained the general principle of the right and necessary power of corporations to remove their officers. *State ex rel. Behan vs. Judges*, 35 Ann. 1075.

If it were true, as alleged by plaintiff, that owing to incidental advantages accruing to him in his trade of marble-cutter, he had paid for the privilege of being appointed to the place for a term of years, that would not relieve him from the relation of an employee subject to the control and direction of his employer in the discharge of his duties with the consequent right of removal for cause.

The reasons for the recognition of this power are two-fold: 1st., that the employer is responsible for the wrongful acts of his employee; 2d., that the employer has the right to have his business properly transacted and that the only adequate security for this lies in the power of discharge, subject of course to legal responsibility in case the discharge is wrongful or without cause.

Hence the wise and universal rule that injunction is not allowed as a remedy to enforce or prevent the breach of contracts for personal service.

This principle has been applied by this court in a case where the owner of a plantation had contracted with another, in writing, to take charge of his plantation for a term of eight years, to reside thereon with his family, and to have exclusive control and direction of all the business affairs appertaining thereto during said term. Alleging that the owner was about to supersede and forcibly dispossess him, and to remove his family, without cause, and before the expiration of the stipulated term, the plaintiff invoked the remedy of injunction, but this court said: "We are not aware of any right the plaintiff has under the contract to be maintained in the possession and control of the defendant's plantation against his will. If the latter think proper to violate his engagement with the plaintiff, he would thereby subject himself to damages." *Seiler vs. Fairex*, 23 Ann. 397.

Even, however, if we were to take a more liberal view of plaintiff's rights under the peculiar contract alleged by him, he would yet encounter other fatal obstacles to the allowance of the remedy by injunction.

Courts proceed, with great caution, in applying such a remedy for the enforcement of mere personal contracts, and act only in clear cases of legal right and for the prevention only of irreparable mischief.

Healy vs. Allen.

Hence the rule is established that, to support such a remedy "the contract itself must be free from doubt, and the injury apprehended from its violation must be of such a nature as not to be susceptible of adequate compensation in damages. And a doubt as to the correctness of the construction of the contract on which the injunction is asked is sufficient ground for refusing to interfere.

And if the contract is uncertain and vague in its provisions, the relief will be withheld." High on Injunction, § 1107.

We are unable to discover any injury to plaintiff from the threatened discharge, which could not be adequately compensated by damages; and, moreover, the contract, and the correctness of plaintiff's construction of it are very far from being free from doubt.

We have never seen a more conspicuous instance of the painful conflicts of evidence which so frequently arise since the law removed disqualifications of interest and admitted the testimony even of the parties themselves.

The contract between the parties was oral and without witnesses. Their own statements as to its terms contradict each other diametrically, and each gives a contrary interpretation of various facts and circumstances which are invoked as corroborating either theory. We are not called upon, in this case, to weigh and determine the preponderance of testimony, but content ourselves with saying that the case, on the evidence adduced, has not that clearness and certainty of proof which would make it proper for the application of the remedy of injunction.

We say this without precluding either party on any question which may arise in an ordinary action for breach of contract.

Another inflexible rule as to injunctions in such cases is that "he who seeks to enjoin the violation of an agreement, or for the protection of his contract rights, must himself come into court with clean hands, and must have carried out, as far as possible, his own part of the contract." High on Injunction, § 1119.

The evidence in the record seriously impugns the conduct of plaintiff in the discharge of his duties, and, without deciding its sufficiency as a cause for discharge, we consider it a sufficient bar to relief by injunction.

Although these questions of law have been slightly referred to by counsel on either side, the importance of the case as a precedent has made it our duty to consider them, and to establish the principles applicable in such cases.

Hincks et al. vs. Converse et als.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered and decreed that there be judgment in favor of defendant, dissolving the injunction and rejecting plaintiff's demand at his cost in both courts.

No. 9625.

EDGAR HINCKS ET AL., COMMISSIONERS, VS. GEORGE T. CONVERSE
ET ALS.

1. It is unnecessary that all joint obligees interested in the enforcement of a joint obligation, should be joined as plaintiffs in a suit to enforce it. Anyone may sue and recover thereon to the extent of his interest in it.
2. The rule with regard to the books of a merchant being inadmissible in his favor, does not apply to those of corporations.
3. The testimony of witnesses on a former trial of same suit, may be used by either party on a second or subsequent trial thereof, if the witnesses are dead or, for other cause, cannot be then produced.

This rule is applicable to evidence offered on such former trial and admitted without objection, in pursuance of a previous agreement of parties, when that rejection of same would occasion the party offering it either injury or surprise.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. S. Benedict for Plaintiffs and Appellees.

Percy Roberts and *E. E. Moise* for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. The plaintiffs, as commissioners of the Workingmen's Bank, claim to represent the successors and assigns of the Workingmen's Accommodation Bank and the individual members thereof, and to be entitled to recover of defendants \$11,373.78, on the bond of Converse.

They aver that there were certain informalities in the act of incorporation of the Workingmen's Accommodation Bank, and that the individual members thereof and their assigns, incorporated said banking association under the name and style of the Workingmen's Bank, and that said act of incorporation was thereafter recognized and approved by the legislature.

They claim to be the legal successors, assigns and transferees of all the assets, rights and credits of said Accommodation Bank and of the individual members thereof; and particularly of all the rights, titles, claims and demands of same, against defendants, on the bond.

They further claim that, in confirmation of their said rights, the in-

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dividual members and former stockholders of said bank, and the owners of its property, rights and actions held in its name, did expressly recognize them, and waive and remit any formal transfer thereof to the Workingmen's Bank.

When this case was last here, this Court decided that neither the act of incorporation nor the legislative enactment conferred any of the rights of the former association upon the Workingmen's Bank "except of those who assented to the proceedings."

It said that, "under the pleadings, the plaintiffs claim that the bank was the assignee of the rights in the bond of the original owners.

"It had the right to prove such an assignment, and to the extent of such proof is entitled to recover.

"The membership in the Accommodation Bank was represented by 3,434 shares of stock belonging to various persons. It is claimed that the Workingmen's Bank has acquired the ownership and direct representation of these, and evidence is found in the record tending to establish the claim.

"This evidence has not been passed upon by the judge *a quo*.

"It consists, in large measure, of the books of the Workingmen's Bank itself, which the judge admitted over the objection and exception of the defendants. This was error.

"The books of that corporation may be very good evidence of the ownership of its own stock; but we cannot see how they can be received to establish the acquisition of the interests of the members of the former concern.

"It is useless to decide this case by piece-meal, or to comment upon other evidence.

"The task devolving upon the plaintiffs is to establish, by competent evidence, the extent to which they own or represent the owners of the stock of the Workingmen's Accommodation Bank. To the extent of the interest so established they may maintain an action on the bond, and recover their proportion of defendants thereon." 37 Ann. 489.

This full quotation is made from the former opinion for the purpose of bringing discussion of the issues involved within proper limits.

I.

The first question propounded by the defendants' counsel is: "Can any one stand in judgment for the debt, except *all* of its original owners appear together, or some one showing himself to be assignee of all of them?"

They have cited no decisions of this Court supporting that theory, but place reliance solely upon the French jurisprudence.

We find various decisions of this Court bearing on the question, and we quote a few of them.

In *Duchamp vs. Nicholson*, 2 N. S. 672, the right of single individual to sue upon an auctioneer's bond for an injury suffered was recognized.

In *Henderson vs. Montgomery*, 2 N. S. 422, it was held that an "injured person may bring suit in his own name upon an U. S. Marshal's bond." 4 N. S. 523, *Dick vs. Reynolds*; 5 O. S. 321, *Mayor vs. Bailly*.

In *Musson vs. Richardson*, 11 R. 37, it was held that an individual stockholder in a liquidated corporation, had a legal right to sue to annul a judgment against it. 2 R. 570, *Quinn vs. Moyes*.

It is a settled principle that the pledgee of a negotiable promissory note, may sue upon it and recover "to the extent of his debt." 29 Ann. 549; 21 Ann. 3; 28 Ann. 419; 7 Ann. 225.

In 32 Ann. 303, *Martinez vs. Succession of Vives*, our immediate predecessors held that an attorney-at-law, having an interest in a judgment for his fee, might sue to have it revived.

In 32 Ann. 431, *Robins vs. Brown*, it was held that a "sheriff has a cause of action in damages, or otherwise, to protect himself from liability; but, his right of action is limited to the degree of responsibility which may result, should the property seized be withdrawn." 33 Ann. 146; 12 R. 563; R. C. C. 2081.

The only case directly opposite is *Alling vs. Woodruff*, 16 Ann. 6, which decides that "in case of a joint obligation as to the obligees, there arises in their favor only a joint right of action, which can only be exercised by a suit jointly instituted by them.

"The law does not permit a multiplicity of suits on an obligation joint as to the obligors; nor does the law allow a multiplicity of actions for the enforcement of a contract joint as to the obligees."

That decision is unsupported by the citation of authority, and it rests, presumably, upon the provisions of R. C. C. 2085, which are to the effect that "in every suit on a joint contract, all of the obligors must be made parties, etc."

But this article is strictly confined to suits against *obligors*.

There is no similar requirement contained in R. C. C. 2081, which relates to contracts in favor of joint *obligees*; or those which "create obligations joint in favor of obligees."

But Act 103 of 1870, Acts of 1871, p. 19, so alters the law as to no longer require all joint obligors to be cited, in order to maintain an action on a joint obligation.

This statute fully answers the argument employed in *Alling vs. Woodruff*, or rather pursuing that course of reasoning, a ready answer is given defendants here.

Their exception cannot be maintained.

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II.

Plaintiffs offered in evidence all the books of the Workingmen's Bank that were offered on last trial; and also the books of the Workingmen's Accommodation Bank, which were not offered on previous trial. All of them were admitted over defendants' objections and exceptions.

They argue the same objection then proffered is good now.

They admit, as a general rule, that the declarations contained in the books of a corporation are good against it; but they claim that they are, as to third persons, *res inter alios acta*.

Defendants' counsel cite 34 Ann. 605, *Gordon & Gomilla vs. Mëchler*, as authority on this question.

It is to the effect that a bank cannot extinguish a credit of one of its depositors by compensation, and that it is essential to the validity of its by-laws that they be consonant with the general law; and they cannot interfere with the rights and privileges of third persons.

In this case the execution of the bond sued on is not denied.

The only question of fact left in contention is—quoting from defendants' counsel's brief—"Has any one or more of the original owners of the debt assigned his interests in it to the Workingmen's Bank? If so, how many?"

The books were not offered or received for the purpose of establishing or increasing the liability of defendants on the bond, but as proof, or the commencement of proof, of the transfer or assignment to the Workingmen's Bank of the stock in the former association.

The authorities quoted apply to the rule laid down in R. C. C. 2248, to the effect that "the books of a merchant cannot be given in his favor," and are not applicable to the question at bar.

Plaintiffs claim to be the owners and representatives of the owners of *all* the shares of stock in the Workingmen's Accommodation Bank. They aver that the stock certificate book of that bank, and the certificates of stock themselves, show that the holders of 510 shares of its stock are surrendered by them to the Workingmen's Bank, and they accepted in lieu thereof the stock of that bank; and the subscription ledger of the Accommodation Bank shows that 134 shares had been subscribed, but for which certificates had not been issued at the time of the liquidation; but the owners of said shares took certificates of the Workingmen's Bank, and received its stock in equal amount in lieu of their stock subscription in the old association.

They also claim that of the stock remaining 170 shares were held by other persons who took part in the organization of the bank, as the

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Workingmen's Bank, their stock in the old association having been exchanged therefor.

They further claim that the books of the Workingmen's Accommodation Bank are the identical ones used by the Workingmen's Bank, or, in other words, the latter continued to use the books of the former.

These announced purposes are in strict keeping with the plaintiffs, cause of action set out in this opinion.

Of many of those facts these books would, in the nature of things, furnish the best evidence, and leave nothing behind in the possession or under the control of plaintiffs, other than secondary evidence.

Those books should furnish a full and complete record of all the transactions of the association, and particularly of its issuance of stock certificates; the pledge, assignment or transfer thereof; the subscription of stock, and generally all the proceedings of the concern.

If any part or all of the stock of this association has been absorbed by the Workingmen's Bank, the latter issuing to the holders thereof new certificates, the books of the Accommodation Bank would necessarily form a connecting link in the chain of evidence thereof.

It is of first importance to know the amount of stock in the Workingmen's Accommodation Bank, either subscribed for or issued; into how many shares same was divided; the amount of each share; to whom they were issued; and by whom same are held and owned.

Proof "tending to establish this claim" was administered upon the former trial, but was not evidenced by the books of the Workingmen's Accommodation Bank.

It did consist, "in large measure of the books of the Workingmen's Bank."

They were held to be competent evidence of the ownership of its own stock. For the same reason, the books of the Workingmen's Accommodation Bank are competent evidence of the ownership of its stock.

The Workingmen's Bank had the right to issue certificates of stock to its subscribers in such manner and style as the by-laws thereof provided. It had the right to issue them to members of the old association, and accept in lieu thereof or in payment therefor the certificates of stock held by them in the Workingmen's Accommodation Bank. Those certificates of stock had a value to the extent of the respective interests of the holders thereof in the bond sued on; and, in order to realize this value, and to reimburse itself for certificates of new stock issued, the Workingmen's Bank have a cause of action upon the bond

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of defendants, as well as for the value of other stock differently acquired. We think defendants' exception was properly overruled.

III.

On the last trial of this cause the defendants objected to the introduction by the plaintiffs of certain depositions that were introduced on the former trial, under a written agreement of previous date, without objection.

The testimony of witnesses in a previous suit between same parties for the same cause of action, when there has been an opportunity for cross-examination, may be used by either party, if the witness be dead, or for other cause cannot be produced. Hen. Dig., p. 506, No. 2.

It was stated in argument, and not denied, that some of those witnesses are dead; and it nowhere appears in the record that any one of them could have been produced by the plaintiffs, for cross-examination by defendant's counsel.

If they did not have that opportunity, on the former trial, it was due to their tacit acquiescence in its introduction without it.

Relying, doubtless, upon the agreement, coupled with the fact that, upon the former trial, no objection to its introduction was urged, the plaintiffs had no expectation of same being met with objection upon the latter one; and to maintain it now would prejudice plaintiff's case when he is not at fault.

We think it is in keeping with the spirit of the agreement that the evidence should be received, and therefore approve the ruling of the judge *a quo*.

IV.

On the merits the evidence has fully satisfied us, among others, of the following facts, viz:

1st. That there were subscribed for, and issued, by the Workingmen's Accommodation Bank, 3434 shares of stock.

2d. That of these the Workingmen's Bank acquired by transfer, and was the owner, at the date of its liquidation, of 972 shares.

3d. That of those subscribed and partly paid for before, and actually issued subsequent to the 27th of September, 1873, the Workingmen's Bank, by transfer, had become the owners of 440 shares.

4th. That of the shares represented by the owners, who signed the agreement authorizing institution of suit on the bond, there are 899 shares.

5th. That there are owned and held by parties who signed the act of organization of the Workingmen's Bank, and who became stock-

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holders therein, and are directly represented by the plaintiffs, to the extent of 859 shares.

6th. That of the said shares there had been surrendered and re-issued as stock in the Workingmen's Bank, 124 shares.

Hence the plaintiffs own and represent 3294 shares of the stock in the Workingmen's Accommodation Bank, and there are remaining 140 shares, of which they have no control.

The evidence further satisfies us of the defalcation of George T. Converse, as alleged, and of the defendants liability, according to the terms and tenor of the bond; but the judgment rendered against E. K. Bryant must be reduced so as to allow plaintiff the sum of $\$11\frac{1}{4}$ ths of \$5000, with interest; and that against the heirs of William P. Converse, Jr., must be reduced so as to allow plaintiff the sum of $\$1\frac{1}{4}$ ths of \$2500, with interest.

And it is therefore ordered, adjudged and decreed that, as thus amended and reduced, the judgment appealed from be affirmed, the plaintiffs and appellees paying cost of appeal.

Judgment amended and affirmed.

No. 9799.

THE STATE OF LOUISIANA VS. EMANUEL DREIFUS.

1. There is an essential difference between a judicial and non-judicial oath. A judicial oath is one taken before an officer in open court; and a non-judicial oath is one taken before an officer *ex parte*, or out of court.
2. In case perjury is assigned on a judicial oath, it is sufficient that the person acting is one of a class of officers having *prima facie* authority, and does administer the oath with due formality and solemnity, in the presence of the court, it having jurisdiction of the proceedings.
3. In case perjury is assigned on a non-judicial oath, it is insufficient to maintain a conviction, if the person administering the oath was not legally authorized to administer *that particular oath*.
4. Being sworn by a clerk, in the presence of the court, is being sworn by the court; and an oath administered by an officer, though incompetent, in presence of the court, is regarded as administered by the court.
5. The power to administer an oath is a ministerial one.
6. This Court has no power to pass upon and decide whether there was a variance between the proof administered and the indictment when presented in connection with a motion for new trial for the first time.
7. An objection that witnesses who testified at, or jurors who sat upon the case, were sworn by an officer without any legal authority to administer an oath, comes too late after verdict against the accused; and objection to same cannot be entertained for the *first* time on application for a new trial.

38	877
49	90
38	877
50	1188
38	877
452	1463
38	877
115	777

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A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee :

1. If an officer is not competent to administer an oath in a criminal trial, objections should have been made at the time witnesses or jurors were offered to be sworn by such officer. An accused will not be permitted to take the chances of an acquittal and failing of success secure a new trial by deferring action as to such officer's incompetency until after conviction. 36 Ann. 206; 37 Ann. 215; 36 Ann. 864; Whar. Cr. P. and P. 801, 804, 876, 877.
2. A minute clerk of the Criminal District Court of Orleans parish is a deputy clerk, and as such is competent to administer an oath in the presence of and under the direction of the Court. Act 30 of 1880; Act 130 of 1880.
3. Act 30 of 1880, does not create a new office. It confers no powers with reference to the minute clerk but regulates the duties of that officer whose pre-existing powers are recognized by the act.
4. Administering an oath calls not for the exercise of either judgment or discretion. It is a mere formality, hence it is a ministerial act. High Ext. a Leg. Rem. § 81.
5. A deputy clerk may act for his principal in the performance of all ministerial acts. He is an officer known to the law. 15 L. 41; 3 Ann 247; 27 Ann, 507; 10 M. 48; C. P. 782;
6. An oath administered by a deputy clerk in the actual presence of the court and under his direction is valid. 7th Circ. (Mich.) 1845, U. S. vs. Nichols, 4 McLean, 23.
7. The power to administer oaths is conferred upon deputies in C. P. 782; secs. 3 and 12 of Act 56 of 1855; secs. R. S. 462, 483 and 2530; Act 78 of 1868, and the last clause of Act 30 of 1880; see Gerald vs. Gerald, dissenting opinion of Justice Slidell. 5 Ann. 246.
8. Where the power to administer oaths by deputy clerks has been recognized with judicial unanimity from the organization of our government unto the present day, the maxim "*Communis error facit jus*," is applicable.

C. H. Luzenberg and *Morris Marks* for Defendant and Appellant :

Authority to administer an oath is a judicial function. *State vs. McCroskey*.

Authority to administer an oath is a material allegation in an indictment for perjury or subornation of perjury, and the administration must be proved as alleged. 2 Russ on Cr. P.; Morrell vs. People, 32 Ill. p. 502; 3 McCord, 308.

In prosecutions for perjury or subornation of perjury, the party charged with the perjury must be lawfully sworn. 3 Inst. 166; 1 Johns, R. 498; 9 Cowen. R. 30; 3 McCord, R. 308; 4 McCord, R. 165; 2 Russ on Cr., 520; 3 Carr & Payne, 419; S. C., 14 Eng. Com. Law. Rep. 376; 2 Chitt. Cr. Law, 304; 4 Hanks, 182; 1 N. and M., 546; 3 McCord, 308; 2 Hayw., 56; 8 Pick., 453; Bouvier's Law Dict. verb Perjury, 331; Wendell's Blackstone, vol. 4, 137; Cr. C. C. (7th ed.) 626; 3 Camp. 432; Wood's Inst. 435.

Authority to administer an oath is an express delegation of authority and cannot be exceeded or delegated to another. *Rex. vs. Mary Hanks*, 3 Carr and Payne, 419; U. S. vs. Curtis, 107; U. S. R. 671; Sandeman vs. Deake and Willard, 17 La. 203; *Regina vs. Hallett*, 5 Cox's Criminal Cases, 238; *Stewart vs. State*, 6 Texas Court of Appeal, 184; *Rex vs. Punshon*, 3 Camp., 96; *McGrager vs. State*, 1 Ind. R. 232.

"Practice cannot give authority to administer an oath." *Rex. vs. Verelst, Esq.*, 3 Campbell's R., p. 432; *Regina vs. Henry Marshall Stone*, English Law and Equity Reports. XXII, p. 593.

In this State no one is authorized to administer an oath except those to whom the power has been expressly delegated. R. S. sec. 1936, as to district judges; secs. 462, 483, 498, 488 (parish of Orleans excepted), as to clerks of district courts; 512, as to clerks of district courts in parish of Orleans and notary public; 529, as to oaths under Acts 216 and

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217, C. Pr. before any clerk of court; 2576, as to foremen of grand juries; 2579, as to Secretary of State; 2561, as to Auditor; Acts of 1877, No. 7, as to notaries public; 3543, as to sheriff.

The minute clerk of Section B, of the Criminal District Court of the parish of Orleans, is a constitutional officer. Const. of 1879, Act 138.

He has not been invested by either the Constitution, or any statute, with authority to administer an oath.

The opinion of the Court was delivered by

WATKINS, J. The accused prosecutes this appeal from a conviction of *subornation of perjury*, and a sentence to six years' imprisonment in the State penitentiary.

For a reversal of the judgment and discharge from the sentence, he relies upon several bills of exception, a motion for a new trial, and a motion in arrest of judgment.

In this court his counsel assign as error in the record and proceedings, that there is manifest error in that it appears from the record "that the perjury, for the subornation of which the defendant was indicted, was perjury alleged to have been committed by one, Susan McMahon, on the trial of the case of the State vs. Thos. J. Ford, et als., in Section B of the Criminal District Court for the parish of Orleans, after she had been sworn as a witness by Richard D. Scriven, minute clerk of Section B of the Criminal District Court for the parish of Orleans.

"This defendant maintains that said Richard D. Scriven, minute clerk aforesaid, had no authority whatever to administer the oath as a witness to the said Susan McMahon on said trial."

The foregoing is the substantial repetition of the averments made in the motion in arrest of judgment.

The indictment sets out with precision that the perjury, for the subornation of which the accused is prosecuted, was perjury committed by Susan McMahon on the trial of the case of the State vs. Ford et als., in Section B of the Criminal District Court for the parish of Orleans, and that "the said oath having been administered to the said Susan McMahon by Richard D. Scriven, minute clerk of the said court, etc."

As this objection to the indictment involves its validity and that of all subsequent proceedings, we will dispose of it first.

I.

The oath lawfully taken is an essential to the indictment and consequent conviction for perjury; and every person who is guilty of subornation of perjury by procuring another person to commit the

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crime of perjury, as aforesaid, shall be punished in the same manner as for the crime of perjury. Whar. Crim. Law, sec. 2176.

The statute under which the defendant is prosecuted declares that "whoever shall wilfully commit perjury or shall, by any means, procure any person to commit wilful and corrupt perjury on his oath or affirmation in any suit, controversy, matter or cause *depending in any of the courts of this State*, or in any deposition or affidavit taken or made *pursuant to its laws*, upon conviction, etc." R. S. sec. 857.

Upon the face of the statute, there are two general classes or kinds of oaths, within its contemplation, on either of which perjury may be committed. One of them is an oath taken "in any suit, controversy, matter or cause depending in *any of the courts of this State*;" and the other is an oath made or taken "in any deposition or affidavit * * pursuant to the *laws of the State*."

If in either case the oath taken is false, wilful and corrupt, the crime of perjury is committed.

One of these has been denominated a *judicial* and the other a *non-judicial* oath.

In the ninth edition of Dr. Wharton's work on criminal law, this distinction is made. He says: "It is essential to constitute the offense that, if the oath be non-judicial, it be taken before the proper officer; or, if it be judicial, before the court having jurisdiction of the proceedings.

"If, in case of a non-judicial oath, it appears to have been taken before a person who had no legal authority to administer it; or, in case of a judicial oath, before a court which had no jurisdiction of the cause, the defendant must be acquitted.

* * * * *

"Being sworn by a clerk in the presence of the court, is being sworn by the court." 2 Whar. Crim. Law, sec. 1257.

Again: "When the court has jurisdiction of the subject-matter of enquiry, it is not necessary that proceedings should be strictly regular. But if for want of some essential condition, no jurisdiction attached, perjury cannot be maintained." Ibid, secs. 1258, 1262.

There is a precise and clear distinction made between a judicial and a non-judicial oath.

Perjury charged to have been committed on a *non-judicial* oath cannot be maintained if the person who had administered it had *no lawful authority*; but perjury alleged to have been committed on a *judicial* oath can be maintained unless the *court was without jurisdiction of the cause*.

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"No *de facto* title by the officer administering the oath will sustain an indictment for perjury. But perjury may be assigned on an oath erroneously taken while the proceedings in which it was taken remain unreversed.

"And an oath administered by an officer (though incompetent) in presence of the court is regarded as administered by the court." Ibid secs. 1263, 1313.

Again: "At common law the name and office of the person or court administering the oath must be given, and a variance in this respect is fatal.

"It is, however, enough to allege swearing before a court, and proof of swearing before an officer of court, in presence of court, will sustain an allegation of swearing before, or by the court." Ib., sec. 1287.

"But, as a general rule, the principle of the statute (23 Geo. C. 11), has been accepted among us as virtually a part of the common law, though it must appear from the indictment that the officer administering the oath was of a *class* authorized by law to act in such capacity.

"Beyond this, specification need not be pushed." Ibid, sec. 1288.

Again: "It is not necessary for the prosecution to prove the appointment of the officer who administered the oath, if a *prima facie* case of authority is made out, and (if the court will not judicially notice it), that the person lawfully exercising the duties of that office had authority to administer an oath in such a case. And the officer may be called to prove that he was *acting* as such.

* * * * *

"Swearing before a clerk in open court is equivalent to swearing before the court. Ib. sec. 1315. * * * * * Proof that an individual has acted *notoriously* as a public officer is *prima facie* evidence of his official character, etc."

In the sixth edition of Bishop's Criminal Law a similar precept is given.

"An oath administered by a clerk is, ordinarily, the same as administered by the judge; subject, perhaps, to statutory modifications in some localities." 2 Bishop Crim. Law, sec. 1020.

But the learned counsel for the defendant insist, in argument, that Bishop and Wharton are not common law authors, and attract our attention to the provisions of the act of May 4th, 1805, which is to the effect that "all crimes, offenses and misdemeanors * * shall be taken, intended and construed according to the common law of England."

"Russell on claims" is a valuable treatise, of which Sir William Russell, once Chief Justice of Bengal, was the author and compiler, and which was subsequently revised by Charles Greaves, an English barrister. It is received authority in the courts of this country.

That learned judge says: "It is sufficient to support the averment that the party administering the oath had competent authority for the purpose by showing, in the first instance, that he *acted* as a person having such authority.

"Thus, upon an indictment for perjury before a surrogate in the ecclesiastical court, it was ruled, that the fact of the person who administered the oath having *acted* as surrogate, was sufficient *prima facie* evidence of his having been duly appointed, and *having authority to administer an oath*.

"And Lord Ellenborough, C. J., said: 'I think the fact of Dr. Parsons having *acted* as surrogate is sufficient *prima facie* evidence that he was duly appointed, and had *competent authority to administer oaths*.'" 2 Russell on Crimes, p. 659.

This may be, perhaps, a new question in our jurisprudence, but all the text writers appear to be in perfect agreement on the principles herein announced.

On their authority we conclude that the following propositions are established, viz:

1st. That there is an essential difference between a judicial and a non-judicial oath; and that a judicial oath is one taken before an officer in open court; and a non-judicial oath is one taken before an officer *ex parte*, or out of court.

2d. That in case perjury is assigned as having been committed on a judicial oath it is sufficient that the person *acting* is one of a *class* of officers having *prima facie* authority, and does administer the oath with due formality and solemnity, in the presence of the court—it having jurisdiction of the cause.

3d. In case the perjury is assigned on a non-judicial oath, it is insufficient to maintain a conviction, if the person administering the oath was *not legally authorized to administer that particular oath*.

4th. Being sworn by a clerk, in the presence of the court, is being sworn by the court; and, an oath administered by an officer, though incompetent, in presence of the court, is regarded as administered by the court.

Richard D. Scriven was minute clerk of section B of the Criminal Court. He acted as clerk when he administered the oath as a witness to Susan McMahon.

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She was sworn as a witness on behalf of defendants, during the progress of the trial of the State vs. Ford and others, a prosecution at that time depending in said Criminal District Court, and which court had jurisdiction thereof.

We regard the minute clerk as a constitutional officer, possessing such powers as are delegated to him by law.

Article 138 of the Constitution of 1879 provides that his "duties shall be regulated by law."

Act 30 of 1880 declares that "they shall, under the supervision of the judge" perform certain duties which are enumerated, "and such other duties as said judge may direct."

Defendant's counsel argue that the power to administer an oath is not a ministerial, but a judicial one, and cannot be delegated; or, in other words, the constitution authorized the Legislature to regulate the duties of the minute clerk, and could not empower a judge to authorize this officer to discharge duties not enumerated in the legislative mandate.

But we are not ready to concede the power to administer an oath to be a judicial one.

Art. 133 of the Constitution of 1868 declares that "*no judicial power* shall be exercised by clerks of courts.

Under that constitutional inhibition the Legislature could not confer upon clerks of court any judicial power; yet they were certainly authorized to administer oaths.

Art. 122 of the Constitution of 1879 conferred upon the Legislature power "to vest in clerks of court authority to grant such orders, and do such acts as may deemed necessary for the furtherance of the administration of justice," etc.; but in the act of the Legislature conferring on clerks certain judicial powers, the power to administer oaths is not enumerated. Act 106 of 1880.

As the clerk had, and exercised the power of administering oaths under the constitution of 1868, it was clearly a non-judicial one, and *ex necessaria causa* "those powers and duties" that were conferred upon clerks embraced the power to administer oaths, and it was a purely ministerial one.

Whether the presiding judge of Section B of the Criminal District Court had ample authority, under the act of the Legislature quoted, to confer upon the minute clerk thereof the power to administer oaths or not—and we need not decide that question; an oath was administered by the minute clerk to the witness, Susan McMahon, in open

State vs. Dreifus.

court, in the presence of said judge, and in the apparent exercise of a rightful and legal authority.

The assignment of perjury on that oath, in a cause depending before that court, and which was in due progress of trial therein, and of which cause said court had competent jurisdiction, is maintainable under the indictment; and the defendant's motion in arrest of judgment was correctly refused.

II.

Our attention is called to the fourth and fifth grounds in defendant's application for a new trial :

The fourth is predicated upon the theory that no evidence was spoken or read to the jury in the case, verifying the statement in the indictment that Susan McMahon was sworn as a witness on the trial mentioned, by Richard D. Scriven, minute clerk.

In support of this motion the affidavits of two persons are annexed to it, and they state, substantially, that no such evidence was introduced.

But the trial judge, in his assignment of reasons, appended to defendant's bill of exceptions, makes a clear and succinct statement to the contrary. He sets out a detailed statement of the evidence, and enumerates the witnesses who gave the evidence, and concludes by saying : "To my mind the evidence on this branch of the case was clear and positive."

We feel constrained to accept this statement of the trial judge rather than the merely negative declarations of two disinterested by-standers.

But it is further argued that "the extract from the minutes of court" of the Ford case "show that Susan McMahon" was sworn "*by the clerk*," and there is therein no mention made of Richard D. Scriven, minute clerk, etc., and that this record evidence discloses a *fatal variance* between the indictment and the proof received under it.

To pass upon this question would necessarily involve an examination of evidence which went to the jury, and upon which we had no power to decide.

Defendant's counsel should have requested the trial judge to charge the jury that the proof as to the person who administered the oath to Susan McMahon, must correspond with the averments in the indictment, else the variance would be fatal, and they must acquit the prisoner; and if the judge had declined to give such a charge, he should have reserved a bill of exceptions to his ruling. 33 Ann. 1016, State vs. Hipolite Polite; 37 Ann. 41, State vs. Tony Taylor.

In Wharton's Crim. Pl. and Pr., sec. 760, it is said: "That when an

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avermment which is necessary to support a particular part of the pleading, has been imperfectly stated and a verdict on an issue involving that averment is found, and it appears to the court, after verdict, that unless this averment were true, the verdict could not be sustained—in such case the verdict cures the defective averment, which might have been had on demurrer.” 1 Bishop Crim. Pro., sec. 707 a.

III.

The fifth ground for a new trial assigned is to the effect that each and all the witnesses who testified and jurors who sat upon the case, were sworn by Richard D. Scriven, minute clerk, a person not authorized to administer oaths, and he has thereupon been tried “without due process of law.”

Such objections should have been made at the time the jurors or witnesses were sworn, to have been of avail to the accused. This competency cannot be raised for the *first* time upon an application for a new trial. 36 Ann. 864, *State vs. Frank Wilson*; 36 Ann. 206, *State vs. Jos. McGee*; 37 Ann. 216, *State vs. Victor Pierce*.

IV.

We have attentively and carefully examined the various grounds of the defendant's motions for new trial and arrest of judgment, as well as the authorities cited in their support, and have reached the conclusion that said motions were not well taken and same were correctly overruled.

Judgment affirmed.

No. 9727.

MRS. MARGARET E. PATTISON, WIFE, ETC., vs. DR. J. H. MALONEY.

1. Good faith purifies the title of its defects and causes the possessor under a just title to be preferred to the true proprietor who has remained so long neglectful of his rights.
2. That there is no defect stamped on the face of the deed is what is meant by valid in point of form.
3. A possessor cannot be deprived of pleading prescription because he might, by inquiry and careful examination, discover that his vendor had no title.
4. A title defective in form cannot be the basis of prescription. By this is meant a title on the face of which some defect appears, and not one that may be found defective by circumstances, or evidence *dehors* the instrument.
5. If, upon examination of the recitals contained in a deed they prove erroneous, this would only be an error of fact, and would not prevent the possessor under it from pleading prescription.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Farrar & Kruttschnitt for Plaintiff and Appellant.

38	885
44	885
38	885
45	192
38	885
46	339
46	565
38	885
49	582
38	885
107	252
38	885
110	337
38	885
113	52

Pattison vs. Maloney.

H. P. Dart for Defendant and Appellee.

The opinion of the Court was delivered by

WATKINS, J. This suit is to compel defendant to accept title to a certain lot of ground, with improvements, situated in the Fourth District of the city of New Orleans, in the square bounded by Laurel, Constance, First and Philip streets, measuring 49 feet front on Laurel, by 160 feet in depth between parallel lines, and designated by the numbers 159 and 161 Laurel street—sale of which to defendant was effected through C. E. Girardey & Co., real estate brokers—who acted as the mutual agents of both seller and purchaser, at the price of \$4,000, to be paid on day of sale, on the 15th of October, 1885.

Defendant for answer pleads the general issue, and admits the promise to buy the property as described, but he avers that the plaintiff has no good and valid title to the property, as to three-fourths thereof, “for the reason that said property was acquired in 1850 for and on account of the firm of Norcross & Co., composed of David D. Boyle and Henry A. Norcross,” and in which the latter was interested to the extent of three-fourths and the former to the extent of one-fourth; and that the Norcross interest has never been divested, and he prays that plaintiff’s demand be rejected.

In argument plaintiff replies, that conceding that the Norcross interest has never been divested by title, or other proceedings, and there is no conveyance of record of the Norcross interest to the plaintiff or her vendors, yet the title tendered is perfect and complete, and that same has been perfected and completed by the prescription of ten years.

In his brief, plaintiff’s counsel propound this question: “Has plaintiff shown possession under a title translativ of property, and in good faith, for ten years; and has she thus proved a good title by prescription to the property sold?”

I.

The present plaintiff claims to have derived title through the following chain of conveyances, viz:

1st. By an authentic and duly recorded act of sale from the heirs of D. D. Boyle to John E. Pattison, of date January 26, 1869.

2d. By Pattison’s assignee in bankruptcy to Lochte & Cordes and Mrs. M. Aloitz; likewise by authentic act of date August 9, 1878, and duly recorded.

3d. By a conveyance from said parties to the plaintiff, which was authentic in form and duly recorded.

The heirs of John E. Pattison’s vendors is fully established; and he,

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as a witness, states that prior to his purchase from the heirs of Boyle he took counsel of Judge G. W. R. Marr, whom he had employed to examine the title; and that after having kept the matter under advisement "some three or four weeks," he reported "that after a thorough examination, he gave me his opinion that it was as good as any title in in the State"—and that he then bought the property, and never had any reason to suspect that there was any defect in the title at that time or since. He further says that under the title from the heirs of D. D. Boyle he went into actual possession as owner, and that he and his assigns have continued in its peaceable and uninterrupted possession ever since; and that he has made permanent and valuable improvements thereon since his purchase—said lot being a vacant one when he so acquired it.

He says that he paid \$1600 for the property, and the improvements cost him \$3800 or more, and that they were erected and constructed in 1869.

Mrs. Pattison, the plaintiff, corroborates that statement.

Consulting the act of sale from the heirs of Boyle to Pattison, we find these recitals, following the description of the property, viz:

"The title to the said lot of ground is held by the said vendors in manner following, viz: At a public sale of the tract of land, surveyed into four lots by said amended sketch, which was made by the sheriff of the parish of Jefferson, in this State, on the 10th day of August, 1850, by virtue of a writ of *fieri facias* to him directed by the Third Judicial District Court of the parish of Jefferson aforesaid, at the suit of D. D. Boyle et al. vs. E. S. Hall, one undivided one-fourth interest in said tract of land was purchased by *Dennis D. Boyle*; and at the death of said Dennis D. Boyle, *his said interest* in said tract of land was inherited by said vendors, * * * and by an act of partition between Isaac Knopp, owner of the three-fourths interest in said piece of ground * * * and said vendors, as the heirs of said deceased Dennis D. Boyle, the owners of the remaining one-fourth, * * * said vendors became the owners of an undivided interest each in the said lot designated by the letter B."

Thus, the plaintiff argues, she has fully answered her own question—that is to say, that she has fully established her title by prescription—claiming to have exhibited, 1st, A just title; 2d, To have shown possession thereunder for more than ten consecutive years; 3d, And that her vendor acquired in good faith.

II.

It is claimed by the defendant that in 1849, a lot of ground 160 feet

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front on Laurel, by 183½ feet on First street, was owned in indivision by Ferry and Knopp and Hall, the latter having an undivided one-fourth interest. That the interest of Hall was attached in the suit of H. A. Norcross & Co. vs. E. S. Hall, and subsequently sold under *fi. fa.* therein on August 10, 1850, "when Dennis D. Boyle, surviving partner of the firm of Henry A. Norcross & Co., and liquidator of said firm. * * * being the last and highest bidder, the said before described property was adjudicated to the said Dennis D. Boyle *for account of said firm* of Henry A. Norcross & Co.," etc., and that same was accordingly adjudicated. The recitals of the sheriff's *proces verbal* of sale are to that effect.

It was admitted as a fact that the public records disclose no conveyance of the Norcross interest to any one. That Norcross died in October, 1849, and that his succession was opened in the Fourth District Court soon after. It is admitted that the record in the partition suit of Dennis D. Boyd et al. vs. Ferry & Knopp, decided in (12 Ann. 425) 1857, cannot be found.

It is admitted that the heirs of Boyle and Ferry & Knopp "partitioned said plot of ground" by an authentic act of date May 12, 1869, "in which partition the lot now in question fell to the heirs of Boyle:" and the heirs of Norcross did not participate therein.

Upon this state of facts, the defendant's counsel predicates the argument that plaintiff had never acquired the Norcross interest, and then asks the question, "How then can he base a prescription on good faith? Perpetually before him *in his deed* stands the reference to the suit of Boyle et al., and the subsequent adjudication to Norcross & Co. under execution thereon."

As quoted, counsel is slightly inaccurate on a material point.

The deed from the heirs of Boyle & Pattison, of date 26th of January, 1869,—the one counsel doubtless refers to—does make reference to the suit of Boyle vs. Hall, and the sale under *fi. fa.*, and the adjudication of the property *not* "to Norcross & Co.," as stated, but, as it recites, "that the undivided one-fourth interest in said tract of land was purchased by Dennis D. Boyle, etc."

III.

Was Pattison bound to look beyond the authentic conveyance order to maintain his title by prescription? Was there any recital in the deed to put him on notice of any defect in the title of the heirs of Boyle, whereby to deprive him of his good faith at the time he made the purchase?

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For "it is sufficient if the possession has *commenced* in good faith. R. C. C. 3482.

"The possessor in good faith is he who has just reason to believe himself master of the thing which he possesses, although he may not be in fact, as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which, in fact, belongs to another." R. C. C. 3451.

Under the circumstances above given, had John E. Pattison "just reason to believe himself the master of the property" he purchased on the 26th of January, 1869, from the heirs of Boyle?

His notarial title did not disclose the defect complained of. It purported to convey a full title, and the act was translatif of property. It was a just title. It was a title which he received from a person whom he honestly believed to be the real owner, and the title was such as to transfer the ownership of the property. R. C. C. 3484.

He had employed a lawyer to examine it, and he reported it good. He had not then, nor has he since, heard the title questioned.

There was, at the date of his acquisition, upon the public records an act of partition of several lots of ground, bearing date May 12, 1868, whereby the heirs of Boyle appeared to have acquired full title to the one in controversy. The record of that partition suit has been lost, and there is no certainty as to who were the plaintiffs "Dennis D. Boyle et al." That is left to conjecture. Knopp and other co-owners as to three-fourths undivided interest therein joined in the partition and accepted title under it. They were parties to the lost record. Seven years had then elapsed since the sheriff's sale was made in the suit of Norcross & Co. vs. Hall, and Norcross died in 1849. If that missing link were supplied, plaintiff's title would be perfect without the help of prescription.

"Good faith purifies the title of its defects and causes the possessor under a just title to be preferred to the true proprietor, who has remained so long neglectful of his rights." McCloskey vs. Webb, 4 R. 205.

"There is no defect stamped on the face of the deed, and that is what this Court say was meant by valid form in a deed which would enable a holder under it to prescribe. Carroll vs. Cabaret, 7 Mart. 406. A possessor cannot be deprived of the right of pleading prescription *because he might by inquiry and careful examination discover that his vendor had no title.* Frigue vs. Hopkins, 4 Mort., N. O. 224;" Geddens vs. Mobley, 37 Ann. 419; Barrow vs. Wilson, 38 Ann. 209.

In Hall & Turner vs. Mooring. 27 Ann. 597, the Court say: "The

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defendant's title is apparently perfect. * * The defect complained of is *dehors* both acts. It is well settled that to become the basis of prescription the title must be *apparently* good and of a kind calculated to induce a belief in the possessor that it is perfect. A title *defective* in form cannot be the basis of prescription. *By this the law means a title on the face of which some defect appears, and not one that may be found defective by circumstances or evidence dehors the instrument.*"

Again: "There can be no greater obligation on the vendee to examine the verity of the statement in the written mandate of Wright than to inquire into the truth of the assertion of the seller that he is the owner. *In both it could be an error of fact, which the law would not consider of such a nature as to prevent the party from pleading prescription.*"

The rule is that when the opinion of the possessor who holds an object under a title of sale has a just ground, *though in fact there is no sale*, the opinion is equal to title."

In 10 Peters 489, Harpending vs. Dutch Church, the Court said: "One tenant in common may well hold adversely to and bar his co-tenant." 5 Wharton 116, McClung vs. Ross.

In 5 Peters 402, Bradstreet vs. Huntingdon, the Supreme Court said: "If parties, having only an equitable right to land, undertake to convey the fee; or, if one tenant in common undertake to convey the whole, and the grantor enter into the actual possession, *intending to claim the whole*, he is not precluded from setting up his possession thus acquired as a bar under the statute of limitations, nor from relying on it as *preventing a conveyance by the owner out of possession.*"

The questions propounded are answered. The plaintiff's title by prescription is perfect and complete. The judgment appealed from is erroneous.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now ordered, adjudged and decreed that the defendant accept the title tendered him by the plaintiff to the property in controversy, at the price of \$4,000, as recited in the act of sale, and perfect and complete said contract of sale, and that all costs of both courts be taxed against him.

Judgment reversed.

 No. 9787.

CHARLES B. MILLER VS. R. H. SHOTWELL ET AL.

An instrument, executed in the State of Alabama and shown to be a mortgage in that State will be treated as such by the courts of Louisiana; but as the lands affected thereby are situated in Louisiana, its effect must be regulated by the laws of this State.

Under our laws, a mortgage does not, of itself, operate a divestiture of title from the mortgagor to the mortgagee.

88	890
44	890
38	890
46	294
46	1001
38	890
112	349

Miller vs. Shotwell.

The mortgagor retains the title and under it will defeat claims of ownership set up by the mortgagee, as resulting from the mortgage.

A common law mortgage is not similar to *rente à réméré*, under the Civil Code of Louisiana.

A PPEAL from the Twenty-fifth District Court, Parish of Vermilion.
Clegg, J.

Henry St. Paul and Jos. A. Breaux for Plaintiff and Appellant.

O'Bryan & White for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. This litigation, which plaintiff styles "a suit for slander of title, with the object to try title," involves the ownership of a large tract of land situated in the parish of Vermilion in this State.

Plaintiff has appealed from a judgment which decreed that the defendants were the owners of the property in suit.

Both parties claim title from C. A. Hatch.

Plaintiff as the vendee of Thomas P. Miller, who had purchased from C. A. Hatch, rests his claim on a deed executed on the 17th of October, 1860, in the State of Alabama, between J. L. and R. H. Shotwell and C. A. Hatch; and the defendants rely on a sale to them by Hatch, under date of December 14, 1860, under which they took and have since retained possession of the lands.

There is no dispute about the original titles of Hatch.

The main controversy hinges upon the proper construction and legal effect of the deed of October 17, 1860, between Hatch and the defendants.

In order to throw the best light on the discussion we transcribe the leading features of the document.

"The State of Alabama, Mobile county:

"Whereas, we, James L. Shotwell and R. H. Shotwell, of the city of Mobile and State aforesaid, are indebted to Christopher A. Hatch, of the parish of Vermilion, State of Louisiana, in the sum of \$16,216.60, as the purchase money of the land hereinafter mentioned; and, whereas, for the payment of said money, we have made our four promissory notes payable to the order of said Hatch and T. P. Miller, at the bank of Mobile, each for the sum of \$4054.16, * * * and, whereas, we are desirous to secure the payment of said purchase money; therefore, we do hereby bargain, sell, convey and confirm unto the said C. A. Hatch, the following described lands purchased as aforesaid, to-wit."

* * * * *

"To have and to hold unto him the said Hatch and to his heirs and assigns forever, upon the condition, however, that if we shall pay the

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amount aforesaid according to the tenor of the promissory notes aforesaid, then these presents shall be null and void; otherwise to remain in full force and virtue." Dated October 17, 1860.

The text of the instrument, viewed in the light of our jurisprudence, and of the laws of Alabama, as shown both by evidence and authority, leaves no doubt in our minds as to the true intention of the parties thereto.

It was clearly to create a mortgage by way of security for the purchase price of the lands therein described.

The leading consideration in the instrument is an acknowledged indebtedness by the Shotwells to Hatch, and the object of the deed was "to secure the payment of said purchase money."

In point of fact both parties are in accord in treating the contract as a mortgage under the form prevailing in the State of Alabama.

The contention between them arises out of the question of the effect of such a mortgage, as affecting the lands in suit.

Plaintiff's theory is that the effect of such a mortgage under the laws and jurisprudence of the State of Alabama, was to vest the ownership of the property in Hatch, the mortgagee, on the failure of the Shotwells to satisfy the payment of the promissory notes, and that the possession of the lands by the Shotwells after their purchase was in subjection to Hatch's right of possession under the deed, and in trust for him.

He assimilates the contract in its effect to our sale with the clause of redemption known in civil law as the "*vente à réméré*."

But this argument is inconsistent with the admission that the deed is a mortgage under the laws of Alabama, and it falls under the very text of the instrument itself.

Hence plaintiff is driven to this argument: "Then, as beforesaid, the sole question is, what was the intention of the parties when they entered into the contract of October, 1860? They were all citizens of and residing in Alabama, they chose the form in use there for like contracts, and it cannot be supposed that they had in view the laws of another State, of which they were utterly ignorant."

The argument is fallacious, both in fact and in law. In the deed itself, Hatch is described as a resident of the parish of Vermilion, State of Louisiana, and he is likewise described in the act of sale to the Shotwells, which was executed in the parish of Vermilion, in which the lands are situated.

The other fallacy of the argument turns upon a question of law

Miller vs. Shotwell.

which is the crucial test of the whole controversy, and that is : under what law must the effect of the mortgage be construed ?

From the very nature of the contract, whether viewed as an act of transfer, or as an act of security, it is clear that, as the lands to be affected thereby are situated in this State, the instrument was intended to take effect in Louisiana.

Now art. 10 of the Civil Code answers the question as to which forum must regulate its effect, it reads :

"The form and effect of public and private written instruments are governed by the laws and usages of the places where they are passed or executed."

"But the effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where such acts are to have effect."

It is, therefore, safe to conclude that, whether the contract of the parties was one of a sale with the right of redemption, or simply a mortgage, its effect must be tested under the laws of Louisiana.

Similar contracts have been subjected to judicial interpretation in this State and the current of authority goes to settle the rule that they must be construed under the laws of this State. Out of numerous adjudications supporting these views, we have selected the following as more directly in point. *Ricks vs. Goodrich*, 3 Ann. 216 ; *Bernard vs. Scott*, 12 Ann. 489 ; *Gunger vs. Bullard*, 16 Ann. 107 ; *McIlvane et al. vs. Godchaux et al*, 34 Ann. 923 ; *Same vs. Same*, 36 Ann. 359.

Having reached the conclusion conceded by both parties that under the laws of Alabama the deed in question was a deed of trust or common law mortgage, and having shown that its effect must be regulated by our laws, we require no argument or reference to any authority to justify the conclusion that it could not have the effect of operating a divestiture of title. Hence, under its effect the mortgagor has not ceased to be the legal owner of the property, and his possession of the same is legal, as it was contemplated by the parties to the deed.

We refer, however, to the following decisions in order to remove the point beyond the domain of possible future discussion. *Smoot vs. Russell*, 1 N. S. 522 ; *Hayden vs. Nutt*, 4 Ann. 71 ; *Frelson vs. Tiner*, 6 Ann. 18 ; *Collins vs. Pellerin*, 5 Ann. 99 ; and to two of the cases hereinabove quoted on a different point. *Ricks vs. Goodrich*, 3 Ann. 216 ; *Bernard vs. Scott*, 12 Ann. 489.

We note the reliance of plaintiff on the case of *Thibodeaux vs. Anderson*, 34 Ann. 797. But that decision has no application here. The Court there held that a common law mortgage, executed in Louisiana

Yale & Bowling vs. Routh.

and intended to affect property in this State, could have no effect against third parties as a mortgage.

In this case we construe an instrument executed in Alabama, avowedly a mortgage under the jurisprudence of that State, but intended to affect property in this State; and we hold that it could not have the effect here, even between the parties thereto, which is claimed for it under the laws of Alabama, and that, as a mortgage, it did not operate a divestiture of title.

Judgment affirmed.

Mr. Justice Fenner, having not heard the argument, takes no part.

No. 9619.

YALE & BOWLING VS. H. ROUTH,

AND

W. G. WHEELER VS. H. ROUTH.

(Consolidated.)

Where plaintiffs' demand is less than two thousand dollars, accompanied by an attachment, and judgment is rendered for the debt sued for, but the attachment is dissolved, this court is without jurisdiction to review the judgment either as respects the debts or the dissolution of the attachment.

Where the defendant in an attachment claims damages for the illegal issuing of the writ, one item of which is the alleged sacrifice of his goods seized and sold thereunder, and it appears that a low appraisalment of the goods was procured by his own contrivance, and he was himself the purchaser of the goods at the sheriff's sale through a person interposed, and also concealed a part of the goods whilst under seizure which, in consequence, were not included in the sale, such facts deprived defendant of all right to complain.

A PPEAL from the Nineteenth District Court, Parish of Terrebonne.
Goode, J.

Chas. Louque, for Plaintiffs and Appellees.

Tobias Gibson, for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. The plaintiffs in these consolidated cases sued the defendant for \$477.29 and \$774.94 respectively. The suits were accompanied by attachments, under which a stock of goods of the defendant was seized.

Yale & Bowling vs. Routh.

During the pendency of the suits, on representation that the property was of a perishable nature, an order for the sale of the goods was rendered, and a sale was made by the sheriff on the 24th day of January, 1885.

The defendant, in his answer, admitted the indebtedness for which he was sued, but alleged that the attachments had issued illegally, and claimed damages in reconvention, as follows :

1. Loss on his goods sold under attachment.....	\$3,200 00
2. Accounts not collected owing to closing of the store....	1,085 00
3. Mental sufferings.....	3,000 00
4. Wrecking his business prospects.....	5,000 00
5. Exemplary damages.....	5,000 00
Total.....	\$17,285 00

This amount he claimed against each of the suing creditors.

The case was tried by a jury, who returned a verdict for the plaintiffs for the amount of their respective claims, but dissolved the attachment, and gave damages on the reconventional demand, for one thousand dollars, and judgment was rendered accordingly. From this judgment plaintiffs appeal.

We cannot review the judgment so far as relates to the plaintiffs' demand and the disposition made of the attachments, for want of jurisdiction, but must limit ourselves to the consideration of the reconventional demand.

The evidence shows that the defendant's stock of goods when the attachments issued was worth about \$3000. They sold for \$300 and were appraised at \$450.

We find in the record no inventory of the goods and no returns on writs of attachment. In the commission issued to the sheriff to sell under the order rendered, after the attachments were levied, the goods to be sold were described and specified, but we are satisfied that these goods either could not have embraced the entire stock attached, or if they did, that their value had been largely overestimated. In fact, an inspection of this list would rather confirm the correctness of their appraisal made just previous to the sheriff's sale.

Be that as it may, we are convinced that this appraisal which is so bitterly complained of by the defendant was really procured by himself.

An illiterate field-hand, a negro, was selected by him as an appraiser, and there is positive testimony that he gave directions for the exact appraisal that was made.

Police Jury vs. Marrero.

We are as equally well satisfied that Routh was the real adjudicatee at the sale, and that the ostensible purchaser was a person interposed, who was acting for Routh, and that the price was paid by him. There is also evidence to the effect that after the sheriff's sale the goods remained in the store for several weeks, and sales were made of the same as before, and a part of the proceeds thereof at least were paid over to him by the salesman in charge of the store.

There is further evidence to the effect that the morning before the sheriff's sale a part of the stock of goods was taken from the storeroom and concealed by Routh in a back room of the building, and was not offered for sale by the sheriff the next day. All these damaging facts against Routh are established to our satisfaction. We state our conclusions, but deem it unnecessary to give in detail the circumstances and the evidence which support these conclusions. If the goods of the defendant were sold at a sacrifice he mainly contributed, and doubtless reaped the benefit of the sacrifice. We believe, as was testified to, that he subsequently made a private sale of the goods to the pretended adjudicatee at the sheriff's sale, and shared in the profits of a resale of the same.

Under these circumstances the other grounds for damages set up are scarcely worthy of consideration. As to the alleged injury to his credit and business it is shown that he had taken the benefit of the bankrupt law, and after his discharge, the business had been conducted in the name of his wife, who failed, and thereafter by himself, and just before the attachments issued he had applied for a respite.

On the whole, therefore, we find no merit whatever in the reconventional demand.

It is therefore ordered, adjudged and decreed that the verdict of the jury and judgment of the lower court so far as they relate to the reconventional demand of the defendant be annulled, avoided and reversed, and the said demand be rejected, with costs of both courts.

No. 9738.

POLICE JURY OF PARISH OF JEFFERSON VS. AUGUSTIN MARRERO.

Held, that under the Section 6 of the State license law, Act 4, 2d Ex. Sess. of 1881, a retail dealer whose ordinary license would be five dollars, but who combines with said business the sale of liquors in less quantities than one pint, can only be required to pay a total license of \$50, and not \$55 as claimed by the parish.

A PPEAL from the Twenty-sixth District Court, Parish of Jefferson.
Rort, J.

S. S. Carlisle for Plaintiff and Appellant.

F. B. Earhart for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. The sole question presented for our consideration in this case is the proper construction of certain clauses of the 6th section of the license law of the State, Act No. 4, 2d Ex. Sess. of 1881.

The act imposed a license upon the business of "selling at retail," graduated in twenty-five classes according to the amount of gross sales, descending from a license of \$3500 in the first class, where the sales amounted to \$3,500,000, to a license of \$5 00 in the twenty-fifth class, where the sales were less than \$7500. The section ends with the following proviso:

"Provided, that if any distilled, spirituous, vinous, malt or other kind of mixed liquors be sold in connection with the business of retail merchant, grocer, restaurant, oyster house, confectioner or druggist, unless it be sold by prescription of a licensed physician, in quantities of not less than one pint nor more than five gallons, the license for such combined business shall be double the foregoing; provided, that any one not pursuing any of the occupations mentioned in this section, selling spirituous, vinous, malt and other kinds of liquors in quantities less than five gallons, shall pay a license of fifty dollars (\$50); and if any of the above mentioned liquors are sold in less quantities than one pint in connection with the business of retail merchant or grocer, restaurant or oyster house, or confectionery, the license shall be four times the above amount for said combined business; provided, no license shall issue to sell liquor in less quantities than a pint without paying a license not less than fifty dollars (\$50)."

The defendant is a seller at retail, falling within the twenty-fifth class, whose sales are less than \$7500, and his license thereon is *five dollars*. In connection with his said business, he sells liquor "in less quantities than one pint," and the question is: what license is due by him? Under the plain terms of the law it would be "four times the above amount," or twenty dollars, but for the final proviso which forbids the sale of liquor in less quantity than a pint by any one without paying a license "not less than fifty dollars." The effect of this proviso is to except him from the general rule of paying four times his ordinary license, because that would be "less than fifty dollars," and to compel him to pay a license of fifty dollars in order to pursue the combined business.

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The object of the law was to require from retail dealers who sold liquors in less quantities than one pint four times the license due without such sale. This would, in most cases, involve a license far exceeding fifty dollars. But as in some of the lowest classes, it would be less than \$50, and as the law-maker was unwilling that any one should be licensed to sell liquor for a less tax than \$50, he required these lowest classes to pay at least that amount. But he does not require them to pay \$50 *in addition* to the ordinary tax, any more than he requires the higher classes to pay four times the ordinary tax *in addition* to that tax itself.

The contrary contention of the police jury has no merit, and the judge *a quo* did not err in confining the claim to \$50, instead of \$55 as charged.

We pay no attention to the complaints against the judgment below urged by the defendant, who is an appellee and has filed no prayer for amendment.

Judgment affirmed.

No. 9711.

PEOPLE'S BANK OF NEW ORLEANS vs. MRS. F. E. F. TRUDEAU ET ALs.

The holder of a promissory note, acquired for a valuable consideration, before maturity, can recover of the maker the full amount of same and the enforcement of the mortgage securing its payment, when the only defense urged against it is a deficiency in the quality of land sold, and the seller has been discharged from all responsibility thereon by defendants.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

E. Howard McCaleb for Plaintiff and Appellee:

1. Where the heirs of the drawer of promissory notes, secured by mortgage and vendor's privilege, obtain from the holder renewals and extensions without the vendor's knowledge or participation, they cannot when sued on the notes, claim a diminution of the amount evidenced thereby, because of an alleged deficiency in the quantity of the land sold. Nor can they call their vendor a third person as to the renewals and extensions in warranty. Having obtained full consideration for the notes, they are estopped from claiming any deduction and from pleading secret equities between them and their vendor.
2. There must be privity of contract between plaintiff and warrantors. This is a *sine qua non* to the call in warranty permitted by the Code of Practice, arts. 378, 379; 8 R. 30: 18 Ann. 554; 19 Ann. 67; 23 Ann. 554.
3. The maker sued by the holder of a note cannot call other parties in warranty. 3 M. 261: 8 L. 37; 8 Ann. 123; Ib. 136.
4. *Quantum minoris* is a direct action and cannot be engrafted on a suit against a vendee by a third holder, not his vendor, to enforce the payment of promissory notes. Such a call

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in warranty by the vendee will not be tolerated in order to evade the plea of prescription of one year available to the vendor in a direct action. R. C. C. 2492, 2496; Tropiong, Vente, T. 1, No. 533; T. 2. Nos. 580, 586.

Chas. Louque for Defendants and Appellants.

The opinion of the Court was delivered by

WATKINS, J. This suit was brought on two promissory notes for \$5,194.45 each, bearing date February 7, 1881, maturing at two and three years thereafter, and secured by special mortgage and vendor's lien upon the Eliska plantation—for the deferred portions of the purchase price of which same had been executed by Emanuel Trudeau.

They were drawn payable to his own order, and by himself indorsed in blank, at the time of their delivery to Manuel Elliott, the seller.

The authentic act of sale evidences these transactions, and also contains the usual stipulation as to the retention of a special mortgage and vendor's lien on the property sold, to secure the payment of the purchase price, and said notes were duly paraphed *ne varietur*.

The note first falling due was, by the plaintiffs discounted for, and at the request of Manuel Elliott, and the second was discounted for the account of Joseph Emanuel Elliott—both prior to maturity.

On the former appear the following special indorsements, viz :

“Pay to the order of J. F. Elliott.

(Signed)

MANUEL ELLIOTT.”

And “Pay to the order of Manuel Elliott.

(Signed)

J. F. ELLIOTT.

MANUEL ELLIOTT.”

On the latter appear these indorsements, to-wit :

“Pay to the order of Joseph Manuel Elliott.

(Signed)

MANUEL ELLIOTT.

And JOSEPH MANUEL ELLIOTT.”

The notes, at their maturity, were by the bank extended at the special instance and request of the maker, and his heirs and legal representatives, after his death, in June, 1883, who had been formally recognized, and put in possession of his estate.

They are made parties defendant in this suit, and, answering, plead the general issue, followed by a special defense, to the effect that they are not liable to the plaintiffs on these notes to the extent of \$6,667.38, for that there was error in the execution of the notes, and want and failure of consideration therefor.

In explanation defendants aver that there was a deficiency in the quantity of land sold their ancestor, Emile Trudeau, to the extent of

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639.70 acres, worth that sum, and they claim a reduction therefor, on such judgment as the court may award plaintiffs; but, in the event judgment should go against them for the whole, they then demand a like judgment to the extent of said deficiency, against the heirs and representatives of Emanuel Elliott, the seller and warrantor, whom they have called upon to defend this suit therefor.

I.

The proof clearly shows that the plaintiffs acquired the notes for value before maturity, and they are therefore holders in good faith, and fully protected under the law-merchant, against any and all equities existing between prior parties thereto.

This is elementary.

Hence, plaintiffs are, at least, entitled to judgment for the full amount of the principal and interest of the notes, with five per cent attorneys' fees, and cost against defendants.

II.

Counsel for defendants, in the brief and oral argument, insist that the mortgage securing the notes is only assignable—passing by the transfer of the notes—and is not protected against existing equities.

While this is true, as a general proposition, we cannot see in what way same can be applied in this case.

Defendants' answer does not claim such relief. It does not demand that plaintiffs' mortgage be in any way limited in extent of area, or to the reduced sum defendants are willing to pay.

Granting the full force of defendants' counsel's argument in regard to the alleged deficiency in the quantity of land sold, and yet plaintiffs are entitled to have their mortgage and vendor's lien recognized, and enforced to the full extent of the land *actually conveyed*; and that is all they have.

The cases cited by defendants' counsel can have no bearing on the case at bar. 8 R. 440, Schandt vs. Frey; 14 Ann. 596, Bauman & McElroy vs. Bradford; 20 Ann. 254, Brou vs. Becuil; 28 Ann. 855. Morris & Co. vs. White; 26 Ann. 376, Garner vs. Goy; 19 Ann. 260; 20 Ann. 264.

To illustrate the inapplicability of the principle contended for, we quote from 14 Ann. 596, as follows:

"If one mortgages property not his own, and without any authority, to guaranty a negotiable promissory note, the mortgage is without any effect.

"A party taking a negotiable note secured by mortgage must incur

Bank vs. Trudeau et als.

the risk that there may be other parties who may successfully oppose his mortgage.

• • • • •
 "If the mortgagee were the pretended owner of the property by a simulated sale, the negotiability of the note cannot give force to the act of mortgage, and thus transform a simulated sale into a real one.

"The negotiability of notes cannot destroy the rights of *third persons* to real property, who are *no parties* to the note, and perhaps know nothing of its existence.

"It is true that the transfer of a note carries with it its accessions, and the mortgage is an accessory, but the mortgage is conveyed only so far as the person giving it was entitled to create it."

Undoubtedly Emile Trudeau was entitled to, and did create a mortgage and vendor's lien to the full extent of his acquisition of property under the act of sale from Manuel Elliott. To that extent it can be enforced by plaintiffs. In this manner the question of the alleged diminution of price, growing out of the deficiency in quantity of land, is eliminated from discussion.

III.

If this were not the case, the defendants clearly had no right to delay trial on the notes, until he could litigate this question with their vendor and warrantors, because neither the heirs of Manuel Elliott, nor Manuel Elliott, occupied such relation to the *notes* sued on as to justify it.

The notes having been executed to the order of the maker and by him indorsed in blank, and payable to bearer, and no further indorsement was necessary to pass title thereto, and any subsequent indorsement thereof was either an accommodation or an act of suretyship.

When, thereafter, the maker and indorser or his heirs procured an extension of time without their consent, such persons are discharged from all liability and ceased to be parties or persons to the contract through their act. Having thus discharged them when they wanted further time to make payment, they cannot now equitably claim the right to postpone proceedings until they can have a reckoning with them on their call in warranty.

We think the judgment of the lower court was correct, and it is therefore affirmed.

Judgment affirmed.

Ashbey vs. Ashbey..

No. 9725.

MARY J. ASHBEY vs. JOSEPH N. ASHBEY.

The charge that a plaintiff sues in two capacities that are inconsistent with each other, should be taken advantage by exception. It is too late after judgment and by motion for a new trial.

An acknowledged account is barred only by the prescription of ten years.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

J. S. & J. T. Whitaker and Chas. S. Rice for Plaintiff and Appellee.

A. J. Lewis for Defendant and Appellant.

The opinion of the Court was delivered by

TODD, J. This is a suit on account rendered by the defendant to the plaintiff for moneys received by him as her agent, showing a balance due plaintiff for \$5,437.92.

There was a plea of prescription of three years filed by the defendant.

This was overruled.

An answer was then filed which averred payment of the debt.

There was judgment for the plaintiff and the defendant has appealed.

In this Court he insists that the judgment was not in conformity to the pleadings. That plaintiff sues for herself individually and for her children as natural tutrix indeterminately.

This is not correct. The language of the petition is as follows: "The petition of Mary J. Ashbey * * natural tutrix of her minor children duly appointed under an order rendered by the late Second District Court," etc. The judgment was rendered in her favor as tutrix. It is true that in the body of the petition it is alleged that the defendant "is indebted to her in said capacity and individually," but that allegation does not of itself constitute her a plaintiff in her individual capacity, particularly in view of the plain language of the petition above quoted, in which she clearly sets forth herself as petitioner or plaintiff in the capacity of natural tutrix of her children.

Even if there was inconsistency in the pleadings or the allegations of the petition on this point, it could only have been taken advantage of by an exception *in limine*, and there was no exception filed. It was for the first time presented in a motion for a new trial, which was too late.

The plea of prescription was properly overruled.

38	902
121	363
121	685

Von Hoven vs. Weller.

The account was an acknowledged account, subject to the prescription of ten years.

There is no merit whatever in the defense.

Judgment affirmed.

No. 9712.

JACOB VON HOVEN VS. BARBARA WELLER, HIS WIFE.

In an action for divorce predicated on a previous judgment of separation from bed and board, rendered one year previously, it is incumbent on the plaintiff to allege and to prove that in the mean time no reconciliation had taken place.

The failure to make such proof is fatal to plaintiff's case.

He must make proof of all elements imposed as conditions precedent to the judgment which he seeks to obtain.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lasarus, J.

B. E. Forman for Plaintiff and Appellant.

Defendant unrepresented.

The opinion of the Court was delivered by

POCHÉ, J. This is a suit for divorce by the husband, predicated on a judgment of separation from bed and board rendered in his favor, one year previous to his present action, and the absence of reconciliation.

The wife made no defense in the lower court, and makes no appearance before this Court.

Plaintiff prosecutes this appeal from a judgment of non-suit against him.

The judge rested his conclusions on the failure of plaintiff to prove want of reconciliation between the date of the judgment of separation and the institution of the present suit.

He is sustained by the record as well as by the law of the case.

Art. 139 of the Civil Code grants the right of divorce to the party who has obtained a judgment of separation from bed and board, "when one year shall have expired from the date of the judgment of separation from bed and board, and no reconciliation shall have taken place."

A proper construction of the article leads to the conclusion that the success of the plaintiff in such a suit for divorce depends upon proof of the existence and combination of three essential and distinct elements, namely: first, a previous judgment of separation from bed and

Von Hoven vs. Weller.

board; second, the expiration of one year since the rendition of the judgment; and third, the absence of reconciliation between the parties since the rendition of the judgment.

The failure of proof of one of these elements or conditions, is as fatal as the omission of either or of both of the others. The conditions precedent imposed by the law are absolute, and mandatory, and no valid judgment can be rendered in default thereof.

Hence in the case of Daspit vs. Ehringer, 32 Ann. 1174, this Court said: "No other evidence having been introduced to show the absence of reconciliation, the plaintiff should have been non-suited."

Plaintiff's counsel invokes the rule of law that the burden of proof is on the one who holds the affirmative; hence he contends that the defendant is bound to allege and prove a reconciliation.

A ready answer to that argument is supplied by the Code itself, and by the record which shows that the defendant has made no appearance.

The case was put at issue by a default, which is equivalent to a general denial, with the burden of proof on plaintiff.

Cases resting upon special laws, cannot be tested under general principles.

In such actions as the present, the Code imposes on plaintiff the burden to allege and to prove the existence of the three conditions imposed by it, as hereinabove enumerated.

And this requirement is in perfect harmony with the general rule that in all actions the plaintiff must make out his case with legal certainty.

The whole theory of our law on the subject of divorce and of separation from bed and board, is to grant relief to one of the spouses, from wrongs on the part of the other which render their living together insupportable; hence a reconciliation is construed as a waiver of the complaint, and is held as a bar to any further proceeding.

Art. 152 of the Code reads: "The action of separation shall be extinguished by the reconciliation of the parties, either after the facts which might have given ground to such action, or after the action has been commenced."

Such would be the legal effect of a reconciliation between the parties after the judgment of separation from bed and board, in a subsequent demand predicated on said previous judgment.

It was therefore incumbent on plaintiff to prove the want of such reconciliation, as a condition precedent to his success in the present action.

Centennial Exposition vs Railroad Company.

We therefore hold that the failure of plaintiff to prove the absence of reconciliation was fatal to his case.

Judgment affirmed.

No. 9756.

38 906
48 1459

THE WORLD'S INDUSTRIAL AND COTTON CENTENNIAL EXPOSITION VS.

38 906
117 1071

THE CRESCENT CITY RAILROAD COMPANY.

An appeal, in which the transcript was not filed within three judicial days after the return day, and in which a motion for extension of time was not seasonably made, will be dismissed, notwithstanding an order extending the time, but granted after the expiration of the legal delay prescribed for making the same.

Such orders are granted at the risk of appellants, and will not save the appeal when it appears that they were inadvertently made.

The absence of counsel does not fall within the category of circumstances beyond the control of an appellant, and is not a sufficient excuse for not filing a transcript in time, or making a seasonable motion for additional delay.

A PPEAL from the Civil District Court, Parish of Orleans.
Tissot, J.

Breaux & Hall and E. M. Hudson, for Plaintiff and Appellant.

John M. Bonner, for Defendant and Appellee.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHE, J. This appeal was made returnable on the third Monday, which was the 19th day of April, 1886, and the transcript was filed here on the 6th of June following.

On the 5th day of May, 1886, appellant obtained from this court an extension of thirty days to bring up the transcript.

The point of appellee's motion is that the application for an extension of time was not seasonably made, as more than three judicial days had elapsed between the return day and the date of the motion for time.

The point is well taken, and the motion to dismiss must prevail.

Nine judicial days are shown by the minutes of this court to have elapsed between the 19th of April, the return day, and the 5th of May, the day on which the motion for an extension of time was presented to this court.

In the case of the succession of Kuntz, 33 Ann. 30, we showed that orders for extension of time in such matters were altogether at the risk of the appellant, who would not be protected by the order, in

Centennial Exposition vs. Railroad Company.

delaying his transcript, if it should subsequently appear that the motion had not been seasonably made, and that the order had, in consequence, been granted inadvertently.

These considerations are not disputed or resisted by appellant's counsel, but their contention, supported by the affidavit of the senior counsel, is that the failure to bring up the transcript or to file a seasonable motion for additional time, is due to the unforeseen absence of the affiant, who was called away on professional business to Washington, D. C., whence he returned only on the 1st day of May. Hence appellant should not be held responsible for circumstances beyond its control.

Their main reliance is on the rulings in the following cases, which we have examined with great care, but which do not bear out appellant's pretensions.

In the case of *Kirkland vs. His Creditors*, 8 N. S. 597, the court relieved the appellant from the effect of a delay caused by circumstances beyond his control. But the circumstances are not recited or mentioned in the opinion—hence that case does not sustain the proposition that the absence of counsel falls within the category of circumstances as contemplated by the court. While on the other hand, the illustrations used by Judge Martin, in the opinion, go a great way to exclude it. He says: "The clerk of the inferior court may die, be disabled by sickness or a great pressure of business, from making out the transcript, or he may neglect or wilfully omit."

In the case of *McDowde vs. Read*, 5 Ann. 42, the absence of counsel, coupled with an agreement with the clerk below, that he would prepare all transcripts of cases appealed by him, and an agreement with the clerk here that he would file all such transcripts without exacting security for costs, were held to be insufficient circumstances to save an appeal filed after legal delay.

In the case of *Fuscich vs. Starke*, 9 Ann. 21, the appeal was dismissed as brought up too late, notwithstanding an affidavit contesting the legality of an intervening term of this court, from which judicial days had been computed against the appellant.

The case of *Wright & Co. vs. Brander*, 17 Ann. 187, went off on an affidavit embodying, among numerous others, the very excuse which is tendered in the instant case. The court said emphatically: "The absence of counsel furnishes no cause for excuse for not complying with the forms of the law."

Following up the decisions of the court from that time to the present day, we find an encouraging current of authority in the same

Scooler vs. Alstrom.

sense. It is true that an appellate tribunal will always and firmly protect the constitutional right of appeal, but on the other hand, the court must not lose sight of the legal rights acquired by an appellee through the omission or neglect of his opponent.

The rule that the absence of counsel is not a circumstance beyond the control of an appellant, sufficient to operate as an excuse for a delay otherwise unaccounted for, must apply with irresistible force to this case, in which the record shows that appellant was represented by a law firm, of which the affiant was senior, and by a third attorney joined to them as counsel. And surely it cannot be pretended that the absence of one of three attorneys left the client without counsel or professional guides. *Chretien vs. Poincy*, 33 Ann. 131; *Pierce vs. Cushing*, 33 Ann. 401; *DeBouchel vs. Husband*, 34 Ann. 102; *Succession of P. G. Quinn*, 37 Ann. 391.

Our conclusion is that on the 5th of May, when the motion was made for an extension of time to bring up the transcript, appellant had forfeited all its rights to the appeal prayed for, by reason of its neglect or omission to present a seasonable motion for additional time, and that the order then inadvertently granted, did not, and could not, have the legal effect to revise the appeal.

It is therefore ordered that this appeal be hence dismissed at appellant's costs.

No. 9726.

M. SCOOLER vs. W. ALSTROM.

An attachment bond made payable "unto James T. Clark, Clerk of the Civil District Court and his successors in office," etc., is a bond in favor of the clerk of that court as required by the law, and is not invalidated by the fact that Clark had ceased to be clerk and had been succeeded by another. The bond being judicial is to be construed according to the law under which it was executed; and moreover, the terms "successors in office" clearly embraced the actual clerk.

Garnishees who provoke unnecessary litigation in resisting the enforcement of their obligations, must bear the costs when the decision is against them.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Breaux & Hall for Plaintiff and Appellee.

Francis B. Lee for Garnishee, Appellant.

The opinion of the Court was delivered by

FENNER, J. Under a writ of attachment issued against the non-resident defendant, plaintiff made the Honduras North Coast Railway

38 907
47 715

Scooler vs. Alstrom.

and Improvement Company a party garnishee, and its answers disclosed that the corporation held for defendant 1150 shares of its own stock.

Judgment was rendered against defendant, with privilege on the property attached. Execution was issued, and the stock was sold thereunder and adjudicated to the plaintiff.

A rule was then taken upon the corporation to show cause why it should not accept the transfer of the stock and issue a certificate therefor in favor of the purchaser.

The sole objection urged by the garnishee is that the judgment was rendered against defendant upon void proceedings, in that the defendant was not cited and did not appear therein, and in that the attachment was insufficient to bind him or his property because issued upon a defective and illegal bond.

The only defect in the bond urged here is that it was made payable "unto *James T. Clark*, Clerk of the Civil District Court, and his successors in office," etc., whereas *James T. Clark* had then ceased to be clerk and had been succeeded by another.

Without expressing an opinion on the right of the garnishee to raise objections of this character, it suffices to say that the objection urged has no force whatever. The bond is a judicial bond executed in pursuance of Act 103 of 1870, requiring such bonds to be "made payable to the clerk of the court which issues the writ." It is well settled that judicial bonds are to be construed by the laws under which they are executed, rejecting surplusage and supplying omissions. *Ricks vs. Gantt*, 35 Ann. 923; *Nugent vs. McCaffrey*, 33 Ann. 272; *Gibles vs. Lessor*, 29 Ann. 272; *Mason vs. Fuller*, 12 Ann. 68; *Slocomb vs. Robert*, 16 La. 174; *Webb vs. Thorn*, Id. 196.

The insertion of the name of the former clerk was clearly surplusage. Besides, the bond, being in favor of "his successors in office," embraced the instant clerk.

The precise objection has been recently considered and pronounced of no merit. *Schlieder vs. Martinez*, 38 Ann. 847.

The garnishee's claim to be exempted from costs, even under a decision adverse to him, on the grounds that he is a mere stakeholder, that the question of his right to pay was doubtful, and that a contest and appeal were essential to his protection, has no force. He cites no precedent for excepting him from the general rule throwing costs on the defeated party; and even if we might, under proper circumstances, establish such an exception in favor of a garnishee, this case presents no claim to it.

Pilsbury vs. Friedlander et als.

We have examined all of the numerous cases cited by him, as justifying his doubts of the validity of an attachment based on such a bond, without finding one tending in that direction; any more than his citation of *Wilkinson vs. Broughton*, Manning's Unr. Cases, 243, supports his contention that the judgment on his rule of the district court was insufficient to protect him without an appeal to this Court. That authority merely held that a payment by a garnishee during the pendency of a devolutive appeal by the defendant from the judgment, would not discharge him if the latter were reversed on appeal. It has no bearing on the instant case, in which the defendant has never appealed in any way.

Judgment affirmed.

No. 9718.

GEORGE PILSBURY VS. JULIUS FRIEDLANDER ET ALS.

Under a contract wherein a firm or commercial partnership undertakes to furnish the capital required to prosecute a designated enterprise to a third person named, who agrees to manage and control same through his influence, and the *net* profits thereof are to be equally divided, the expense thereof is upon the latter, unless the contrary is stipulated or agreed upon.

A PPEAL from the Civil District Court for the Parish of Orleans.
Lazarus, J.

Chas. Louque for Plaintiff and Appellant.

Braughn, Buck, Dinkelspiel & Hart for Defendants and Appellees.

The opinion of the Court was delivered by

WATKINS, J. The plaintiff alleges "that on the 15th day of April, 1884, * * whilst in Belize Honduras, he was employed by the late commercial firm of J. Friedlander & Co., then composed of H. Leopold, Julius Friedlander, Henry Viavant and Albert Pilsbury * * as solicitor and representative of said firm in said country; that no terms were made with petitioner" (as to) "his salary for employment."

He alleges that he worked faithfully for, and represented his principals "until the 16th day of June, 1885, at which time said firm repudiated their contract with" him.

He alleges further that, during the fourteen months he worked for said firm "he only received from them the actual cost of his traveling expenses," and that his services were "well worth the sum of \$150 per month, for which all the members of the firm are responsible *in solido*" and he prays judgment against them for \$2100.

Pilsbury vs. Friedlander et als.

Henry Viavant and Albert Pilsbury accepted service and made no appearance or defense, and judgment by default was entered against them; but Friedlander and Leopold appear and answer, and resist the plaintiff's demands.

In their answer they specially deny that plaintiff was at any time in their employ, or in the employ of the firm of J. Friedlander & Co.

They represent that, during the existence of the firm of J. Friedlander & Co., "Albert L. Pilsbury became interested in a *certain portion* of their business, that is, the portion relating to their Central and South American trade," and he procured the services of his brother, the plaintiff, and that, "though drafts were drawn on the firm * * * for the expense of George Pilsbury, same were never paid except upon the approval of Albert L. Pilsbury, and were charged to his individual account."

They further represent "that all the correspondence of George Pilsbury, relating to the business done by him, was addressed to and answered by A. L. Pilsbury individually, and in no case was same done by either one of respondents, or by the firm of J. Friedlander & Co."

I.

The only serious question presented for our consideration is whether the plaintiff was ever actually and really employed by J. Friedlander & Co, or not. He does not claim that any definite arrangements were made as to what his compensation should be or for what length of time he should work, or whether by the month or year.

Quite a number of witnesses were examined, and the usual conflict of testimony occurs.

An examination of the evidence has satisfied us of the following facts substantially.

That the firm of Pilsbury & Sons failed in business, and George Pilsbury went to Honduras for the purpose of making collection of its assets, and was thus employed in 1884, when he began operations there for his brother, A. L. Pilsbury, who had made a contract with J. Friedlander & Co., appertaining to the Central American business.

This agreement was to the effect "that all profits arising out of the business contracted by A. L. Pilsbury, or brought under the management of the firm through his influence, either directly or indirectly, shall be equally divided as to the net results between the parties."

That H. Leopold had exclusive charge of the office, and the engagement of employees of the firm, to the knowledge of A. L. Pilsbury; and that, notwithstanding H. Viavant, while in Belize, in June, 1884,

engaged the plaintiff to represent the firm and published, in a Honduras paper, a card to the effect that "J. Friedlander & Co., would *continue the business of Messrs. Pilsbury & Sons, under the superintendence of Messrs. A. L. Pilsbury and George Pilsbury*;" but he made no arrangement with regard to George Pilsbury's salary, but says, he "left that to be settled by his brother, who was better able to fix his salary."

As a member of the firm, Mr. Viavant states that his sole duty "was to buy spot cotton;" and his publication of the card in the Belize paper was unknown to the firm of J. Friedlander & Co., until January, 1885, when it was repudiated and withdrawn.

On the 16th of June, 1885, the plaintiff voluntarily discontinued his employment in Honduras, and returned to New Orleans.

During the term of his employment plaintiff conducted his business correspondence exclusively with his brother, A. L. Pilsbury, and produced none of their letters on the trial.

The only letter that was produced by plaintiff, and introduced in evidence, signed by J. Friedlander & Co., opens in this wise, viz:

"George Pilsbury, Esq., Honduras:

"*Dear Sir—By request of Mr. A. L. Pilsbury, we take the liberty of addressing you regarding the Honduras business, which can be, under proper management and careful solicitation, worked up to some magnitude.*

"Viavant returned, but his trip seems to have accomplished little," etc.

This letter bears date at New Orleans, July 7, 1884, but makes no mention of plaintiff's employment by Viavant, who had then just returned from Honduras.

Plaintiff drew on J. Friedlander & Co. from time to time, and for small amounts, to cover his expenses while in Honduras; but he notified his brother, A. L. Pilsbury, and when same were received, J. Friedlander & Co. called the attention of A. L. Pilsbury to them, and procured his consent to pay them, and charge same to his account. Plaintiff had no account with them during the period of his employment.

The plaintiff never demanded payment of any specific salary from the firm, and received no payment on that score.

When he returned from Honduras he called at the office of J. Friedlander & Co., and requested permission of Mr. Leopold and Mr. Viavant to see his brother's books in order to ascertain his *brother's interest* therein, and, at that time, told Mr. Leopold, "that, although he had no contract with his brother, *he was entitled to one-quarter interest.*"

State ex rel. Levet vs. Lapeyrollerie.

Previous to this he had called upon his brother for a settlement.

At that time plaintiff claimed that this one-quarter interest meant "no more and no less than the half interest of * * * A. L. Pillsbury," and that same was his understanding when he returned from Honduras.

A lot of cards were printed for the firm of J. Friedlander & Co., with the name of the plaintiff printed or stamped in red ink across their face. Of them plaintiff says, as a witness: "I don't know who sent them; they were sent by the firm; my brother wrote me as he did usually. All the correspondence was done with my brother."

A. L. Pillsbury ordered the cards, and sent them to the plaintiff, but the evidence fails to disclose that the firm of J. Friedlander & Co. had knowledge of it.

There was kept a separate set of books for the Central American business, of which A. L. Pillsbury had the management, and it was distinct and separate from that kept for the cotton commission business of J. Friedlander & Co.

Mr. Beer states that when he met plaintiff in Honduras he did not claim to then represent J. Friedlander & Co. "He claimed that Messrs. J. Friedlander & Co. were simply *agents for Mr. Pillsbury and brother.*"

The statements made by George Pillsbury, Henry Viavant and A. L. Pillsbury do not fairly correspond as to the plaintiff's employment.

Under this summarized statement of facts we conclude that the alleged contract of employment sued on by plaintiff, is not supported by the evidence.

There is no reasonable doubt of the valuable services rendered by the plaintiff whereby this Central American adventure became a success for a time; but, under the contract of the parties, as interpreted by the evidence, the plaintiff cannot recover of the defendants, Friedlander and Leopold.

Judgment affirmed.

No. 9767.

THE STATE EX REL. J. M. LEVET VS. CHARLES AND ANTOINETTE
LAPEYROLLERIE.

Where the execution of a judgment of an inferior court is sought to be prevented by means of a writ of prohibition on the ground of the want of jurisdiction in the court rendering the judgment, the circumstance that such court had overruled the plea to its jurisdiction, and assumed jurisdiction of the cause, does not debar this Court from reviewing

38 912
51 1702

38 912
1125 1036

State ex rel. Levett vs. Lapeyrolerie.

the question of said court's jurisdiction and its ruling thereon. In fact, before that court took jurisdiction of the cause, an application to this Court for its interference would be premature.

The object or purpose of a suit or the matter in dispute should be determined not by the prayer of the petition alone, but from the body of the petition in conjunction with the prayer.

Even if the prayer does not ask in plain terms the decree that the allegations of the petition would clearly warrant, such omission will not prejudice the petitioner's right to recover on the averments of his petition, where they are sufficient to sustain the proper action and decree, and there is a prayer for general relief.

A PPLICATION for Prohibition.

T. J. Semmes & Legendre for the Relator—(not of counsel in the original suit)

G. Leche, L. DePoorter and J. D. Augustin for the Respondents.

The opinion of the Court was delivered by

TODD, J. The relator obtained a judgment against the respondents in the district court of the parish of St. John the Baptist. From this judgment an appeal was taken to the Circuit Court of Appeals for said parish.

In that court a motion to dismiss the appeal was made on the ground of want of jurisdiction in said court *ratione materiae*.

This motion was denied and the court proceeded to try the cause, and reversed the judgment of the district court.

The ruling of the court on the question of jurisdiction was made in the same decree that pronounced on the merits of the controversy.

The plaintiff in said case then applied to this Court for a writ of prohibition directed against the defendants in said case to prevent the execution of the judgment rendered by the said Circuit Court of Appeals, on the ground that said court had usurped jurisdiction of said suit, and that the judgment was consequently null and void; and this is the matter now before us.

1st. We are first met by an exception to the proceeding on the part of the respondents substantially to the effect that the question of jurisdiction was formally presented before said Court of Appeals by the motion filed therein to dismiss the appeal, and was determined by that court; and that its action on the subject was final and cannot be reviewed by this Court under or by a writ of prohibition.

We have repeatedly held that a writ of prohibition would not lie to prevent an inferior court from taking jurisdiction of a cause in advance of any action by that court assuming jurisdiction—that such a

State ex rel. Levet vs. Lapeyrollerie.

proceeding would be premature until such action had taken place. State ex rel. Matt vs. Rightor, Judge, 37 Ann. 843; State ex rel. Girardey vs. O. B. Steele et al., 38 Ann. —

Should we now hold that the writ would not lie after the court had assumed jurisdiction, and that such action of the inferior court was beyond review, it would be virtually closing the door to relief in all cases where it was charged that jurisdiction had been usurped by such court.

We therefore conclude that there is no force in the exception, and that the question of jurisdiction in the said Court of Appeals over the subject-matter of the suit referred to is properly before us for determination.

2d. A reference to the petition in said suit of Levet vs. Charles and Antoinette Lapeyrollerie, filed in the district court of St. John the Baptist and above referred to, shows that the plaintiff in said case—the relator herein—claimed to be owner of a real servitude established for the benefit of a plantation belonging to him, over a plantation or tract of land the property of the defendants in the case—the servitude consisting of a canal cut through the land of said defendants for the drainage of his, relator's, plantation. He charged that the said defendants had threatened and attempted to close up the said canal; and it was further alleged quoting from the petition "that defendants' action in closing said canal as aforesaid, or otherwise infringing upon the rights of servitude in favor of the property owned by the petitioner, would cause him an irreparable injury. That the conduct of defendants which made this injunction necessary has damaged him to the extent of five hundred dollars."

The prayer of the petition is as follows:

"Wherefore, petitioner prays that defendant be cited, etc.; that a writ of injunction issue enjoining, etc., from closing up or in anywise obstructing the said ditch," etc. * * *

"That after legal delays and due proceedings, said injunction be made perpetual, and defendants *condemned to pay* petitioner the sum of *five hundred dollars* as damages, and costs of suit, and for general relief," etc.

The judges of the Circuit Court construed this prayer to limit the matter in dispute simply to the amount of the damages claimed, and thus concluding assumed jurisdiction of the cause. We note as a singular fact, however, that though they ruled that the issue was thus restricted, in the opinion rendered by them they entered fully into the question of the servitude claimed and rejected the relator's claim

thereto. It is satisfactorily shown by the record that this right of servitude was worth \$14,000. If that was in contest in the suit, and by their opinion and decree the judges virtually so held, it was clearly beyond their jurisdiction.

It is true, considering the claim set out in the body of the petition, and the language of the petition respecting it quoted above, that the prayer seems very meagre, and certainly shows inartistic and defective pleading, and has produced the whole difficulty in the case.

It seems to us that, when the Circuit Court confined the demand in suit, under their construction of the prayer of the petition, solely to the damages asked for, it might be reasonably argued that the only logical judgment it could have rendered was the dismissal of the suit. For it is to be noted that when the suit was commenced the canal was neither wholly nor partially closed, but it was merely alleged that the closing of it had been threatened or attempted, and that five hundred dollars damage, or any damage in fact, could have been caused by a mere threat or attempt to do an act, seems somewhat problematical.

The error committed by that court (and we hold that it was in error) was in testing the matter in dispute by the narrowest construction of the language of the prayer of the petition.

It is clear to our minds, from the plain wording of the body of the petition touching the claim therein, which is accurately and explicitly set forth as to its character and mode of acquisition, considered together with the prayer of the petition, that the sole object or purpose of the suit was to secure to the plaintiff therein the benefit of the servitude or right of drainage claimed, and to prevent its destruction. And we hold that to determine the matter in dispute in a suit it is essential to be guided and governed not alone by the verbiage of the prayer, but that the entire petition should be considered. 3 Ann. 268; 10 Ann. 719.

And it has been further held that a mistake in the prayer of the petition will not prejudice a plaintiff's right to recover on the averments of his petition where they are sufficient to sustain the proper action, and there is a prayer for general relief. 15 Ann. 426.

When we make, however, a critical analysis of the language of the prayer of the petition, considered with reference to the plain averments in the body of the petition, it seems plain that the demand made even by the prayer is substantially to establish judicially the right to the servitude claimed.

State ex rel. Savage vs. Judge, etc.

As before stated, the character of the servitude is fully described, as likewise its use and benefit to the claimant; how it was acquired, and the irreparable damage that would be caused by its destruction or loss, and then follows the prayer that the defendants be enjoined "from closing or obstructing in any manner the canal, and that the injunction be perpetuated." In other words, a decree was asked by which the use and benefit of the canal—which the petitioner then enjoined—should always be preserved to him, and this prayer necessarily included the recognition of the relator's right to it.

Our conclusion is that the Court of Appeals exceeded the bounds of its jurisdiction in determining and trying and rendering judgment in the case of J. M. Levet vs. Charles and Antoinette Lapeyrollerie, above referred to, and that said proceedings and judgment of said court are null and void, and that the judgment of the district court was in no manner disturbed thereby.

It is, however, urged as a bar to any action by this court, that the judgment of the Circuit Court had been executed by closing the canal in dispute by the respondents herein, and that therefore the writ came too late. Even could we take cognizance of such a fact, which is made to appear only by the *ex parte* affidavit of respondents' attorney, still by the same affidavit it is shown that the canal, though thus closed, has been reopened by the removal of the dam closing it, and therefore it seems that the status of the matter in dispute had been restored, and is now just as it existed when the injunction against its closing was first issued by the court at the first instance.

The writ of prohibition is, therefore, made peremptory, at the cost of the respondents.

No. 9839.

THE STATE EX REL. M. J. SAVAGE VS. N. H. RIGHTOR, JUDGE, ETC.

Mandamus will not lie to compel a judge of the district court to grant an injunction which he has refused, when the case for injunction does not fall within any specific provision of law, but is based only on the general provision of Article 303, C. C., authorizing judges to grant injunctions when necessary "to prevent any injurious act." Such applications are addressed to the discretion of the judge, which is not subject to control under our supervisory jurisdiction.

APPPLICATION for Mandamus.

Alfred Goldthwaite for the Relator.

W. S. Benedict and *Henry Renshaw* for the Respondent.

State ex rel. Savage vs. Judge, etc.

The opinion of the Court was delivered by

FENNER, J. The facts out of which this application grows are briefly these :

McCall brought a petitory action against Savage to recover certain immovable property. Savage answered, setting up general and special defenses and praying, in event of judgment against him, that he be recognized as a possessor in good faith and as such entitled to the value of improvements and disbursements.

The district court rendered judgment rejecting McCall's demand and the latter took an appeal to the court of appeals. That tribunal rendered its final decree as follows: That there be judgment in favor of plaintiff and against defendant, "decreeing the said William John McCall to be the owner, *and as such entitled to the possession* of the property described in the pleadings." (describing said property) "and that the plaintiff's rights to sue for and recover the rents and revenues of said properties be and the same are hereby reserved; and it is further ordered, adjudged and decreed that there be judgment rejecting the reconventional demand of the said defendant, M. J. Savage, for disbursements in respect of said above described properties, as having been made too vaguely and indefinitely in his pleadings to entitle him to make any proof thereof on the trial, or to recover any judgment therefor in this action; with reservation to the said M. J. Savage of the right to sue hereafter, as he may be advised, for the recovery of any disbursements in respect of said property made by him and for which he may be entitled to recover according to law in a proper proceeding."

This decree was rendered executory by proper proceedings in the district court.

Thereupon, Savage, availing himself of the reserve in his favor contained in the decree, brought his action against McCall for his disbursements, alleging his possession in good faith and his right under Article 3453, C. C., to retain the property until he is reimbursed the expenses he has incurred on it. Further averring that McCall was about to execute the foregoing final judgment and thereby to dispossess him without such reimbursement, he applied for a writ of injunction, on due affidavit and bond, restraining such execution and dispossession until the reimbursement claimed was made.

The judge, after hearing the parties, concluded that it would be improper for him to enjoin the execution of a final decree of the appellate court having jurisdiction over him, which decree unambiguously recognized McCall as entitled to be put in possession of the property, without restraint or qualification, and he refused to grant the injunction.

State vs. Levy and Trégre.

Hence, this application for mandamus, in which relator, averring that it was the plain duty of the judge to issue the injunction, that his refusal was a denial of justice and that it will work him an irreparable injury for which he has no other adequate remedy, appeals to our supervisory jurisdiction for relief.

The case falls clearly and distinctly within the authority of *New Orleans vs. Telephone Company*, 37 Ann. 571, in which, after full discussion, we reached the conclusion summarized in the syllabus, as follows:

"In cases not falling within those specially provided in the Code of Practice or other statute as proper for the issuance of injunctions, but based on the general discretion vested in judges to grant injunctions when necessary to prevent any injurious act, the application is addressed to the sound and legal discretion of the judge."

We search the articles of the Code of Practice and the statutes without finding any provision authorizing injunction in the specific case presented by relator, except the last clause of Article 303; and having held that, as to applications under this general clause, "discretion is vested in the judge to determine whether the injurious act set forth is one proper for the exercise of the remedy by injunction," that at once removes the case from the pale of our supervisory jurisdiction. We use this power only to enforce the performance of duties imposed by law on inferior judges—never to control their discretion. The judge had the right to exercise his discretion in the matter, and having done so in evident good faith, the question whether he erred or not is utterly irrelevant in this application.

The case of *State ex rel. Murray vs. Judge*, 36 Ann. 578, on which relator relies, contains nothing inconsistent with the foregoing. The Court was there occupied with the general question of whether, in any case, mandamus would lie to compel the granting of an injunction, and we held that, in "clear cases," it would; but we, by no means, held that it would lie in all cases; and, indeed, refused it in that very case.

It is, therefore, ordered that the mandamus be denied.

No. 9768.

THE STATE OF LOUISIANA vs. LEON LEVY AND ANDREW TRÉGRE.

ON Application for Habeas Corpus, for the Privilege of Bail.

Sims & Poché, for the Relator.

J. L. Gaudet, District Attorney, and *F. C. Zacharie*, contra.

State vs. Morales.

By MR. JUSTICE POCHÉ ; MR. JUSTICE TODD concurring :

Considering that the commitment under which the defendants are held in custody emanates from the Judge of the Twenty-second Judicial District Court, a court of general jurisdiction and of special jurisdiction in the premises, and that the same was issued after a thorough preliminary examination, at which the accused introduced evidence, and were heard by counsel ;

Considering that the power of the Judges of the Supreme Court of this State to issue and entertain writs of *habeas corpus*, is one of original jurisdiction, concurrent with, and not superior to, the same power which is vested in district judges, (Constitution, arts. 89 and 115), and that the attempt of a judge or judges of the Supreme Court to review the commitment, shown to be regular and legal in form, issued by a competent district judge, would be in reality a sort of collateral appeal, not granted by law or sanctioned by the Constitution, (Church on Habeas Corpus, p. 304, and authorities therein cited ;) it must be held that the judges of the Supreme Court are powerless to review the commitment of the district judge, when it is issued after a preliminary examination, and that, therefore, the relief herein prayed for cannot be granted.

It is, therefore, ordered that the application for a *habeas corpus* made in this case, be dismissed, and that the application of the defendants to be admitted to bail be denied.

F. P. POCHÉ,
R. B. TODD,
Associate Justices.

No. 9771.

THE STATE OF LOUISIANA VS. STEPHEN MORALES.

() N Application for Bail by Writ of Habeas Corpus.

David N. Barrow, for the Relator.

Alex. Hébert, District Attorney, *contra*.

By MR. JUSTICE POCHÉ ; MR. JUSTICE TODD concurring :

After a preliminary examination by the district judge for the parish of Iberville, on a charge of murder, the accused was committed for trial without the benefit of bail, hence his present application for bail by means of the writ of *habeas corpus*, on the allegation that the

State ex rel. Smith vs. Judge.

testimony produced against him did not render the proof evident or the presumption great that he was guilty of murder, as charged.

The record shows that the preliminary examination was ordered at his own instance, that it was thorough and legal, and that he was heard by counsel; hence, that examination answers all the purposes contemplated by law to be afforded by the writ of habeas corpus; and the evident object of the present application is to obtain a review of the finding and order of the district judge. "The great and primary object of the writ of habeas corpus is to afford judicial relief to parties who are illegally deprived of their liberty." *State ex rel. Conden vs. Sheriff*, 36 Ann. 856.

In this case the accused has had judicial action by competent authority, on his application for bail, and it does not appear that he is illegally deprived of his liberty. Unless glaring injustice has been done to an accused by a district judge in a preliminary examination, the judges of the Supreme Court will not feel authorized to reverse the order therein rendered, by means of the writ of habeas corpus.

The circumstances surrounding this application are almost identical with the facts in the case of the *State vs. Levy and Tregre*, recently discussed, and the present application, must, as it should, share the same fate.

It is, therefore, ordered that the defendant's application for bail be denied, that the proceedings for habeas corpus be dismissed.

38	920
47	1601

88	920
120	377

No. 9841.

THE STATE EX REL. J. L. SMITH VS. THE JUDGE OF THE EIGHTEENTH
DISTRICT COURT, PARISH OF ST. TAMMANY.

Exceptions to the *form* of proceedings do not draw in question the jurisdiction of the court.

It is not until an exception to the jurisdiction of an inferior court has been filed and illegally overruled that a prohibition lies from this Court.

APPPLICATION for Certiorari and Prohibition.

White & Saunders, F. A. Guyol and W. B. Lancaster for the Relator.
Respondent *in propria persona*.

The opinion of the Court was delivered by
BERMUDEZ, C. J. This is an application for a prohibition.

State ex rel. Wood & Bro. vs. Judge.

The relator complains that the district court has illegally overruled an exception to its jurisdiction, and that it persists in passing on the *merits* of the controversy.

The district judge *denies* the *filing* of such exception and claims that he has a right to hear and determine the case.

The suit is one in which the election of relator as mayor of Mandeville is contested by one who pretends to have been elected to that office.

The exception which was filed charges:

1st. That plaintiff's petition was not filed in compliance with the law governing contested elections, and does not disclose a cause of action;

2d. That it was not filed in due time, is vague and indefinite;

3d. That it was not accompanied by the petition of voters required by law, and the defendant reserved his right to answer to the merits.

Those exceptions cannot be viewed as questioning the jurisdiction of the court over the controversy. Far from doing so, they invoke its exercise for the dismissal of the proceedings as irregular in point of *form*.

It has been repeatedly held that it is not until a formal exception or objection to the want of jurisdiction of the court has been filed or made, and illegally overruled, that a prohibition will issue.

The ruling in 35 Ann. 1104, does not apply to the instant one.

It is therefore ordered that the restraining order herein made be rescinded, and that the application be dismissed with costs.

No. 9773.

38	921
45	926
38	921
48	293

THE STATE EX REL. B. D. WOOD & BRO. VS. THE JUDGE OF THE
FOURTH CITY COURT OF NEW ORLEANS.

Where a court acts clearly within the bounds of its jurisdiction, and no vital defects or irregularities mark the proceedings in a case before it, this Court will not, under its supervisory powers, annul the judgment rendered in such case though it may be contrary to the law and the evidence.

Inferior courts should, as a rule, respect the decisions of appellate courts and be guided by their authority; but though it may be charged that the judge of an inferior court has refused to be governed by the decree of the appellate court, on an appeal from one of his own judgments in his (the inferior judge's) decisions in other like cases before him, this Court is without power to compel him to conform his action and conclusions to the views of such higher tribunal.

APPPLICATION for Certiorari and Prohibition.

State ex rel. Wood & Bro. vs. Judge.

W. S. Benedict and Henry Renshaw for the Relators.

T. M. Gill for the Respondent.

The opinion of the Court was delivered by

TODD, J. The relators, feeling aggrieved by the action of the respondent judge with respect to certain suits brought before his court against the relators by one James Sweeney, and judgments rendered therein, seeks relief therefrom by means of writs of *certiorari*, *prohibition* and *mandamus*. The facts relating to said proceedings, and the matters complained of and the causes of complaint, are almost identical with those reported in the opinion delivered by this Court in a case of a similar title and between the same parties. 38 Ann. 377. In that case the relief asked was denied.

There, as in this instance, the relator charged in substance that the plaintiff, in the suits filed in the respondent's court, had subdivided a large claim as alleged indebtedness of the relators into small sums and had instituted separate suits on the same—the amounts being unappealable; that judgments had been rendered therein contrary to the law and the evidence; that this mode of procedure was adopted in order that the relator should be unable to get relief from the illegal judgments by appeal; and that with the same view the judge refused to consolidate the cases, although the demands therein were but parts of the same alleged debt.

The only further ground of relief that he relies on in the present application is in effect that, since the decision of this Court in the previous case mentioned, one of the numerous suits before the respondent's court was found to be appealable and that an appeal had been taken from the judgment rendered therein; and that on appeal the judgment appealed from had been reversed; that a copy of this judgment of the appellate court had been exhibited to the respondent judge, but that he had persisted in rendering in the remaining cases pending before him similar judgments to his former ones.

It was also urged that the respondent had likewise disregarded a decision of this Court which was favorable to the rights of the relator in the suits of Swinney against him referred to.

After mature consideration, we have reached the conclusion that the further grounds urged in the application now before us, beyond those presented by the relator in the previous case referred to, do not bring him within the scope of the supervisory powers that may be exercised by this Court over the proceedings of inferior tribunals.

Each one of the suits instituted before the respondent judge, as was

State ex rel. Gaynor vs. Judge.

said in the previous case decided by us, was clearly within his jurisdiction, and there is no charge of the want of citation or any other vital irregularity in the proceedings.

As to the case appealed to the district court and the judgment therein reversed, there is nothing in the record before us to show us what facts were proved and what issues of law were presented either in the court of the first instance or in the appellate court where the case was tried *de novo*, and there may have been just reasons resulting from further or additional evidence or new legal questions presented justifying the judgment of the latter tribunal.

There are no transcripts of the proceedings and evidence in the two counts to enable us to verify the allegations of the relator that the case was tried upon the same evidence and legal issues. So that the reversal of the judgment rendered by the respondent judge in a single case cannot be held as conclusive that his conduct was arbitrary, illegal and unwarranted in the other cases as charged. If in the case appealed there had been a decree remanding the case and requiring the respondent judge to render some special judgment or do some specified act with reference thereto, and he had refused to do it, then there might have been some reason for the interposition of a higher court; but the judgment of the superior court in a single case was no imperative mandate to him to render a like judgment in similar cases, nor operated to entirely override and contro! his judicial discretion in such cases.

Putting it in the most favorable light for the relator, whilst it is proper as a general rule that the judges of all inferior courts should respect the authority of the appellate courts and be ruled by their decisions, we find no warrant in this Court, at least under the circumstances presented in this case, to compel them to do it.

The restraining order heretofore issued is therefore set aside, and the application for the writs mentioned is denied at the costs of the relator.

No. 9831.

THE STATE EX REL. JAMES S. GAYNOR VS. S. CHARLES YOUNG,
JUDGE OF NINTH JUDICIAL DISTRICT.

1. A mandamus lies to compel the performance of duties purely ministerial in their nature and so clear and specific that no element of discretion is left in their performance.
2. It will lie to judges of inferior courts, in order to require them to do justice according to the powers of their office, whenever they have delayed acting; and to prevent a denial of justice; and when the law has assigned no relief by the ordinary means; and when justice and reason require that some mode should exist of redressing a wrong or an abuse of any nature whatever.

38	923
49	883
38	923
152	1286

38	923
115	482
38	923
115	1085

State ex rel. Gaynor vs. Judge.

3. The writ will issue to compel a district judge to grant an injunction restraining a tax collector from collecting the tax of fifty cents per bale on cotton within the Fifth Levee District, authorized by Act 44 of 1886, until its alleged unconstitutionality can be judicially determined.

A PPLICATION for Mandamus.

L. F. Mason, Ph. Hough, Wm. T. Martin, Conner & Conner and Elam & Luce, for the Relator.

Steele, Garrett & Dagq for the Respondent.

The opinion of the Court was delivered by

WATKINS, J. Relator applied to the respondent judge for an order granting a writ of injunction restraining and prohibiting the tax collector of the parish of Concordia, and the Board of Levee Commissioners for the Fifth Levee District, "from proceeding further in the collection and enforcement" of the tax of fifty cents per bale upon 350 bales of cotton by him produced on his plantation in that parish during the year 1886, and authorized to be assessed, levied and collected under and by virtue of Act 44 of 1886. His petition is annexed, in which he demands an injunction upon the following grounds substantially, viz:

That the Board of Levee Commissioners of the Fifth Levee District "have levied a tax of five mills on the dollar on all the taxable property in said district, and a tax of five cents on each and every acre of land in said district, and fifty cents per bale on each and every bale of cotton in said district," and particularly upon his 350 bales, and which alone amounts to \$175; and he avers that, under the rules and regulations of said board, said tax is due, demandable and exigible; and that the tax collector is collecting, and attempting to collect and enforce, the said cotton tax upon his cotton; "and threatens to seize and sell, and will seize and sell, the said cotton * * * to enforce the payment of said tax; * * * and the said tax collector is authorized and commanded by the said levee board to enforce and collect the same," etc. He "avers that said T. K. Green, tax collector, has deputies stationed at all the points where plaintiff ships his cotton, to forbid and prevent plaintiff from shipping his said cotton, except on payment of said * * * tax."

He "avers that said Levee Board, under their rules and regulations, have prohibited and forbidden all steamboats, railroads and common carriers, under a severe penalty, to remove or transfer said cotton,

State ex rel. Gaynor vs. Judge.

* * * except upon the payment of said * * * cotton tax,"—all in pursuance of the provisions of Act 44 of 1886.

Petitioner avers that said act is unconstitutional, null and void, and the assessment of taxes thereunder is illegal, for various reasons, viz:

1st. That it is in violation of Article 46 of the Constitution, being a local or special statute having effect only in the parishes composing the Fifth Levee District, and no notice was given as required by Article 48 of the Constitution.

2d. That said act violates Article 203 of the Constitution, which requires that all taxes assessed shall be equal and uniform—said cotton tax being neither equal nor uniform.

3d. That said act authorizing the levy of said cotton tax was an interference with, and a regulation of, commerce between the States, and is in violation of, and in conflict with, the Constitution of the United States.

4th. That said act is in violation of Article 214 of the Constitution of the State, which limits taxation within a levee district, by the commissioners thereof, to five mills on the dollar of valuation—and that said cotton tax is in excess thereof.

5th. That said act embraces more than one object in its title, and is in violation of Article 29 of the Constitution.

This petition was accompanied by proper affidavit and suitable bond; yet the respondent judge declined to grant the order prayed for, in these words, viz:

"I decline to order a writ of injunction to issue as applied for in the foregoing petition for the reason that I do not consider that the *averments of the petition* authorize a writ of injunction to issue as prayed for."

Relator further charges that not only has said judge refused to grant said injunction, "but he has instructed and commanded M. A. Joyce, clerk," * * * in the absence of "himself from the parish, * * * to deny and refuse to grant any writ of injunction or restraining order" to him; and has threatened to punish said clerk for contempt if he did; and, that said clerk, acting under the respondent's instructions, has refused to grant the same.

He alleges that said refusal and denial of said judge, under the circumstances detailed, is a denial of justice and operates a deprivation of his legal rights and works him great injury.

The respondent judge for answer admits this refusal to grant the injunction prayed for, and justifies his action on the grounds, viz:

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1st. "That no allegation in the petition presents that the Levee Board, one of the defendants in injunction, was domiciled in Concordia parish; nor was there an allegation that said board had committed any trespass in said parish, or that they had done any act therein for which any action for damages lay," and that there was nothing to show "that the court of that parish had jurisdiction."

2d. That a writ of injunction does not lie in such a case, until a seizure has been made, "or at least, the allegations of the petition should show that the taxes are due, and steps have been taken to enforce payment."

3d. "The allegations of plaintiff's petition are too vague and indefinite to authorize the issuance of the writ." * * *

4th. "Instead of preserving the rights of all parties, the injunction, if granted, would practically annul, in advance of a judicial decree, a prohibitory law, and deprive the Levee Board of the security which the law gives them on the cotton."

5th. "As the ordinances of the Levee Board are not annexed to the petition, and are not referred to in such a way that the court can determine what regulations have been made for the collection of the tax, it is impossible to tell what the tax collector and the board are restrained from doing," etc.

Respondent then concludes by saying: "Respondent may have been of the opinion that act 44 of 1886, was entirely constitutional; if so, was he under any legal obligation to restrain its enforcement, because some litigant was willing to swear that, in his opinion, the law was unconstitutional?"

C. P. 296 provides: "Injunction * * * is a mandate obtained from a court by a plaintiff, prohibiting one from doing an act which *he contends may* be injurious to him, or impair a right which he claims."

It is not necessary, in order that he be entitled to the writ, that the act complained of be absolutely injurious *per se*, or that the right he claims shall be really and actually impaired.

C. P. 298.10 provides that "the injunction *must* be granted * * * to stay execution * * * when the sheriff is proceeding on the execution contrary to some provision of law," etc.

In *Shannon vs. Lane*, 33 Ann. 491, this court said: "Proceedings for the assessment and collection of taxes are assimilated, in many respects, to judicial proceedings, for which they are regarded as substitutes."

"The assessment, the record of the delinquent lists, and the tax

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collector's sale are the respective equivalents of judgment, seizure and execution sale."

Hence, this application for an injunction is not one addressed to the discretion of the judge to whom it was made.

In making a comparison between the writs of mandamus and injunction, it was very correctly said in High's Extraordinary Legal Remedies: "An injunction is essentially a preventive remedy, mandamus a remedial one.

"The former is usually employed to prevent future injury, the latter to redress past grievances.

"The functions of an injunction are to restrain motion, and enforce inaction, those of a mandamus to set in motion and compel action.

"In this sense an injunction may be regarded as a conservative remedy, mandamus as an active one.

"The former preserves matters *in statu quo*, while the very object of the latter is to change the status of affairs, and to substitute action for inaction." Sec. 6.

Mandamus is not necessarily conclusive as to the right in controversy. *Ibid*, sec. 11.

Mandamus will only lie to compel "the performance of duties purely ministerial in their nature, and so clear and specific that no element of discretion is left in their performance; but that as to all acts or duties necessarily calling for the exercise of judgment and discretion, on the part of the officer or body, at whose hands their performance is required, mandamus will not lie." *Ib.*, sec. 24.

Ministerial acts are those which are peremptory and absolute in their character. *Ib.*, sec. 34.

Mandamus will lie "to the judges of any inferior courts, commanding and requiring them to do justice according to the powers of their office whenever they have delayed acting." *Ib.*, sec. 148.

It only lies to compel the court to act; does not prescribe judgment. *Ib.*, sec. 149.

The object of this writ is "to prevent a denial of justice * * * and should, therefore, be issued in all cases where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong, or an abuse of any nature whatever." C. P. 830.

Under the circumstances detailed in relator's petition for injunction we think he was clearly entitled to the writ.

This case comes clearly within the principle announced in 29 Ann. 795. Beebe vs. Guinault.

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The respondent's objection that the relator's petition for injunction did not disclose jurisdiction in his court, is untenable. The act in question confers upon the sheriff and *ex-officio* tax collector power to collect said cotton tax in terms.

This tax is alleged to have been assessed by the Levee Board, and same was then in process of collection by the tax collector under instructions from the board, in the parish of Concordia, where the relator and his cotton then resided. The residence of the Board of Levee Commissioners, nor that of the members thereof, cannot control the jurisdiction. 23 Ann. 557, *Simpson vs. Hope, Sheriff*, and other like authorities.

It is, therefore, ordered, adjudged and decreed that the writ of mandamus be made peremptory, at the cost of respondents.

No. 9798.

THE STATE OF LOUISIANA VS. JOSEPH STEPHENS.

An appeal returnable at New Orleans on the first Monday in November in a criminal case, which ought to have been made returnable at Shreveport at the opening of the term, will be dismissed, where it is apparent that the return day is suggested by appellant in the body of his motion.

It will not relieve the appellant even if the return day was suggested by the judge.

The error of the judge was accepted and became that of the appellant, and is a fault imputable to him.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Roman, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee:

1. An appeal in a criminal case will be dismissed, *proprio motu* when made returnable on appellant's suggestion at an improper time and place. 38 Ann. 34, 42, 363; 36 Ann. 865; 35 Ann. 980; 32 Ann. 692, 542; 27 Ann. 540.
2. "Violently" is equivalent to "forcible," and conveys with technical accuracy the idea of force as involved in the crime of rape. Therefore, in an indictment for assault with intent to commit rape, the term "by force" is not sacramental, but may be supplied by the word "violently." 32 Ann. 336; Archb. P. and P. (Pomeroy's notes) p. 1011; Whar. Prec. of Indictment and Pleas, sec. 253; Stark C. P. 429; 1 Mood. C. C. 179; 96 and P. 521; 1 Whart. Cr. Law, sec. 573; 12 S. and R. 69; 8 Gray 859; S. P. 67; N. C. 33.
3. No rule exacts from a judge the adoption of the very language suggested by counsel for the accused in instructions to the jury which the latter may seek from the court. Nothing more can be required of the trial judge than to embody in charge the substantial meaning of an established principle of law invoked by the accused. 35 Ann. 1100, 970, 1150.

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4. A judge not only may, but should, refuse to charge an abstract legal proposition, which has no bearing on the case on trial, whether the proposition be correct or incorrect. 35 Ann. 970, 774, 1043; 37 Ann. 443, 576; 38 Ann. 41.

The bill of exception must show that defendant asked for instructions which had a material bearing on the case, and that he did not require the court to charge upon abstract principles of law. 6 Ann. 287; 12 Ann. 679; 23 Ann. 425; 34 Ann. 1084; 35 Ann. 770.

J. J. Foley for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. The Attorney General asks the dismissal of this appeal, because made returnable on an improper day, at the suggestion of appellant.

The sentence was passed on the 2d of September, and the appeal was moved for in writing on the 14th following, the court acting on the motion which merely asks for the appeal, suggesting the return day. It is not followed, as motions usually are, by the order of the court granting the appeal, returnable to this Court at the city of New Orleans on the first Monday of November, the day suggested in the body of the motion of appeal, under the signature of counsel for defendant.

The appeal ought to have been made returnable to this Court at Shreveport on the second Monday of October following, it being the place and time where this Court was first to hold session after the passing of sentence. Act No. 30 of 1878, secs. 1, 3, 4; *State vs. Laqué*, 37 Ann. 853; *State vs. Burns*, 363.

Counsel for appellant offered to file an affidavit to show that it was at the suggestion of the judge that the appeal moved for was made returnable at New Orleans.

He was not permitted to do so, for the reason that, conceding the fact, the suggestion instead of being declined was accepted, and thus the error of the judge became that of the appellant, to whom it is imputable.

It is therefore ordered that the appeal herein be dismissed with costs.

Fenner, J., dissents.

ON APPLICATION FOR REHEARING.

WATKINS, J. This application is made on the sole ground that, in dismissing the appeal, the opinion of the Court misinterpreted Act 30 of 1878, section 4 of which is, as appellant's counsel insists, as follows, to-wit:

"That all such appeals shall be made returnable to the Supreme

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Court within ten days after granting the order of appeal, *whenever* the said Court may be in session on the return day thereof."

He argues therefrom that, inasmuch as the order of appeal under consideration was granted on the 14th of September, 1886, at a time when this Court was *not* in session, the same was properly made returnable to this Court at its session on the first Monday in November, in this city, as it was.

This question has never been, in terms, decided; but it has, frequently, in effect.

The word "whenever," as employed in the Act, is meaningless, and destroys its sense.

Researches have clearly satisfied us that the word used in the text of the original act is *wherever*.

In construing that statute, as *printed* in the volume published, this Court has invariably given it effect *as written in the text*.

In cases quite similar to this one, it has been held that appeals should have been made returnable to this Court at its term *first* convening thereafter. That ruling is in strict keeping with the spirit of the law, and in harmony with the evident intention of the legislature.

Rehearing refused.

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45 1370

No. 9746.

M. DELUCAS VS. NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

Railroad companies, as public carriers, have the right to eject passengers from their cars for non-compliance with their reasonable rules.

The rules of a city railroad company, acting under a contract with the city, which requires the company to carry passengers over two sections of its line for one fare, which requires such passenger to keep and show, undetached by him, a coupon ticket, as a voucher of his right to continue on the car beyond a given point, are reasonable in law. Any passenger refusing to comply with said rules may be ejected from the car.

A PPEAL from the Civil District Court for the Parish of Orleans.
Houston, J.

R. H. Downing and *F. Kernan*, for Plaintiff and Appellant.

John M. Bonner, for Defendant and Appellee:

1. Carriers of passengers have the right to make reasonable rules and regulations for the management of their business.
2. The rule, requiring the blue coupon to remain on the strip of tickets until detached by the collector at Napoleon Avenue, under the double system of fare and the changing of

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all the drivers, where the second fare is collected, is not only reasonable but is absolutely necessary to secure the collection of the second fare.

3. Passengers are bound to observe the reasonable rules and regulations of the carrier, and should be expelled from the car for disobedience of them. *Hutchinson on Carriers*, §§ 569 to 573, 587, 588, 590; 71 Pa. St. 432; 56 N. Y. 300; 15 N. Y. 464; 51 N. Y. 105; 42 Am. R. 669; 34 Am. R. 277; 35 Am. R. 278; C. L. J., vol. 18, p. 394; 135 Mass. 407; *Wood on Railways*, p. 1429; *Thompson on Carriers of Passengers*, pp. 340, 375; 33 *Howard Pr. R.*, p. 327.
4. When expulsion is wrongful and unaccompanied with aggravating circumstances, the measure of damages is the actual loss sustained by the expulsion. *Rorer on R. R.*, vol. 2, p. 865, § 15; *Wood on Railways*, pp. 1433, 1439; 23 *Ohio St.*, p. 21; 39 *Ohio St.* 129, 134; 75 *Ill.*, 125, 132; 4 *Wal.* 605; 15 N. Y. 464; 56 N. Y. 300.

This is an action brought by the plaintiff against the defendant to recover the sum of \$5000 as damages for being ejected from one of defendant's cars.

The plaintiff obtained three small verdicts from three different juries, before the lower court, each of which was promptly set aside by the trial judge.

The case was then submitted to the court on the evidence and judgment was rendered in favor of defendant.

From that judgment the plaintiff prosecutes this appeal.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff seeks to recover damages in the sum of five thousand dollars against the defendant, for having been illegally and violently ejected by one of the company's employees from one of its cars on which he was a passenger.

He prosecutes this appeal from an adverse judgment. Verdicts rendered in his favor by two different juries had been set aside by the judge of the district court, who was finally authorized by consent to try the case without a jury.

It appears, from the record, that under a contract with the city of New Orleans, the defendant company obtained its franchise to run passenger cars from Canal street to Carrollton, formerly a suburban village, now a part of the city of New Orleans—a distance of six miles. The run between Canal street and Napoleon Avenue is made by cars propelled by mule or horse power, and between Carrollton and Napoleon avenue the cars are run by steam. At the avenue, the drivers who have come from Canal street go no further and return; the same change being made with regard to the engineers in charge of the cars on the upper section of the line.

In the contract the fare is fixed at five cents between Canal and Napoleon avenue, or any intervening point, and the same fare was required between Carrollton and the avenue or intervening points. But a concession was made in favor of actual residents of the city above Napoleon avenue, who had the privilege of making the whole run of the line for one fare, or five cents, provided they agreed to purchase

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not less than ten tickets at a time, at the price of fifty cents for the ten.

In carrying out that part of its contract the company issued bunches of tickets of ten each, to be sold only to actual residents above Napoleon avenue, every two coupons of which were intended to represent a ride on the cars above and below the avenue, either from Carrollton to any point below, or from Canal to any point above the avenue.

It then adopted and gave publication of, rules to regulate the manner of using such tickets—of which there were ten red and ten blue in each bunch, and perforated so as to be detached without effort and without mutilating either the detached or remaining tickets.

Under the rules of the company the red ticket, which was good for the first part of the ride either up from Canal or down from Carrollton, or intervening points, had to be detached by the passenger and by him deposited in the fare box. At Napoleon avenue there was a collector to receive all fares on every car, either up or down, and to him the blue ticket, corresponding to the red which had been put in the box by the passenger, was good for the balance of the ride; but, under the rules, and according to a notice printed on the ticket itself, the passenger was not allowed to detach it from the bunch, as it was not good if detached, by any one but the collector.

The company had given stringent orders to their collectors to vigorously enforce this rule, and to carry no passengers who would refuse to comply therewith. The system went into operation on the 1st of November, 1882, the rules, printed on paste-boards, had been posted at every station on the road and in every car, and had been published in all the daily papers in the city, for ten days before they were enforced. It is not denied that they were fully known to the plaintiff in this case.

Now it appears that on the 11th of November following, plaintiff, who resided above Napoleon avenue, entered one of the defendant's cars at a point above the avenue, on his way down to Canal street, and deposited one of the red tickets, hereinabove described, in the fare box. On reaching the avenue station, and the car being about to leave on the down trip, he was called on for his fare by one of the collectors, to whom he tendered a detached blue ticket.

This was refused by the collector with the information that under the rules it was not good unless detached by the collector himself, and that the party should either hand to the company's agent a bunch of tickets from which he could himself tear out a blue ticket, or pay the

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regular fare, either in currency or by means of a red ticket. On the party's refusal to comply with either of the designated modes, he was ejected from the car by the collector in charge, with the assistance of another collector, whom the former had called to his aid. The removal of plaintiff from the car was accomplished without violence and without unnecessary force.

The evidence is conflicting on several important points of the foregoing statement, but we consider the facts as we have related them to be established by the preponderance of the testimony in the record, after a close scrutiny and a careful analysis thereof.

Under these facts, the law of the case involves two propositions:

1st. Have public carriers the legal right to eject passengers from their cars for non-compliance with their rules?

2d. Were the rules of the defendant company now under discussion reasonable?

I.

Although public carriers have the duty of transporting all passengers for reasonable compensation, they are not thereby stripped of any of their rights of property and ownership over the appliances which they use for the transportation of such passengers.

They have, in common with all other parties, the right to enforce the performance of the contracts which they make with persons, looking to the transportation of such persons, and to remove any passenger who may refuse to comply with the stipulations of the contract.

A person who refuses to present or show his ticket, or to pay his fare when called on to do so, on a train or car, becomes a trespasser, and thus becomes liable to ejection exactly as any other trespasser could be expelled from premises which he had illegally entered.

Under certain circumstances it is not only the right, but the clear duty, of a public carrier as an act of justice to its other passengers, and under its responsibility for the safe and speedy transportation of its passengers, to eject or remove a recalcitrant or obstreperous person who wantonly refuses to comply with the reasonable and necessary rules adopted by the carrier. The indulged disorder or refusal of one passenger would engender the same conduct in others, and soon the travel would become neither comfortable nor safe.

A party who refuses to comply with the mode of paying his fare as agreed upon between himself and the carrier is under the same condition of one who refuses absolutely to pay any fare at all; and hence, the only alternative is to carry him for nothing, or to eject him if he

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refuses to leave when requested so to do. No one has the right to exact transportation of a public carrier without compensation.

II.

The question now recurs to the inquiry whether the rules of the defendant company were reasonable.

Under the contract between the company and the city, stipulating an advantageous exception in favor of actual residents above Napoleon avenue, the railroad company had the undoubted right to devise and adopt some means by which they could restrict the privilege thus contemplated to the persons for whom it had been intended. Now, as the employees in charge of cars below Napoleon avenue were not the same who had charge of the cars on the upper section of the line, it strikes us that the means adopted and hereinabove described were quite reasonable and exposed the parties entitled to the privilege to no serious inconvenience.

We must note that the condition of buying not less than ten tickets at a time by that class of persons was exacted under the terms of the contract by the city authorities, and for reasons which are very apparent.

Under the system adopted, the real consideration of the ride on the part of the residents above Napoleon avenue—either on an up or down trip—was the red ticket, and the blue ticket forming a coupon therewith and attached thereto was simply a voucher of the right of the party to continue his ride on the car beyond Napoleon avenue, which was the geographical centre of the contract. Now, in order to prevent either fraud or imposition on the company, either by imitations or by persons who could pick up the blue tickets and had not held the red one, which was the principal consideration of the contract, and so expressed on its face, it was certainly reasonable to adopt the rule that to be used as a voucher, the blue ticket should remain attached to the bunch, until it was torn therefrom by the agent or collector. Hence, we conclude that the rules of the company were reasonable, and that a non-compliance therewith by a passenger exposed him to be legally ejected from the car.

These views find sanction not only in reason, but are amply supported by most respectable authorities. Hutchinson on Carriers, sect. 569, 571, 572, 563, 587, 588, 590; Wood's Railway Law, p. 1429; Louisville and Nashville R. R. Co. vs. Harris, 42 American Reports, 669; Howard's Practice Reports, vol. 33, p. 327; Walker vs. Dry Dock, etc., Company, 15 New York Rep. 455; Hibbard vs. New York and Erie, 51

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New York Rep. 105; *Hamilton vs. New York Central R. R. Co.*, 56 New York Rep. 300; *Townsend vs. New York Central R. R. Co.*

Now, in the instant case, either the plaintiff had bought a bunch of tickets and had deposited a red one in the box, or he held no bunch. If he had, it was his duty to present the bunch to the collector so that the latter could detach the blue ticket, and his non-compliance therewith was a violation of his contract with the carrier which exposed him to ejection. If he had not owned a bunch of tickets from which he had detached the red ticket, then the blue ticket which he tendered to the collector was not the required voucher under the contract and under the rules—in that event he was simply an intruder on the cars, and his ejection therefrom was justifiable in law.

In either event the company has been guilty of no wrong towards him, and hence it cannot be held in damages.

Judgment affirmed.

No. 9731.

MRS. B. MASON ET AL. VS. E. L. BEMISS.

When an assessor finds a person in the quiet possession of property, as owner under an apparent title purporting to be derived from a judicial sale, he is justified in assessing the property in the name of the person thus holding.

He is not required to examine the court records and investigate the proceedings pertaining to the title claimed and determine the question of its validity before acting.

When at a succession sale the widow in community and the tutrix of the minor heirs (sole heirs) purchases a piece of property that belonged to the community, in order to receive a valid title under the adjudication, she is not compelled to pay over the amount of her bid, provided she is properly charged with it in the account of the administrator and the money is not needed to pay the debts, and where it is shown that after the payment of the debts a balance remains, which is paid over to her by the agent or the one entitled to receive it.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. S. Benedict and H. C. Cage for Plaintiffs and Appellees:

1. Title to real estate can neither be created or destroyed by parol evidence. 4 Martin, 475; 9 Rob, 414; 4 Ann. 229; 12 Ann. 54; 26 Ann. 445; 27 Ann. 198.
2. An assessment of property is similar to a judgment, and an assessment in the name of a wrong party not the owner of the property is equivalent to a judgment without citation, and any sale or execution under either is an absolute nullity and confers no right whatever upon the purchaser thereon. 24 Ann. 251; 32 Ann. 236, 925; 36 Ann. 392.
3. An assessment in a wrong name is equivalent to a judgment without a citation. It is an absolute nullity. 30 Ann. 295, 871; 32 Ann. 526; 29 Ann. 508; 32 Ann. 912; 28 Ann. 537; 34 Ann. 107, 193; 32 Ann. 526; 30 Ann. 175, 626, 950, 870; 29 Ann. 416, 112, 884; 33 Ann. 442; 14 Ann. 200; 12 Ann. 748; 11 Ann. 214.

38	935
51	809
51	976

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4. Where the assessment and tax sale thereunder are absolutely null and void, the tender of the interest, costs and penalties is not necessary before bringing any suit. 33 Ann. 529; 32 Ann. 926, 1292; 34 Ann. 706; 37 Ann. 356.

Nicholls & Carroll for Defendant and Appellant:

No tax sale can be annulled until the price paid, with ten per cent interest, be tendered to the purchaser. Const. art. 210; 28 Ann. 651; 24 Ann. 524; 33 Ann. 435.

An adjudication at probate sale shifts the title. C. C. 2608; 2 L. 501; C. C. 2623; 1 Ann. 201.

Where property is adjudicated to the surviving widow, and her bid figures in the administrator's account as cash, and, not being needed to settle the succession, the money is retained by her as surviving widow and usufructuary or natural tutrix—she and the administrator simply passing receipts—this transaction discharges the administrator, the title passes to the widow, and the recourse of the heirs must be against her in the final settlement. They cannot ignore the acts done by the widow or the adjudication which shifted the title. 12 Ann. 337; 30 Ann. 120; 24 Ann. 336.

A purchaser at judicial sale acquires a vested right, which is not divested until there be a final judgment ordering a resale at his risk. 13 Ann. 332; 23 Ann. 466.

If property be sold for taxes, and the owners do not redeem within one year, the purchaser acquires a complete title. Const. art. 210.

In a petitory action, plaintiff must win on the strength of his own, not on the weakness of his adversary's title. 10 M. 293; 12 R. 46; 11 Ann. 546; 22 Ann. 57.

Plaintiffs can never be granted more than they ask. 4 M. 289; 2 N. S. 241; 10 Ann. 487; 6 M. 525; 1 Hen., p. 731; Louque, p. 338, Nos. 2 and 3.

The purchaser at a tax sale, made regularly, is a purchaser in good faith, and even if his deed be set aside, is entitled to rents up to judicial demand, and to be reimbursed for improvements and taxes. 35 Ann. 1086; 37 Ann. 417; 38 Ann. 216; Sec. 47, Act 77 of 1880.

The opinion of the Court was delivered by

TODD, J. This is a suit by the widow and heirs of Benjamin Mason, deceased, to recover certain immovable property described in the petition, and to annul a tax sale to the defendant in possession.

Benjamin Mason died on the 1st of May, 1860. In December of the same year the real estate of the succession was sold on the application of the administrator, to pay debts.

The property in dispute was part of his estate, and which said deceased owned at the time of his death.

It was subsequently sold to pay the taxes owing thereon, and at the sale, on the 29th of March, 1884, it was adjudicated to the defendant.

The main ground of nullity charged in the petition against this tax sale is that the property was not assessed in the name of the true owner—alleged to be the succession of Benjamin Mason—but in the name of Mrs. B. Mason.

Other nullities were set up in the petition against the tax sale, but they all seem to be abandoned except the one above mentioned—the illegal assessment.

The answer avers that the assessment was correct, that Mrs. B. Mason was the owner of the property and in possession thereof by virtue of its adjudication to her at succession sale in 1860, as above-mentioned.

There was judgment for the plaintiff, and defendant has appealed.

We find that Mrs. Mason was in possession of this property as owner from the date of the probate sale, in 1860, till the tax sale, in 1884. It is true that no deed or *proces verbal* of sale is found in the record, conveying the title to her, but an examination of the proceedings in the administration of the succession of Benjamin Mason satisfies us that such adjudication did take place.

This property appears on the inventory of the succession.

We find, also, an order of court, directing the sale of all the real estate belonging to the succession.

The account of the administrator, filed subsequently, shows that the sale was made. This account further states that a part of the real estate was sold for cash; that the price was not paid in, and he credits himself with the amount of same—\$800.

Next appears a written acknowledgement from the Widow Mason, as natural tutrix, that she had not paid in the \$800—her bid on the property adjudicated to her at probate sale, together with a receipt to the administrator for the balance in his hands derived from the sale of the property after payment of the debts.

The account further shows that the debts of the succession were paid in full without this \$800, and that there was a balance in his hands—being the same balance receipted for by the surviving widow and tutrix.

We find in the record the deed to the other lands sold at the same time to the other purchasers at said sale, and these deeds embrace all the lands belonging to the succession, and described in the inventory, except the property is dispute in this suit. All the real estate having been disposed of at said sale, as stated, and the deeds in the record embracing all the real estate inventoried, except this particular piece in controversy, and a part of this real estate having been proved by the administrator's account and Mrs. Mason's acknowledgment and receipt to have been adjudicated to her, it necessarily results that it could have been no other than the identical property in suit that was bought by Mrs. Mason—property which, as before stated, she held possession of as owner from the 29th of March, 1861, date of succession sale, till it was sold for taxes in 1884.

It is, however, urged that the fact that the price of adjudication was

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not paid by Mrs. Mason, of itself vacated or avoided the sale, and that the title to the property never passed to the adjudicatee, but remained in the succession.

It might be a sufficient answer to all this to say that, as the question at issue is not the validity of a succession sale, as between the purchaser at such sale and the heirs of the succession under proper pleadings, but only the question of the legality of an assessment, it is not required of the officer charged with the assessment, that before making it, he should constitute himself a judge of the validity or invalidity of the judicial proceeding upon which the title to the property purports to rest, but that the fact of possession for many years as owner, under an adjudication, would alone suffice to guide and determine him in making the assessment as relates to the ownership of the same.

Be this as it may, however, we have no hesitation in saying that where the widow in community makes a purchase at probate sale of community property—being at the same time usufructuary and tutrix of the minor heirs of the succession—she is not required to pay over the price of the adjudication where the same is not needed to discharge the debts of the succession. In such case she is entitled to withhold the price. It would certainly be a vain thing and a meaningless formality for her to pay over the amount to the administrator and then take it back again. 12 Ann. 337; 24 Ann. 336; 30 Ann. 120; Cochran vs. Violet, recently decided and not yet reported, and authorities therein cited.

In this instance, as before stated, the price at which the property was adjudicated to the surviving widow was not needed to pay debts, and was properly retained by her.

It sufficed that the proper receipts passed between her and the succession's representative; which was done.

These considerations lead us to the conclusion that the judgment appealed from was erroneous.

It is, therefore, ordered, adjudged and decreed that the judgment of the lower court be annulled, avoided and reversed, and that plaintiffs' demand be rejected, with costs in both courts.

No. 9717.

SAMUEL FLOWER, ADMINISTRATOR, ETC., vs. ELIZABETH JACKSON
NOBLE, WIFE, ETC.

A decree of this Court reversing a judgment of the district court rejecting all evidence in support of a party's demand, on the ground that his petition set forth no cause of

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action, has only the effect of deciding that if *all* the averments of said petition are proved, the party is entitled to some relief.

Where, after trial on the merits, certain important allegations are not proved, the case is in no manner affected by our former decree, but stands on its intrinsic merits

Where defendant in executory process enjoins the enforcement or negotiable mortgage notes held by a third person who acquired before maturity, on the grounds of payment and compensation between the maker and the original payee of the notes, alleging simulation and fraud in the title of the transferee, failure to establish such simulation and fraud destroys the foundation of the case.

It is an elementary principle of the law of negotiable instruments that such equities subsisting between the original parties cannot be set up against a *bona fide* transferee for value before maturity.

Where the notes were taken in payment of a debt, knowledge by the transferee of the actual insolvency of the transferor, even if proved, could give rise to no relief, except under a revocatory action, of which the petition in this case wants the essential features in the allegations, the prayer and in the parties made.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

Nicholls & Carroll for Plaintiff and Appellant.

Geo. L. Bright and F. Kernan for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. The plaintiff, as holder of certain negotiable promissory notes executed by defendant and secured by special mortgage, instituted executory proceedings for the seizure and sale of the property subject to said mortgage.

The defendant applied for an injunction to restrain the seizure and sale of her property, in a petition and supplemental petition, the substantial allegations of which, so far as essential for our consideration, are as follows :

1st. That defendant was the holder of a policy of life insurance in "The Life Association of America," a corporation created under the laws of Missouri, and domiciled in said State, by the terms of which it agreed to pay to her the sum of \$10,000 sixty days after the death of her husband, whose life was insured for her benefit, in consideration of payment to the company of a stipulated annual premium.

2d. That premiums had been paid to said company to the amount of \$3539.50.

3d. That on November 10th, 1879, the said corporation was judicially declared insolvent by the decree of a competent court of Missouri, by the effect of which it became unable to comply with its own agreement under the policy, and became liable to defendant in the amount of the value of said policy at that date.

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4th. That although its insolvency was judicially declared only on November 10, 1879, the corporation was actually insolvent for some time prior thereto, and specially on the 14th of October, 1879, when plaintiff acquired the notes, which insolvency was well known to said plaintiff.

5th. That on October 2, 1879, she bought the property herein involved from the Life Association of America, and gave the three mortgage notes sued on, which were payable in one, two and three years from said date.

6th. That at the time when said association became insolvent, it was the holder of said promissory notes, and that they thereby became extinguished by payment and compensation.

7th. That after said insolvency and extinguishment of said notes, some person pretending to represent the association "illegally, fraudulently and without consideration" transferred said notes to the plaintiff herein.

8th. That plaintiff "is not and never was the owner of the notes sued on, and that his possession thereof is fraudulent and simulated."

9th. That John R. Fell, who made the pretended transfer to the plaintiff, had no authority to do so, and that it was done to defraud her, and was an illegal and fraudulent attempt to dispose of the assets of an insolvent corporation to the injury of its creditors, and especially of herself.

On these allegations she prayed for an injunction and for a decree that the said notes and mortgage be cancelled, annulled and surrendered to her.

The case was here once before on appeal from a judgment in favor of the plaintiff, based on a ruling of the district judge excluding all evidence in support of defendant's demand, on the ground substantially that her allegations, even if proved, would support no relief in her favor.

In a very guarded opinion, we reversed this judgment, saying in conclusion, "it may well be that plaintiff may fail in her proof, but it does seem that if she can establish satisfactorily *all* her averments, she should be entitled under the pleadings, as they exist, to some relief." *Noble vs. Flower*, 36 Ann. 737.

The case having been remanded after full hearing in the lower court, now returns to us in an appeal from the verdict of a jury and judgment based thereon in favor of defendant.

After a careful review of the evidence, we conclude that not only has defendant failed "to establish satisfactorily all her averments."

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but that the only ones which could give her the slightest standing in court are directly and positively negatived.

That evidence clearly establishes that plaintiff acquired the notes, which were negotiable, before maturity; that he acquired them from the company, which owned them, before any judicial declaration of insolvency or restraint of its power to dispose of its property; that he received them in partial settlement of a loss arising under a policy of insurance of the life of Gen. John B. Hood, which had matured by his death; that this was so perfect a consideration of the transfer of the notes that, but for that settlement, it would have been paid in full and in cash, even after the judicial insolvency, by the receiver of the corporation, as testified by the first receiver—defendant's own witness; that the plaintiff, when he received the notes, had no knowledge of the actual insolvency of the company, even if such knowledge could affect him in such an action as the present; that, far from being a party to defraud Mrs. Noble, he was ignorant that she was a policy holder of the corporation, or in any manner a creditor thereof.

The title of plaintiff to the notes being thus cleansed from the stains of fraud and simulation, which defendant sought to impress upon it, we are aware of no principle of law under which he can be affected by any equities subsisting between his transferror, the association, and the defendant.

The particular equity of compensation, which defendant invokes, even if it were otherwise applicable, which we are far from holding, is defeated by the familiar principles of the law-merchant governing negotiable instruments, and equally by the rule laid down in the Code itself, which declares that "compensation cannot take place to the prejudice of rights acquired by a third person." Art. 2215.

Defendant's claim against the association only ripened into an actionable right on the civil death of the corporation, which resulted from the decree declaring its insolvency and dissolution rendered on November 10th, 1879, as we held in the case of *Life Association vs. Levy*, 33 Ann. 1203. Plaintiff's rights to the notes had been acquired prior to that time and, under the article of the Code quoted, could not be prejudiced by any claim of compensation.

It is, moreover, an elementary principle of the law of negotiable instruments, that while, as between the maker and the original payee or the transferee of the latter after maturity, the maker may set up equities between himself and the original payee, such as want or failure of consideration, payment, compensation, compromise and the

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like, he can make none of these defenses against a *bona fide* transferee for value before maturity.

Finding that such is clearly the character of plaintiff's title to the notes, it destroys the essential foundation of defendant's case.

Even if, at the time of receiving the notes, plaintiff had known of the insolvency of the association, which the evidence disproves, that would furnish no ground of relief, except in the form of a revocatory action, of which the proceeding herein presents no feature, and which, besides, would necessarily fall for want of proper parties.

It is, therefore, ordered, adjudged and decreed that the verdict and judgment herein appealed from be annulled, avoided and reversed, and it is now ordered, adjudged and decreed that judgment in favor of plaintiff, Flower, administrator, dissolving the injunction herein issued, and dismissing the demand of Mrs. Noble, at her cost in both courts.

No. 9810.

THE STATE OF LOUISIANA VS. BILL NELSON.

1. A razor is not a dangerous weapon within the intentment of Revised Statutes, sec. 932.
2. An indictment which charges that the accused "did have, and carry, concealed on or about his person, a certain dangerous weapon called a razor," is bad.
3. Whether the instrument named in the indictment as a "dangerous weapon" is one within the meaning of the statute, the trial judge must decide, on hearing a motion to quash or one in arrest of judgment, as upon every other essential ingredient of an indictment.

A PPEAL from the Tenth District Court, Parish of Red River.
Hall, J.

M. J. Cunningham, Attorney General, and *J. C. Pugh*, District Attorney, for the State, Appellee.

Pierson & Hull for Defendant and Appellant.

The opinion of the Court was delivered by

WATKINS, J. The accused appeals from a judgment of conviction under Revised Statutes, sec. 932, which declares that "whoever shall carry any weapon, or weapons, concealed on or about his person, such as bowie-knives, pistols, dirks, or any *other* dangerous weapon, shall, on conviction," etc.

The indictment charges that the accused "did have and carry concealed, on or about his person, a certain dangerous weapon called a *razor*, contrary to the form of the statute," etc.

38	942
51	933
51	984
38	942
106	275

State vs. Nelson.

He waived trial by jury, and elected to be tried by the judge.

In limine his counsel filed a motion to quash the indictment on the grounds, viz:

1st. That carrying a razor is not carrying a concealed weapon.

2d. That a razor is not a dangerous weapon within the meaning of the law.

It seems the motion to quash was tried with the merits and was overruled, and a judgment of guilty entered.

At this stage of proceedings the counsel for the accused filed a motion in arrest of judgment, in which he assigns as error apparent upon the face of the record the defects mentioned in his motion to quash, and the overruling of the same by the trial judge.

The record contains no part of the evidence adduced on the trial; and no bill of exceptions.

The only question, therefore, is whether defendant's motion to quash the indictment was well taken, or his motion in arrest should have been sustained.

It presents a matter of substance material to be averred in the indictment.

Is a razor a weapon within the intendment of the statute under which defendant was indicted?

The *gravámen* of the statute is the punishment of persons who carry "weapons" concealed on or about their persons.

The statute instances the following, viz: such as bowie-knives, pistols and dirks. The sentence then concludes with the qualifying phrase, "or other dangerous weapons."

It is plain that the carrying of a weapon concealed is the crime the statute contemplated. To bring the accused within its provisions, the indictment must charge that he had carried concealed on or about his person a weapon of the particular description enumerated, or some "other dangerous weapon."

In the judge's opinion he says: "While the razor was not originally intended by the inventor and maker as a dangerous weapon, it has become one in common practice, and is more frequently carried and used as such than the bowie-knife, the dirk, or any other dangerous weapon, except the faithful revolver;" and, after citing a few authorities, concludes "that a razor, therefore, if carried as a weapon, is within the prohibition of the statute; * * * and while a razor may be used for other purposes, it is incumbent upon the State to show in the evidence that it was carried as a weapon."

"Any other view would defeat the purpose and intent of the law;

State vs. Nelson.

for if a person can carry a razor concealed on or about his person, *as a* weapon, he can carry a butcher-knife, carving-knife, or any other instrument of domestic use, however dangerous and deadly its character, on or about his person."

In our opinion the meaning of the statute, unmistakably, is the carrying of a weapon *eo nomine*, and concealed. It must be a dangerous weapon *per se*—such as a bowie-knife, pistol, or dirk; and this must *affirmatively* appear upon the face of the indictment itself.

If it does not it is bad, and cannot support a conviction.

We do not regard the particular purpose to which the instrument is applied, as exercising control over its *character* as a weapon.

Whether the instrument named is a *weapon* the trial judge should decide, on a motion to quash, as upon every other essential ingredient of an indictment.

This question being determined, the charge against the accused goes to the jury upon the evidence adduced under it. To decide otherwise would be to hold that the jury were competent to pass upon the validity of the indictment.

This must be valid in its incipency.

It must set out the crime with which the accused is charged with precision and certainty. This cannot be supplied by proof, nor eked out by inference.

A razor is an instrument or implement appertaining to the toilet, or shop. It has a well-known and specific use to which it is ordinarily applied. It is not known, or usually sold in market as a weapon. It may be quite as easily and conveniently carried in the pocket as a pen-knife, and when thus carried is effectually concealed from public open view. Under such circumstances the concealment of one would be just as pernicious as the other.

Conceding, for the argument, the full extent of the vicious habit of carrying a razor as a concealed weapon, mentioned by the judge, the cause of the State is not improved.

This habit may be one of recent origin, confined to a limited extent of country, and, perhaps, one that is practiced by a *certain* class of citizens.

A statute prevails throughout the State, and includes within its provisions every individual inhabitant thereof. It would seem to follow, as a logical sequence of this argument that, in the parish of Red River the carrying of a razor concealed, where this local habit, or usage prevailed, would be thus brought within the denunciation of the statute, while the carrying of a razor concealed by an inhabitant of some other parish of the State, where no such custom prevailed, would not.

State vs. Nelson.

It is argued that this court has placed an interpretation upon the words "a dangerous weapon," which supports the theory of the State.

In construing sec. 790 Rev. Stats., which declares that "if any person lying in wait, or in perpetration, or attempt to perpetrate, any arson, etc., * * * shall shoot, stab, or thrust any person *with a dangerous weapon*, etc.," this court said, in *State vs. Lowry*, 33 Ann. 1224: "From this it appears, and we hold, that 'thrusting' a person may well include thrusting with 'an iron bolt, rod, or pin,' whether the point be sharp or not.

"Such an instrument may well be *a dangerous weapon*," etc.

Conceding the correctness of that decision—and we do—does it follow that the *carrying* of "an iron bolt, rod or pin" concealed on or about the person, is the carrying of *a dangerous weapon*, in the sense of R. S., sec. 932 ?

If so, then the *carrying* concealed on or *about* one's person of any article which might be *used as* a dangerous weapon in a combat, whether it be an instrument or not—a stone, a bat, a ball, a pocket-knife, a rod, a bolt, or a bar—anything with which *injury* might be inflicted, would *become* "a dangerous weapon;" and any person carrying *any one* of these articles concealed on or *about* his person—not "in open public view"—would become *eo instanti*, liable to prosecution therefor.

The law-maker, in our view, intended something more reasonable, and only denounced as a crime the carrying concealed dangerous weapons *eo nomine*, and not such articles, or instruments as might be *used* in an assault.

In the brief of the Attorney General we find the following paragraph, viz:

"The statement that carrying of a razor, *concealed as a weapon*, is a carrying of concealed weapons is calculated to direct the mind to the fact and the manner of the concealment, rather than to the *intent and purpose* with which is carried."

Again: "The statement that the carrying of a razor *as a weapon* is more correct, and directs the mind to the *intent and purpose* with which the razor is carried."

A ready answer to those suggestions is that neither "statement" conforms to the statute, which declares that "whosoever shall carry any weapon or weapons concealed."

The gist of the question is the carrying of a *weapon* concealed, and not the carrying of an instrument "concealed as a weapon," or the carrying of an instrument "*as a weapon concealed*."

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The weapon, in the words of the statute, must be *such as* Bowie-knives, pistols, dirks, or *other dangerous weapon.*"

31 Ann. 849, State vs. Martin, in which the court says: "To constitute the crime charged it suffices that a dangerous weapon be carried on about the person; and it matters not that it be so carried *with or without any actual intent.*"

The definition quoted in the brief of the Attorney General, from Worcester, is conclusive against the State. It is: "Instruments *made on purpose* to fight with are called *arms, or weapons*; such as are *accidentally employed* to fight with, *weapons.*"

A legitimate deduction from this is that a razor belongs to the latter class, i. e., such as are accidentally employed to fight with, and not to the class of instruments "made on purpose to fight with."

The razor might be a weapon if *accidentally or actually employed* to fight with—as in State vs. Lowry—but it certainly is not such a dangerous weapon as is contemplated by the statute.

The motion to quash, or the motion made to arrest the judgment should have been sustained.

It is, therefore, ordered, adjudged and decreed that the judgment and sentence pronounced thereunder, be annulled and set aside; and it is further ordered, adjudged and decreed that the indictment be quashed and the accused discharged.

DISSENTING OPINION.

FENNER, J. I think the court places too narrow a construction upon the statute.

It prohibits and punishes the carrying of "a weapon or weapons concealed on or about one's person, such as pistols, Bowie-knives and dirks, or any other dangerous weapon." The court's construction confines the prohibition to weapons "such as pistols, Bowie-knives and dirks," and nullifies the last clause entirely.

But the statute obviously goes further, and, after prohibiting the carrying of weapons, "such as pistols, Bowie-knives and dirks," extends the prohibition to "any other dangerous weapon" whatever.

Such construction not only renders objectless and meaningless the last words of the statute, but entirely emasculates its spirit and force. For what is the use of prohibiting the carrying of Bowie-knives, and dirks, if butcher-knives and carving-knives, in every way equivalent, may be carried with impunity?

Butcher-knives, carving-knives and razors are doubtless made for

 In the Matter of the Estate of Romero.

innocent and lawful use ; but such use does not involve or suggest the necessity of carrying them concealed about the person. They are dangerous weapons, as has been frequently held under other statutes, and, when so carried, there is nothing in their nature or use which suggests any other purpose, ordinarily, than to carry them as weapons, and as dangerous weapons, within the statutory prohibition.

The records of our criminal courts show that these instruments, and especially the razor, are frequently so carried and used to effective purpose. The decision suggests to persons anxious to pursue the bad habit, which the law seeks to cure, a way of evading the law so simple and easy as to rob the law itself of all effect.

I dissent from the opinion and decree.

I concur in this opinion—Todd, J.

No. 9784.

IN THE MATTER OF THE ESTATE OF ANTOINE ROMERO.—ON OPPOSITION TO TABLEAU OF ADMINISTRATOR.

Claims against a succession, although recognized by the administrator on his tableau as debts of the succession, must be proved up when opposed by heirs and creditors, in default of which they will be rejected.

Promissory notes executed by the deceased and prescribed on their face before they are placed on the tableau will be rejected as prescribed, on the opposition of heirs and creditors, unless interruption of prescription be legally proved.

A PPEAL from the Nineteenth District Court, Parish of St. Mary.
Goode, J.

Edward Simon for Opponents and Appellants.

J. A. Breaux contra.

The opinion of the Court was delivered by

POCHÉ, J. This controversy involves oppositions to the tableau of administration of the succession of Antoine Romero, propounded by Severin Romero and his co-heirs, children of the deceased, opposing generally all debts entered on the tableau as due by the succession, and claiming as heirs certain amounts alleged to be due by their deceased father to their mother, on account of the latter's paraphernal property received by the husband and converted to his own use, and urging a further demand of \$1180 alleged to have been received by their father as paraphernal funds of their mother.

The account is also opposed by Donatien, Felicien and Irma Dom-

In the Matter of the Estate of Romero.

ingue, who seek to be placed on the tableau as creditors for the sum of \$1005, alleged to be due to them by the deceased as the administrator of the succession of their deceased father, Francisco Domingue. These last opponents also resist the claims of the several creditors whose accounts are opposed by the heirs of Antoine Romero. The claims thus opposed are those of prosper Romero, Hervilien Segura, two claims of Désiré B. Miguez, Charles Delcambre, Theodore Delcambre, Lucien Pommier, succession of J. A. Mestayer, and St. Peter's church, and R. Segura.

The judgment of the district judge rejected the claim of Severin Romero and his co-heirs as creditors, ignored that of the Domingue opponents, rejected as unproved and, besides, as prescribed, the claims of Hervilien Segura and of Lucien Pommier, who had been placed on the tableau as creditors, and that of Achille Bessum, who had filed an opposition with the object of being recognized as creditor; and homologated the account as thus amended.

This appeal is prosecuted by Severin Romero and his co-heirs and by the Domingue heirs.

Hervilien Segura, Lucien Pommier and Achilles Bessum, whose claims were rejected below, have not appealed, nor has the administrator, hence that feature of the judgment is not open to discussion.

But the same reasons which induced the district judge to reject these claims apply to those of Prosper Romero, St. Peter's church and the succession of J. A. Mestayer, whose several accounts are entirely unsupported by any evidence, and to those of D. B. Miguez, Raphael Segura, Charles Delcambre and Theodore Delcambre, whose notes are all prescribed, the record containing no legal evidence of the interruption of prescription.

The Romero opponents have no evidence in the record to support their claim of \$1180, alleged to be due to their mother on account of the paraphernal funds belonging to her and alleged to have been disposed of by the deceased, Antoine Romero.

Their other claim is for the sum of \$800, the alleged value of cattle belonging to their mother at the date of her marriage, and alleged to have been sold by the husband for his use and benefit. The evidence on that point consists exclusively of vague parol testimony, which fails to show the number of cattle received, the price at which any were sold, or any other particulars of the alleged transaction on which a judicial conclusion could rest. Both of their claims were properly rejected.

The claim of the Domingue opponents is proved by competent evi-

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dence, consisting of the account of administration of the succession of their deceased father presented by Antoine Romero as administrator, who charged himself with the sum of \$1005 accruing to these opponents, then minors, and no effort has been made to prove any payment thereof or thereon.

The omission of our brother of the district court to recognize this claim must be due to an oversight. But these opponents claim a mortgage to which they are not entitled.

It is therefore ordered that the judgment appealed from be amended in the following particulars:

1. In ordering the Domingue opponents to be placed on the tablean as ordinary creditors in the sum of \$1005, with interest as claimed in their opposition, which claim had been ignored in said judgment.

2. In rejecting the claims of Prosper Romero, Raphael Segura, Désiré B. Miguez two claims, Charles Delcambre, Theodore Delcambre, St. Peter's church, and of the succession of J. A. Mestayer, which had been allowed in said judgment.

And it is now ordered that said judgment, as thus amended, be affirmed, costs of appeal to be paid by the succession.

No. 9763.

THE STATE OF LOUISIANA VS. DENNIS CORCORAN.

An appeal in a criminal case will not be dismissed on the ground that the transcript of appeal has not been filed in the Supreme Court on the return day, if it appeared that it was filed within three judicial days thereafter.

In a prosecution for manslaughter, it was urged that a few minutes before the killing the deceased and a number of companions were assembled at a certain place; that they left there together and went to the place where the accused was found and was pointed out by one of the parties to the deceased, who was told by the one thus pointing him out to go and talk to him; and the deceased, without speaking, immediately approached the accused and seized him by the throat and beat him in the face; that the accused pulled loose from his assailant and retreated to the middle of the street, where he was followed by the deceased, again seized violently and beaten by him. In which last struggle the mortal blow was given by the accused. At this stage of the testimony the witness on the stand, and who was one of the party that had accompanied the deceased, was asked in substance, when this attack was made on the accused, what did you do, and what did each one of the party present do (naming each one), at the same time and place, which question was objected to, the objection sustained, and the witness not permitted to answer. Held, that the ruling was error. It is not true that the *res geste* can consist only of what was said and done at the time by the participants in a combat. They may embrace what was said and done by any and all present, which have any bearing on the affair or are in any manner connected therewith.

38	940
45	844
38	949
48	1409
38	940
109	650
109	662
38	940
h120	818

State vs. Corcoran.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee:

ON MOTION TO DISMISS.

A transcript of appeal in criminal cases must be filed within ten days after granting the order of appeal. The Code of Practice does not regulate criminal proceedings. Article 589 evidently refers to civil matters. 31 Ann. 1171; 31 Ann. 805; 31 Ann. 483; 6 Ann. 653; 13 Ann. 491; 14 Ann. 469; 36 Ann. 310; 37 Ann. 62; 32 Ann. 1268; Sec. 4, Act 39 of 1878.

ON MERITS.

1. A declaration by the deceased before the homicide, but having no casual connection with any immediate act produced by the fatal conflict which resulted in the killing, is not a part of the *res gestæ*, and therefore inadmissible in evidence. Wharton Cr. Ev. sec. 262.
2. Before hostile threats by deceased against the accused are admissible in evidence, it must be shown the accused was present when they were made or they were communicated to him. 30 Ann. 1177.
3. The ruling of the court *a qua* refusing to grant a new trial, based upon questions of fact, cannot be revised by this Court.

Jas. C. Walker for Defendant and Appellant.

ON MOTION TO DISMISS.

The opinion of the Court was delivered by

TODD, J. There is a motion to dismiss the appeal on the ground that the transcript was not filed within ten days from the date of the order granting the appeal.

The order was granted on the 17th of May, and the transcript was filed on the 26th, same month.

This court has held that an appeal in a criminal case will not be dismissed on the ground that the transcript has not been filed on the return day, if it appears that it was filed within three judicial days thereafter. *State vs. Hampton*, 33 Ann. 1252; *State vs. Butler*, 35 Ann. 392.

The motion to dismiss is therefore refused.

ON THE MERITS.

The defendant, Dennis Corcoran, indicted for manslaughter, was tried, convicted and sentenced to seven years' hard labor, and has appealed.

The case comes up on several bills of exceptions taken to the rulings of the trial judge on questions of evidence.

It is only necessary that we consider one of these bills.

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The facts relating to it, and the circumstances under which it was taken are briefly these :

It had been proved that fifteen or twenty minutes before the killing took place, the deceased, Dan Haughery, Robert Simpson, Henry Hogan and several others, were at the Poydras Market ; that they left together and proceeded to the corner of Liberty and South Poydras street, where the accused was found leaning against the posts of a shed. That when thus discovered, Robert Simpson said to Haughery, the deceased : " Dan, there is Corcoran ; go talk to him." That thereupon the deceased, without saying anything, advanced upon the accused, seized him by the throat, and beat him in the face with his fist. That the accused after trying to ward off the blows, succeeded in getting loose from his assailant, retreated to the middle of the street ; that the deceased pursued, and overtook him, again seized him by the throat, and again beat him in the face. It was during this second attack by the deceased that the mortal blow was given by the accused. It further appears, from the record, that the counsel for the accused had sought to establish that Haughery and his companions had left Poydras Market, where they were assembled, as above-mentioned, for the purpose of hunting Corcoran, and beating him ; and this he attempted to prove by a witness on the stand, and asked the witness (quoting) : " If shortly before the difficulty, say ten or fifteen or twenty minutes before the alleged homicide, did you not hear the deceased, Dan Haughery, ask Robert Simpson and Henry Hogan and others, to go with him to find Corcoran, to beat him ?"

On objection, the judge would not permit the witness to answer the question.

From all this it appears that the theory of the defense was that there had been a plot formed by Haughery and his friends to find Corcoran and beat him, and that, in accordance with this plot, they had hunted him up, and Haughery had attacked him. Then, after proving this first attack by Haughery on Corcoran, the retreat of the latter and the pursuit and second attack by Haughery, the counsel for the accused, doubtless for the purpose of further supporting the theory of the defense, *i. e.*, the plot for a combined attack on Corcoran by Haughery and his friends, asked Hogan, one of this party, and then on the stand as a witness, the following question (quoting) :

" While Haughery was beating accused in the face in the manner you have described, what did you do, and what did Robert Simpson do, and what did Thomas O'Boyle do, at the same time and the same place ?"

Steers vs. Insurance Company.

This question was objected to on the ground (quoting) :

"That it was not competent to prove in behalf of the accused anything that was said or done by any person or persons at the same time or place, except repeat what may have been said or done by the deceased or the accused, or by either of them."

This objection was sustained, and the witness not permitted to answer the question.

In this the judge erred, under the circumstances stated and the facts developed, the question seems to us entirely legitimate and pertinent. Nor is it true that only the acts and declarations of the actual participants in a combat or melee can be proved as a part or parts of the *res gestae*. The *res gestae* may also embrace the contemporaneous acts and declarations of others present. 1 Greenleaf, secs. 108-111; State vs. Horton, 33 Ann. 290; State vs. Vines, 34 Ann. 1083.

We do not know what this witness might have testified to in answer to the question appearing above had he been permitted to answer it; but we can well conceive, from the facts already proved, that he might have disclosed facts highly favorable to the accused.

His testimony might have conclusively established that the accused was the victim of a plot or conspiracy on the part of Haughery and his friends, as charged by the counsel for the accused; that the entire party might have joined in the attack, or that Haughery was aided, abetted, or encouraged by the others, or other like facts tending to excuse the act of the defendant inflicting the mortal blow.

These are only suppositions, but whatever the answer of the witness to that question may have been, the accused was entitled to it, and the objection to the question was utterly untenable, and the ruling to the prejudice of the accused.

It is, therefore, ordered, adjudged and decreed that the verdict of the jury be quashed, and that the sentence of the lower court be annulled and reversed, and the case be remanded to the lower court to be proceeded with according to law.

No. 9747.

S. B. STEERS, FOR USE OF, ETC., VS. HOME INSURANCE COMPANY.

Where an insurer knows that the premises may be used for storing cotton, and inserts this written clause: "It is understood that when the above building is used as a warehouse the rate will be changed," the storing of cotton will not avoid or forfeit the policy. On the contrary, these words indicate that the policy is to remain in force, for unless it remained in force the rate could not be changed. In such case, even conceding that a

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right to "change" meant a right to "increase," it was a right reserved to insurer, who alone could fix rates. The insurer could demand a higher rate, or he could cancel the policy where a right to cancel is provided. But, under the facts of this case, where the insurer did neither, the policy remained in force and the plaintiff must recover.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Kennard, Howe & Prentiss and Bayne & Denégre for Plaintiff and Appellee:

1. Where an insurer knows that the premises may be used for storing cotton, and inserts this written clause: "It is understood that when the above building is used as a warehouse the rate will be changed," the storing of cotton will not avoid or forfeit the policy. On the contrary, these words indicate that the policy is to remain in force, for unless it remained in force the rate could not be changed. In such case, even conceding that a right to "change" meant a right to "increase," it was a right reserved to insurer, who alone could fix rates. The insurer could demand a higher rate, or he could cancel the policy where a right to cancel is provided. But under the facts of this case, where the insurer did neither, the policy remained in force and the plaintiff must recover.
2. But if this clause be held to impose on the insured the duty of notifying the insurer of the storage of cotton, it yet appears in this case that such notice was given. It might be claimed that the burden of proof on this point was on the company. 40 Missouri, 40; 3 Welshy, H. & G. (Exchequer, 535). But if it be not, the fact of notice in this case is established by clear, positive and affirmative testimony, which is met only by the negative testimony of a witness whose memory is shown to be defective. Case stronger for plaintiff than that of *Story vs. Hope Ins. Co.*, 37 Ann. 254; *Willis vs. Hanover*, 79 North Carolina.
3. In such a case as this, defendant should have been satisfied, at least, with the decision of the lower court; and the plaintiff, put to needless expense, annoyance and delay by the appeal, is entitled to damages.

Singleton, Browne & Choate for Defendant and Appellant:

1. The property covered by the policy in question was insured as vacant property, and not as a cotton warehouse. Sefton, pp. 60, 61, 68, 70; Steers, p. 18; Policy.
2. The policy prohibited any change in the use or occupation of the property which would materially increase the risk without the assent of defendant. Conditions 1, 5 and 6.
3. The property insured was used and occupied by the plaintiff as a cotton warehouse after the policy issued and at the time of its destruction by fire. Steers, pp. 10, 16, 23.
4. Such use materially increased the risk and avoided the policy, unless the defendant assented to such use. Sefton, pp. 64, 162; Steers, p. 38; Brown, pp. 82, 83, 84, 85, 86; 23 Ann. 458; 40 Mo. 27; 38 Me. 439; 10 Pick. 535; 9 Allen, 329; 99 Mass. 160; 14 Allen, 330; 21 Pick. 164; 45 Barb. 454; 17 Barb. 111; 34 Pa. St. 79; Wood on Ins. p. 445.
5. The burden of proof was upon the plaintiff to show that he notified defendant of the change in the risk, and that it assented to such change. Wood on Ins., sec. 507; 16 Md. 377; 98 Mass. 381; 100 Mass. 472; 12 M. 73; 8 N. S. 259; 4 R. 219; 7 R. 418; 2 N. S. 66; 3 N. S. 575; 2 L. 569; 11 L. 17; 15 Ann. 509, 663; 11 M. 4, 194; 3 L. 534; 10 Ann. 639; 13 Ann. 397; 14 Ann. 207.
6. The plaintiff has failed to establish that such notice was given to the defendant, or that it assented to such change in the use. Sefton, pp. 65, 94, 95, 100, 102, 103.

The opinion of the Court was delivered by

TODD, J. This is an action to recover on a policy of fire insurance issued by the defendant company.

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The policy issued on the 20th of February, 1885, for the sum of \$4000, and on the 27th of October following the building insured, known as the "old Golding Foundry," was destroyed by fire.

The defense is that the property was insured as a vacant building; that it was stipulated as part of the contract that if the premises should be occupied or used, and the use changed so as to increase the risk, without notice to the company and its consent indorsed on the policy in writing, then the policy should be void. It is charged that during the period covered by the policy the property was held by the plaintiff as a warehouse for the storage of cotton, without the consent or knowledge of the company, and as a place for cleaning old iron cotton ties with coal tar, without the consent of the company, and that such use materially increased the risk and avoided the policy.

There was judgment in favor of the plaintiff, and the defendant appealed.

The second defense about the cleaning of old iron ties with coal tar seems to have been abandoned, leaving only to be determined the first defense, relating to the use of the building as a warehouse, without the knowledge or consent of the company.

There is a clause in the policy that reads (quoting): "It is understood that when the above building is used as a warehouse the rate will be changed."

It is apparent from this clause, and especially from the use of the word "when" therein, that it was in contemplation of the parties to the contract that the building would be used at some time as a warehouse; and further, that when so used the insurance should continue, but at a different rate.

The contention, therefore, that the use of the building as a warehouse avoided the policy, is not sound, since the words of the contract refer to the precise case of its being so used, and provides for the continuance of the policy in that very event.

The company was, however, entitled to a notice of the change made in the use or condition of the building.

The plaintiff swears positively and emphatically that he did give such notice to the president of the company; told him "he was about to store cotton in the building," and further said to him, to use his language: "I suppose you will charge me a higher rate now?" To which the president replied (again quoting): "I do not know whether I will or not; I will see."

It is true that this was denied by Mr. Sefton, the president of the company, who testified in the case.

State ex rel. Piper vs. Batt.

The judge *a quo*, doubtlessly, acting on the principle or elementary rule of evidence "that positive testimony on a given point must always predominate over negative testimony on the same point,," gave credence to the statement of Steers rather than to the denial of this statement by Sefton, and mainly by reason of it rendered judgment in favor of the plaintiff. In the case of Story vs. Insurance Company, 37 Ann. 258, this Court, when the same question was before it, used the following language:

"But one witness swears affirmatively, and the other negatively. The assertion of a fact which never had an existence cannot be consistent with truth; whereas the denial of a fact which has existence may, without violating the truth, be the result of inattention or a defective memory," and then announced the rule of law on the subject quoted above.

An examination of the record affords some confirmation of a defective memory on the part of this witness, which it is unnecessary to enlarge upon. We find no reason whatever to reject the conclusion reached by the district judge upon this issue of fact, nor to question the correctness of the judgment rendered by him. The judgment is therefore affirmed, with costs.

Fenner, J. recused on account of interest.

No. 9742.

THE STATE EX REL. C. C. PIPER VS. JOSEPH BATT.

The statute authorising the organization of corporations for literary, scientific, religious and charitable purposes, prescribes the course to be pursued in order to effect such incorporation, and also the method of making amendments or alterations of the original articles. Courts cannot regard or give effect to amendments not made in compliance with the mode prescribed by the statute.

Where the charter provides that the board of delegates, themselves elected annually, shall annually elect a chief engineer, the action of one board in electing such officer for a term of five years, cannot destroy the right and duty of succeeding boards to elect the engineer according to the charter.

The first election only conferred upon the person elected the right to hold the office for one year, or until his successor was elected and qualified, and when, after the expiration of the year, a succeeding board of delegates has elected another to the office, his qualification ended the term of the former occupant, whose former election was no valid or legal warrant for continuing in the office.

Failure to elect on the day fixed in the charter did not exhaust or destroy the power, and did not invalidate an election held at a subsequent regular meeting.

A PPEAL from the Civil District Court for the Parish of Orleans.
Tissot, J.

State ex rel. Piper vs. Batt.

Farrar & Kruttschnitt for Relator and Appellee.

W. S. Benedict and *Richard Downing* for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. Relator, averring that he lawfully holds the office of Chief Engineer in the corporation known as the "Firemen's Charitable Association of the Sixth District of New Orleans," and that Joseph Batt claims said office, and asserts his right to perform the duties and functions thereof, invokes the writ of *quo warranto*, requiring said Batt to exhibit to the court the authority on which he bases his claim and pretensions.

Batt returns, as his warrant for claiming said office, an election, held in pursuance of the charter of the corporation, on December 11, 1885, at which he was chosen as the successor and for the unexpired term of Horace P. Phillips, deceased, who had been regularly elected as Chief Engineer for the term of five years, beginning on the 12th of August, 1884, and ending only on the like date of 1889.

There is no pretense on the part of Batt that he was elected otherwise than for the unexpired term of Phillips, or that he succeeded to any other right than Phillips would have possessed had he survived.

On the other hand, there is no dispute before us as to the validity of Batt's election as the successor and for the unexpired term of Phillips, whatever that may be.

The judge *a quo* so held, and relator does not controvert the finding.

The vital question is: has the term of Phillips, and of Batt, as his successor, expired?

There is no doubt that the board of delegates which elected Phillips intended to elect him for a term of five years, and that Phillips had already filled such a term under a previous election, in 1879.

But the question is whether the board of delegates had the power to elect a Chief Engineer for a longer term than one year.

The association was incorporated under the laws of the State, providing for the organization of corporations for literary, scientific, religious and charitable purposes. Rev. Stat., secs. 677 to 682.

The corporate powers were vested in a board of delegates, to be elected *annually*, and amongst other officers, that of Chief Engineer is created, and it is unequivocally provided that he also shall be elected *annually* by the said board, after its own election and organization.

As the charter is the fundamental law of the corporation, unless the foregoing provision has been altered by amendment, legally made, it

is difficult to imagine how any board of delegates could claim the right to elect a Chief Engineer for a longer term than one year.

But the law which authorized the formation of such corporation, and provided the mode in which they might be formed, was equally careful in providing the mode in which acts of incorporation might be altered or amended, viz: by executing an authentic act containing the proposed amendments, submitting the same to the District Attorney for his opinion as to their legality, and, after obtaining his approval, recording his certificate to that effect with the act. R. S. 679.

We could no more recognize the validity of an amendment not made in accordance with the foregoing requirements than we could recognize as a valid corporation an association which had never complied with like requirements of the law for their formation.

The charter itself contained a provision that "it could not in any way be altered, amended or repealed unless by consent of three-fourths of the whole board of delegates, notice of the same in writing having been given at a prior meeting."

Respondent seeks to show that such consent was given to an amendment altering the term of the Chief Engineer to five years. The judge *a quo* found otherwise; but we consider this of no consequence whatever. That provision merely directs the first step to be taken in order to secure an amendment. It did not dispense with the necessity of following up this step by complying with the express requirements of law already indicated, nor could it give force to an amendment not made in conformity with those requirements.

It is not pretended that any amending act has ever been drawn or submitted to the district attorney, or approved by him or recorded.

Hence, it is perfectly clear that the original charter subsists intact, without alteration or amendment, as the fundamental law of the corporation.

The right and duty of each succeeding board of delegates, themselves elected annually, to elect annually a Chief Engineer, are expressly and unequivocally guaranteed by the charter, and it is impossible for one board, by electing that officer for the term of five years, to deprive succeeding boards of this right so secured.

The board of delegates, which entered upon their duties under the charter on the first Monday of January, 1886, have exercised this right by the election of the relator as Chief Engineer, and he is recognized as such officer by said board. When relator qualified under this election, the term of Phillips, which had long since expired, and was only continued until his successor for a new term had been elected and

Mercier et al. vs. New Orleans.

qualified, and of Batt, who held under like conditions, came to an end, and the judge *a quo* did not err in holding that the warrant asserted by respondent as the basis of his claim to the office was insufficient and invalid.

We do not consider that the election of Piper was invalidated by the fact that it did not take place on the day directed by the charter, but at a subsequent regular meeting. The time mentioned is not of the essence of the power, and the omission to observe it did not exhaust or destroy the power of election. *Jacobs vs. Murray*, 15 Cal. 221; 2 *Hennen's Dig.*, p. 1580.

The estoppels set up against Piper have no force.

Judgment affirmed.

No. 9748.

J. A. MERCIER ET AL. VS. CITY OF NEW ORLEANS.

Section 9, of Act 107 of 1884, only confers upon the city council of New Orleans power to revise valuations and correct descriptions of property actually assessed and entered upon the rolls by the board of assessors. It does not authorize the council to make original assessments or to list property which the board has omitted from the rolls. Such omissions are to be corrected by the board of assessors in the manner pointed out by Section 2 of the same act.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Braughn, Buck, Dinkelspiel & Hart for Plaintiffs and Appellants.

Walter H. Rogers, City Attorney, for Defendant and Appellee.

The opinion of the Court was delivered by

FENNER, J. On May 2, 1885, the plaintiffs became the adjudicatees at public auction of the real estate formerly known as "Christ Church," on Canal street, which, up to that time, had been used as a place of public worship and was exempt from taxation under Art. 207 of the Constitution.

The authentic title under the sale was only completed and recorded on June 6, 1885.

The board of assessors, who were required under the law (Sec. 8, of Act 107 of 1884) to complete their assessment "on or before the 31st of July," failed to list said property for taxation in any manner.

The city council of New Orleans, acting under its construction of Sec. 9, of Act 107 of 1884, after notice to plaintiffs, undertook to supply this

omission and to order the property to be placed on its rolls as subject to taxation on an assessment of \$75,000.

Plaintiffs, averring the illegality and nullity of said proceedings on various grounds and suggesting apprehended injury, bring this suit to have them annulled and cancelled.

No exception is taken to the proceeding, which is submitted on the merits of the case.

At the trial, the following admission was made: "This property was not assessed by the board of assessors, and has not been assessed by them either for State or municipal taxation to this day."

The only warrant assigned for the council's action is Sec. 9, of Act 107 of 1884, in the following words:

"Sec. 9. *Be it further enacted, etc.,* That Sec. 27 of the aforesaid act be amended and re-enacted so as to read as follows: That all taxpayers shall have the right to appear before a standing committee on assessment of the city council of New Orleans, and in other parishes before the board of reviewers, as provided for in the aforesaid act, during the sessions of said boards, and be heard concerning the description of the property listed and the valuations of the same as assessed, and they shall have the right of testing the correctness of their assessments before the courts of justice in any procedure which the Constitution and laws may permit; but the action to test such correctness shall be instituted on or before the first day of November of the year in which the assessment is made. The said committee on assessment shall meet on the second Monday of the month of August, in the city of New Orleans, of each year, to consider and examine into the applications of those owners of assessed property who believe the assessor's valuation to be in excess of and beyond the actual cash value of the property so assessed. Said committee shall determine upon said applications and report their action at once to the city council for its approval or rejection, and such decision by the council shall be final, unless set aside, in accordance with Article 203 of the Constitution. That the said committee on assessment shall be and are hereby empowered to increase any assessment imperfectly or improperly made; provided, that before said increase is made, the taxpayer be served with a notice to appear before said committee within five days and show why such increased assessment should not be made."

Our opinion is very clear that this section only confers on the council power to revise valuations and correct description or other imperfections in assessment of property made by the board of assessors and entered upon their rolls, but that it does not confer power to make

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original assessments or to list property which the board has, whether intentionally or inadvertently, omitted from the rolls.

The remedy for such omission is clearly pointed out in Section 2 of the same act, which authorizes the board of assessors to correct it, and defines the proceeding by which this may be done.

The theory of the city seems to be that when a person is not assessed for all the property belonging to him, such assessment is imperfectly made within the purview of Section 9. But it is property, and not persons, which is made the subject of assessment, and the whole context of the statute shows that the section refers exclusively to imperfections in the assessment of property actually listed and assessed by the board of assessors.

The action of the city council in making this assessment was clearly unauthorized, and plaintiffs are entitled to relief.

Rights of parties under proper proceedings are reserved.

It is, therefore, ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed; and it is now adjudged and decreed that there be judgment in favor of plaintiff, declaring the assessment herein made by the city council of New Orleans to be null and void, and ordering same to be stricken from the records of the city comptroller, and that defendant pay costs in both courts.

No. 9786.

THE STATE OF LOUISIANA VS. JOHN WILLIAMS.

1. When an accused person has been tried and a verdict of guilty returned against him, the trial judge is without power or authority to grant a new trial *ex proprio motu*.
2. The trial judge is in no sense the custodian for the accused, and it was not his duty to take care of his welfare.

There would have been ample time for him to consider measures for his relief when applied for by the accused.

A PPEAL from the Twentieth District Court, Parish of Assumption.
Beattie, J.

E. A. O'Sullivan, District Attorney, for the State, Appellant.

Defendant unrepresented.

The opinion of the Court was delivered by

WATKINS, J. The accused was indicted, tried by a jury, and found guilty of cutting, stabbing and wounding one James James, with a dangerous weapon, with intent to kill and murder said James, whereupon the trial judge, *ex proprio motu* set the verdict aside, and

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granted a new trial, over the objection and exception of the District Attorney.

The trial judge assigns as his reasons for so doing :

1st. That the evidence, in his opinion, did not justify the verdict.

2d. That it would be unlawful for him to sentence the accused for such a felony when he was not guilty of it.

3d. That it had been suggested to him that the accused be brought into court and asked whether he wished a new trial. He says: "Of course, if I had been *forced* to appoint counsel for him, and counsel, knowing my opinion, would have advised him to *make no motion*. If I did not appoint counsel, my duty was to see that he was not led into error, and it would "have become my duty to advise him not to apply, as it had already been stated by me that I would grant it *ex proprio motu*."

The question presented, as well as the proceeding complained of, is a singular one.

We are at a loss to understand why a judge, who believed it to be his duty to see that the accused was not led into error, did not allow him "to make his full defense by counsel learned in the law," in the first instance.

He should have appointed some member of the bar to represent him. R. S. 992.

Having permitted the accused to go to trial without being represented by counsel, we think it was clearly his duty to have, at least, appointed one to care for his interest after the verdict, he claimed to be unjust, was rendered.

Conceding the correctness of his motives, and the unworthiness of the verdict, we think the trial judge ventured a step beyond the bounds of duty.

The court is in no sense the custodian for the accused, and it was not his duty to see that he was not led into error. While we are not prepared to say, at this time, that, if the new trial were sustained, the verdict first rendered would operate a bar to a second trial, on same information, it might be a serious question.

Const., art. 5, provides: "Prosecutions shall be by indictment, or information; provided that no person shall be held to answer for a capital crime unless on a presentment or indictment by a grand jury. * * * Nor shall any person be twice put in jeopardy of life or liberty for the same offense, *except on his own application for a new trial*, or where there is a mistrial, or a motion in arrest of judgment is sustained." Const. 1879.

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This is a new principle incorporated into the organic law, not existing in any former one, viz: "Nor shall any person be twice put in jeopardy of life or liberty for the same offense, *except on his own application for a new trial*," etc.

There had long been serious controversy among jurists and lawyers as to the proper interpretation of "twice in jeopardy;" and doubtless the phrase employed was placed in the Constitution in order to make it an insurmountable barrier to further dispute on that question.

It must be observed, and the trial judge erred in not doing so.

It is, therefore, ordered, adjudged and decreed, that the order granting the new trial *ex proprio motu* be annulled and vacated, and that the cause be remanded to the court *a qua* for further proceedings according to law, without prejudice to the right of the accused, to make application for a new trial.

Judgment reversed.

No. 9802.

THE STATE OF LOUISIANA vs. MICHEL SONNIER.

In an information charging an assault with intent to kill, it is not necessary that the pleader should qualify both the "act" and the "intent" as felonious. To qualify the intent is sufficient.

The averment that the party assailed was then in the peace of the State, is not necessary to be proved; its omission is therefore not a matter of substance which would vitiate the information; hence, objection grounded on its omission cannot be made by a motion in arrest of judgment.

A PPEAL from the Thirteenth District Court, Parish of St. Landry.
Hudspeth, J.

John N. Ogden and E. P. Veasie, District Attorneys, for the State,
Appellee.

W. C. Perrault for Defendant and Appellant:

1. "If the offense be statutory it is indispensable to describe it, if not in the letter, at least in the spirit of the statute creating the offense. The substance must be rigidly given." Voorhies *Crim. Jur.* p. 388, no. 69, 70, 72; same book. p. 387, no. 67, 68; Wharton *Crim. Prac. and Plead.* (8th ed.) §§ 152, 153, 154, 163, 166; 5 Ann. 324; Bishop *Crim. Proc.* § 309 and notes, § 362 and notes, §§ 368, 377.
2. An information framed under Sec. 793, R. 8. of Louisiana, which does not aver that the assault was made with felonious intent, or that the intent was to feloniously kill and slay, is defective and bad for uncertainty, because in such cases the intent forms the gist of the offense and must be specially averred. Wharton's *Crim. Law* (8th ed.), Vol. 1, § 641; 36 Ann. 99; Voorhies *Crim. Jur.* p. 388, No. 72; Wharton's *Precedents of Ind.* § 242; Bish. C. P. § 556.
3. An information framed under said Sec. 793, which does not allege that the party assaulted

38	962
45	1182
38	962
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38	962
50	459
38	962
111	804

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was a "person in the peace of the State then being." is fatally defective. The law in said section intended to deal with unprovoked assaults upon peaceable and unprovoking persons; and although not material to be averred in murder or manslaughter cases, is of the essence of the offense created and punished by Sec. 703 of E. S. of Louisiana. Voor. Crim. Jur. p. 144. p. 387, no. 67, 68; also p. 388, no. 69, 72; Whar. Cr. P. and P. §§ 152, 153, 154, 166; Bish. C. P. §§ 268, 556.

The opinion of the Court was delivered by

POCHE, J. Defendant appeals from a conviction of an assault with intent to kill, under section 793 of the Revised Statutes, and from a sentence of imprisonment and a fine exceeding three hundred dollars.

His complaint, by means of a motion in arrest of judgment, presents two questions:

1st. The alleged defect of the information in this, that it does not qualify the assault, or the intent as felonious.

2d. The fatal omission of the words, "in the peace of the State then being."

1st. A serious doubt may exist as to the nature of the offense denounced by section 793, and as to the intention of the law-giver to therein provide for a felonious offense.

But be that as it may, we find that the information in this case charges the accused with "an assault with intent to kill and feloniously slay," etc., and we conclude that the intent is thereby sufficiently described. In such cases, it is not indispensable to qualify both the act and the intent. *State vs. Bradford*, 33 Ann. 921.

It is true that the information is drawn in a very inartistic manner, but the argument of defendant's counsel, predicated on the idea that the words "kill" and "slay" are not synonymous, is somewhat hypercritical.

2d. There is no merit in the second ground of the motion. This Court has held, on good authority, as well as on reason, that the omission of this averment is no ground for a motion in arrest of judgment. *State vs. Vincent*, 36 Ann. 771.

We have also held, and we reaffirm the ruling, that the omission of the words "in the peace of the State then being," was covered by section 1063 of the Revised Statutes, which provides that "no indictment for any offense shall be held insufficient for want of the averment of any matter unnecessary to be proved," and that such an averment was not necessary; hence the omission of the same does not vitiate the indictment. *State vs. Simeon*, 36 Ann. 923.

We therefore conclude that an objection on that ground does not involve a matter or defect of substance, and that it cannot avail the defendant under a motion in arrest of judgment.

Judgment affirmed.

State vs. Philbin.

No. 9803.

THE STATE OF LOUISIANA VS. DAVID PHILBIN ET AL.

Where a statute uses the words "wilfully or maliciously" to qualify the act therein declared an offense, the indictment may charge the act as "wilfully and maliciously" done; or it suffices if it is charged as wilfully done or as maliciously done, using either of the qualifying words alone.

Where a common law crime, such as murder, forgery, or the like, is denounced by a statute by name, indictments for such crime should be charged in the words and qualifications prescribed by the common law for indictments for such offenses.

When, however, a statute denounces a certain act or acts an offense and specifically describes the act, though such offense may bear a close relation to a well known common law offense, and belong to the same species, the offense thus declared is properly a statutory offense, and may be charged in the language of the statute.

An indictment, under Sec. 843, for setting fire to and burning an outhouse, etc., charging that it was done "feloniously, unlawfully and maliciously," is valid.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Baker, J.

M. J. Cunningham, Attorney General, and *Lionel Adams*, District Attorney, for the State, Appellee:

Where the defense denounced by the statute consists in wilfully or maliciously setting fire to and burning a building, the indictment may charge the burning to have been done "feloniously, unlawfully and maliciously." It is permissible, but not essential, to set out that the criminal act was both wilful and malicious. 1 Bish. C. Proc. §§ 436, 434, 558; Bish. on Stat. Crimes, § 244; Whart. Cr. P. and P. §§ 228, 162, 163.

F. B. Earhart for Defendants and Appellants:

The crime of arson, in this State, is the "wilful and malicious burning of the house of another." State vs. Fulord, 33 Ann. 683.

In Louisiana, the Supreme Court holds that the generic term of arson is included in Secs. 841, 842, 843, R. S. L.; 33 Ann. 683.

The commission of any one of the distinct offenses enumerated in these sections constitutes the crime of arson. 33 Ann. 683.

Arson being a common law offense, this Court holds in an indictment for the commission of a common law offense, under a statute: "It is insufficient to charge in the statutory terms alone, but must be charged with all the essential averments of the common law for the same offense here." State vs. Flint, 33 Ann. 1992, and authorities there cited by Justice Fenner on rehearing; Bishop's Cr. Proc. vol. 1, par. 599, 600, p. 365, 3d edition; Bishop's Stat. Crimes, 2d ed., par. 88, p.; 76 Ib. pp. 115 to 139; Bishop's Crim. Pro., vol. 1, par. 339; State vs. Hannett, 54 V. p. 83; C. L. Mag., vol. 4, p. 272; State vs. Bradley, Del. Gen. Sessions, Crim. Law Mag., vol. 1, p. 796.

Wilfully and maliciously. These words cannot be supplied in the indictment by "feloniously, unlawfully and wilfully." Bishop's Crim. Pro., 3d ed., par. 613, p. 373; 34 N. H. 510; 13 Allen, 354; 108 Mass. 487; B. C. P., vol. 2, para. 42, 43, 44, pp. 19, 20.

Where the statutory words were "feloniously, unlawfully and maliciously," and those in the indictment were "feloniously, voluntarily and maliciously," the variance was held to be fatal. Rex vs. Reader, 4 Carr & P. 245; Rex vs. Turner, 1 Moody, 239.

The word *or*, in Secs. 841, 842, 843, R. S. of La., means *and*. Should read in the indictment, "wilfully and maliciously." This word *or* is construed *and* in the case of State vs. Mitchell, 5 Iredell Rep. N. C., p. 350; State vs. Price, 37 Ann. 219.

State vs. Philbin.

Justice Poohé, organ of the court, in *State vs. Williams*, 37 Ann. 777, says a serious difference of opinion may exist on the proposition that the word "wilfully" is synonymous with the words "feloniously" and "of his malice aforethought." It may so be said of the words "unlawfully" and "wilfully."

Arson is defined at common law to be the voluntary and malicious burning of the house of another. 3 Inst., 66; 1 Leach, 245; Chitty's Crim. Law, vol. 3, ed. of 1841, p. 1120.

It must be wilful and malicious. 1 Hale, 509; 2 East, P. C. 1019; Chitty's Crim. Law, vol. 3, p. 1120.

In the indictment at common law the terms voluntarily (or wilfully) and maliciously are requisite. 2 East, P. C. 1021; Chitty's Crim. Law, vol. 3, 1124, 1125; *Rex vs. Reader*, 4 Carr & Payne, 245. As to form of indictment: Chitty's Crim. Law, vol. 3, p. 1127; Wharton C. L., para. 625, 1673; Wharton's Precedents, Indictments and Pleas, 3d ed., vol. 1, p. 389, *et seq.*

The case of *Chapman vs. Com.*, 5 W. 427, is not in point. This was not common law arson, but the burning of a barrack of hay or grain. A barrack is not a house or barn, but a thatched roof erected over a rick of grain.

The opinion of the Court was delivered by

TODD, J. The defendants were sentenced to seven years' imprisonment at hard labor.

The indictment under which they were tried and convicted charged that the defendants "did feloniously, unlawfully and maliciously set fire to and burn a certain building * * * known as Hill's soda water manufactory," etc.

A motion in arrest of judgment was made. The ground of the motion was substantially, that the offense charged was the crime of arson at common law, and that the indictment in charging that the act was done feloniously, *unlawfully* and maliciously, was insufficient in law, and that the offense being arson the bill should have charged that the setting fire to or burning was done feloniously, *wilfully* and maliciously, in conformity to the requirements of the common law.

This indictment purports to be based on Section 843 of the Revised Statutes.

Section 841, R. S., declares that "every person who shall wilfully or maliciously set fire to or burn a house * * * in the night time, in which a human being is usually staying, * * * shall suffer," etc.

Section 842 provides that "whoever shall wilfully or maliciously set fire to or burn any house * * * in the day time * * * shall suffer," etc.

Section 843 declares in substance that whoever shall wilfully or maliciously set fire to or burn an outhouse or other building not used as a dwelling, shall suffer, etc.

If the indictment in this instance can be considered as charging a statutory offense under any one of the above named sections, the language, or words therein used, viz: "feloniously, unlawfully and mali-

State vs. Philbin.

cously," would be sufficient. Wharton Cr. P. and P., § 228; 1 Bishop Cr. Pro., § 436; Bishop Statutory Crimes, § 244; State vs. Price, 37 Ann. 218.

For, as settled by these authorities, where the words qualifying the act constituting the offense are in the alternative, or separated by the disjunctive "or," they may be joined by the conjunctive "and," or it will suffice to use in the indictment one only of the qualifying words. As for instance, in this case where the words of the statute are "wilfully" or "maliciously," they may be set forth in the bill "wilfully" and "maliciously," or the indictment may charge that the act was wilfully done or that it was maliciously done—using either of the qualifying words alone.

This indictment charges that the act was feloniously, unlawfully and maliciously done; and since the word "maliciously" is used, it is enough, and the word unlawfully may be regarded as surplusage; that is, provided that in this instance it is sufficient to follow the language of the statute.

But the counsel for the accused contend that the offense for which the defendant is prosecuted, is the crime of arson at common law, and that the indictment must conform strictly to the forms and words prescribed by the common law in indictments for that crime, and refers us to a decision of this Court, State vs. Flint, 33 Ann. 1292, in support of his contention. That was the case of an indictment for forgery, and we did hold in that case that the common law form for the prosecution of that crime must be followed in this State. The reason for such a ruling was that our statute relating to that offense simply denounced the crime of forgery substantially by name only, without defining the crime or declaring what act or acts would constitute the offense. So, if the crime of arson had been denounced by the statute without descriptive words of the act or acts that constituted it, then resort would have to be made to the common law for rules to guide in the prosecution of it; and the case, in such event, would come strictly within the rule laid down in the Flint case above mentioned. But it is altogether different in this instance. The statutes above referred to, on one of which this prosecution is founded, do not denounce *eo nomine* the crime of arson, they do not contain the word "arson," but they declare certain acts—which are specifically described under varying conditions—as so many offenses subject to different punishments; and these offenses, thus declared, though relating to the same subject as arson—the setting fire to and burning buildings and like structures—differ in one or more essential particulars from that crime, as defined by the common law.

State vs. Natal,

When acts, thus specifically described, are declared offenses, and the penalties prescribed by statute, they are really statutory offenses, and are to be charged not according to the strict requirements of the common law, but the indictment may follow the language of the statute or statutes.

The counsel, however, refers us to the case of the *State vs. Fulford*, 33 Ann. 683, as ruling that the offense declared by the statute under which this prosecution was instituted was the crime of arson, as known to the common law. The party in that case was indicted under the same statute that we are now considering and a plea of the prescription of one year was interposed in bar of the proceeding, and in dealing with that plea, it was stated by the organ of the Court that the offenses declared in these statutes against setting fire to and burning houses, etc., were included in the generic term of arson, and were different grades of that offense. In one sense this is entirely true, since such an act of burning, in common parlance, is termed or called arson. But the question now presented was not before the Court in that case, and the Court nowhere said in that opinion that the acts denounced in any one of these statutes constituted the crime of arson as defined by the common law.

Judgment affirmed.

No. 9582.

THE STATE OF LOUISIANA VS. JOSEPH NATAL.

The legality and constitutionality of the Private Market Ordinance of the City of New Orleans, No. 4798, A. S., have been hitherto fully affirmed by this Court.

Under Article 86 of the Constitution, prosecutions for the violation of said ordinance may be properly carried on in the name of the State.

A PPEAL from the First Recorder's Court of the City of New Orleans.

Walter H. Rogers, City Attorney, and *Branch K. Miller*, Assistant City Attorney, for Plaintiff and Appellee.

Belden & Armbruster for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. This appeal is taken from a sentence imposing a fine for violation of an ordinance of the city of New Orleans, No. 4798, A. S., known as the Private Market Ordinance.

The objections to the legality and constitutionality of said fine are several, viz:

88	967
105	211

State ex rel Gooch vs. Robinson.

1st. That the prosecution cannot be conducted in the name of the State on the affidavit of a private individual, but that the city is the proper and necessary party to conduct such prosecutions.

Under Article 86 of the Constitution, which provides that "all prosecutions shall be carried on in the name and by the authority of the State of Louisiana," and in the absence of any legislative direction authorizing prosecutions for violations of her ordinances, to be conducted in the name of the city of New Orleans, we think the prosecution was properly instituted in the name of the State. 1 Dillon Munic. Corp. § 429, and authorities there cited; see also, State vs. Gisch, 31 Ann. 544, which was a prosecution in the name of the State under the same ordinance.

2d. The remaining objections go to the legality and constitutionality of the ordinance.

They have been heretofore considered and overruled by this Court in two cases. State vs. Gisch, 31 Ann. 544; City vs. Wolf, 36 Ann. 986. Judgment affirmed.

No. 9840.

THE STATE EX REL. W. D. GOOCH VS. J. E. ROBINSON, JUSTICE OF
THE PEACE, PARISH OF DESOTO.

In an application for writs of *certiorari* and prohibition, the complaint of the relator that the inferior court has issued an unwarranted execution against his property, will not be favorably entertained by the Supreme Court, if the record shows that the relator had himself previously submitted to the court *a qua* the question of the alleged illegality of the execution which he resists, by means of an injunction.

The judgment rendered on said injunction by a court of competent jurisdiction must be held as having disposed of all the points of law involved in the alleged illegality of the execution, especially when it appears that there had been a regular trial, in which all the rules of legal procedure had been observed. Hence, such a judgment cannot be reviewed otherwise than on appeal.

The supervisory jurisdiction of the Supreme Court under a *certiorari* must be restricted to an examination into the validity of the proceedings held in the lower court; it cannot be exercised to review the judgment as to its correctness either on the law or on the facts of the case.

The supervisory powers of the Court must not be confounded with its appellate jurisdiction.

APPPLICATION for *Certiorari* and Prohibition.

Wm. Goss for the Relator.

Geo. E. Head for the Respondent.

The opinion of the Court was delivered by
POCHÉ, J. Relator complains that an illegal and unwarranted exe-

38	968
47	1534
38	968
48	788
48	1253
48	1382
49	1057

cution against him has been issued by respondent, under the following circumstances:

As a judgment creditor in respondent's court, relator issued an execution and caused the seizure of property belonging to his debtor; and on the opposition of a third party, a judgment was rendered by the justice of the peace, allowing the proceeds of the property thus seized to the third opponent.

Subsequently, demand was made upon relator by the constable of the court for payment of costs incurred in the third opposition, for the preservation and preparation for sale of the property seized and sold under execution as above stated. On his refusal to pay the costs thus demanded of him, on the ground that the same were unlawfully charged to him, the respondent illegally caused execution to issue against him in satisfaction of the costs thus illegally charged to him, amounting to a sum less than ten dollars, in the absence of any and all legal prerequisites.

Whereupon relator sued out of respondent's court a writ of injunction in order to restrain said unwarranted execution. On trial, his injunction was dissolved and the execution was thus allowed to proceed against him. Hence, his present application was made with a view to test the validity of the respondent's proceedings.

Conceding that the execution complained of had been wrongfully obtained, and that on the trial of relator's injunction respondent erred in rendering a judgment dissolving the same and sustaining the wrongful execution, we find no warrant for our interference in the premises under our supervisory jurisdiction.

In the trial of the injunction over which respondent had undoubted jurisdiction, a jurisdiction invoked by the relator himself, all the rules of procedure and all the forms of law were followed and observed by the justice of the peace—who rendered his judgment only after a legal trial and after full hearing of the parties.

The record contains no suggestion of the least invalidity of the proceedings, and the validity of the same is the only question for review under the writ of *certiorari*. Under such a proceeding this Court can exercise no appellate jurisdiction, and cannot review the judgment in order to pass upon or test its correctness, either in law or in fact. Such an examination is exclusively and solely within the province of the court having appellate jurisdiction in the premises. If no appeal lies from the judgment, it shares the fate of all judgments which are not appealable in nature or character.

The only question open for discussion in the proceeding before us,

State ex rel. Gooch vs. Robinson.

under the pleadings, is the alleged error of the respondent in rendering a judgment maintaining and countenancing an execution alleged to have been obtained in wanton violation of law.

To attempt to review that judgment would be on our part an assumption of an appellate jurisdiction which does not exist, and would involve us in a greater error than that which is charged against the respondent. State ex rel. Wood & Bros. vs. Judge, 38 Ann. 377; State ex rel. Berthoud vs. Judge, 34 Ann. 782; State ex rel. Wood vs. Judge, No. 9773, not reported.

We are, therefore, powerless to grant any relief to relator under these proceedings.

It is, therefore, ordered that the alternative writs herein granted be set aside, that said writs be declined, and that relator's application be hence dismissed at his costs.

Mr. Justice Watkins dissents from this opinion, and reserves his right to present his views in writing.

DISSENTING OPINION.

WATKINS, J. Relator obtained final judgment against Isam Henry on the 29th of October, 1885, for his debt and cost; and, under execution, caused to be seized, in satisfaction thereof, among other things, a lot of seed cotton.

This cotton the constable had ginned, packed and advertised for sale.

On the 14th of November, 1885, R. H. Smith filed in the district court a third opposition suit, claiming a preference on the proceeds of the sale of the cotton, on the ground that he was a creditor of the judgment debtor for necessary plantation supplies furnished.

This case was transferred to the justice court, and judgment was rendered thereon the 29th of April, 1886, for the proceeds of sale and the cost of opposition.

Subsequently the constable demanded of the relator, as the plaintiff in the original suit, payment of \$27.75 cost, incurred therein.

Of this he paid \$17.40, and refused to pay \$10.35 as excessive, illegal and not approved. The items objected to were for hauling, weighing and ginning the said cotton, and the bagging and ties furnished.

At the request of the constable, and with the assent of third opponent, the respondent issued an execution under the judgment in the third opposition suit, and directed it against relator, judgment creditor in the original suit, and thereunder the constable seized relator's property.

This sale he enjoined on the ground that said cost was not legal and demandable of him, and could not be enforced against him by execution.

The respondent dissolved this injunction, and ordered the sale to be proceeded with, and relator made application for *certiorari*, with a view to test the validity of the execution for cost and proceedings thereunder.

While it is true that respondent had full and complete jurisdiction over the injunction suit, which relator had invoked in his own favor; and that all the rules of procedure and the forms of law were therein pursued; yet, relator's complaint of the issuance of the execution, by the respondent, in a cause in which there was no judgment against him, and for the recovery of costs not approved, and not taxed as cost, *contradictorily with him*, and not covered by the fee bill—stands out clearly and prominently.

Relator did not apply for a writ of prohibition, and, consequently, no question is raised with regard to the respondent's jurisdiction. C. P. 845, 846, 851.

The application for *certiorari* necessarily admits his jurisdiction.

The writ only commands him to send to this court a certified copy of his proceedings, in order that their "validity may be ascertained." C. P. 855.

The writ is only granted when "the suit is to be decided in the last resort, and when there lies no appeal, by means of which proceedings absolutely void might be set aside," C. P. 857, 864; or when final judgment has been rendered, and execution has issued. C. P. 866.

In the latter case, the writ of *certiorari* will arrest the execution, until the validity of the proceedings can be determined.

If, upon an examination of the record, the proceedings appear to be null and void, "and have not been *sanctioned* by the party complaining of them," it is the duty of this court to "avoid the proceedings, and direct the inferior judge to *try the case anew*, in conformity with the provisions of the law." C. P. 864.

The execution issued for a sum less than \$10, and hence, an injunction against it, *by the debtor in the writ*, could not be appealed to the district court. The amount sought to be collected, was below the lower limit of its appellate jurisdiction. Const., art. 111.

This is the test of its appellate jurisdiction. 9 Ann. 236; 12 Ann. 784; 13 Ann. 150; 18 Ann. 398; 16 Ann. 47; 21 Ann. 307; 36 Ann. 423.

The judgment rendered by respondent was final, and unappealable.

State ex rel. Gooch vs. Robinson.

A suit seeking to compass the nullity of an execution, as one that was illegally issued, cannot be regarded as a sanction of it.

The Code clearly contemplates recourse being first sought by the relator, in the court having jurisdiction of his demands; and that the stage of such suit must be "in the last resort," or judgment must have been actually rendered therein, when *certiorari* is applied for.

His pursuit of that relief was not a sanction of the action, or execution.

The case at bar bears no analogy to the State ex rel. Zuberbier & Behan vs. Judge, 33 Ann. 15, wherein relators were shown to have voluntarily appeared, and made answers as garnishees, in response to a citation, afterwards objected to as illegal.

Instead of sanctioning the execution, the relator enjoined and resisted its enforcement.

In State ex rel. Geale vs. Recorder, 30 Ann. 450, Manning, C. J., said that C. P. 857 "was framed expressly for those cases where there was no appeal, and where the inferior court was of last resort," by means of which, proceedings absolutely void might be set aside.

In State ex rel. DeBuys vs. Judges, 32 Ann. 1256, an application was made "for a *certiorari*, to ascertain the validity of certain proceedings by which the relator was sentenced for a contempt of court, to an imprisonment of ten days and to pay a fine of fifty dollars." The relator complained that he had been arrested, under an order of court, and without a hearing condemned, and sentenced without notice, and that same was illegal.

The Court, quoting from High of Extraordinary Legal Remedies, the following—"the right to a hearing is absolute, and cannot be denied in a court of any grade,"—said: "Where the forms of law in such respect have not been observed, the proper remedy is by *certiorari*."

The paramount law of the land provides that "no person shall be deprived of life, liberty or property without due process of law." U. S. Const. Amend., 5.

In the present case no proceeding had ever been taken against the relator to ascertain and tax the costs in dispute, as is plainly required by R. S. 750. Those claimed of him fall within its provisions. This was a condition precedent to their recovery of *plaintiff* in the suit of Gooch vs. Henry, wherein same were engendered.

In State ex rel. Houston vs. City, 30 Ann. 82, it was held that "*where disputed*, the sheriff's account is but a *claim*, and until acknowledged by a final decree of a competent court, that claim cannot be enforced by *mandamus*."

In *Beauz vs. Price*, 14 Ann. 187, it was held: "Where the *plaintiff* has recovered judgment, the proceeding to render his property liable in *execution* for cost is statutory, and the form of the statute must be strictly pursued, under pain of *nullity*."

When the respondent issued a writ of execution under the judgment in the third opposition suit against relator, who, *as plaintiff in another suit, had obtained judgment for cost* against Henry—without notice to him and without any judgment authorizing it—he was guilty, in my opinion, of an abuse of legal proceedings, and thereby enabled the constable to seize relator's property *without due process of law*.

His subsequent judgment dissolving the relator's injunction no more rendered the *execution legal*, than did the sentence of the judge for contempt, or the decree of the recorder punishing a violation of the lottery statute.

I am of the opinion that this Court has ample authority, in the exercise of its supervisory power, to declare the respondent's proceedings absolutely void, and to direct him "to try the case anew, in conformity with the provisions of the law."

For these reasons, I dissent from the opinion of the Court.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF LOUISIANA,
IN NEW ORLEANS, DURING THE YEAR 1886.

AND NOT REPORTED IN FULL.

No. 9643.

James H. Cosgrove vs. His Creditors.

In proceedings in insolvency by a husband, where property is withheld from his schedule because his wife claims to have bought it with money given or paid her by him, the wife should be made a party, and the cause will be remanded in order that she intervene or be called in by the creditors.

No. 9567.

The State of Louisiana vs. Andrew Harrison.

This case involves the same principle as No. 9566, The State vs. Samuel Cohn, page 42.

No. 9433.

A. F. Grundy vs. Crescent News and Hotel Company.

In an action for a malicious prosecution where the evidence shows that the defendant, in causing the plaintiff to be arrested and prosecuted, acted from motives of private interest and without probable cause, his action, even under the advice of counsel, will not exempt him from liability.

No. 9584.

The State of Louisiana vs. F. Lamarque.

The issues in this case are the same as in No. 9582, The State vs. Joseph Natal.

No. 9583.

The State of Louisiana vs. D. Rotzé.

The issues in this case are the same as in No. 9582, The State vs. Joseph Natal.

No. 9770.

The State of Louisiana vs. Edgar J. Andry.

The record in this case suggests no error and presents nothing for review

No. 9693.

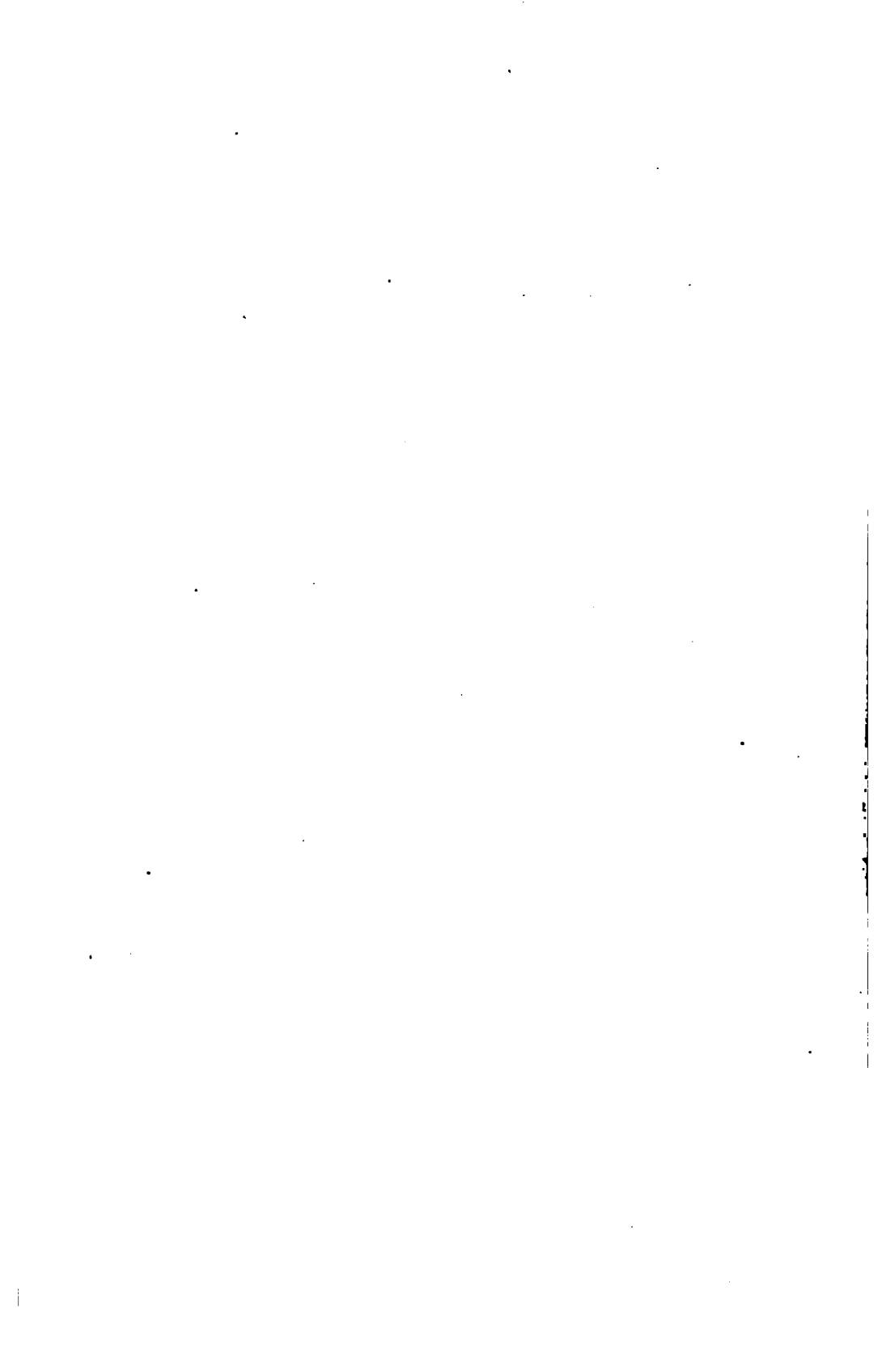
E. Conery, Jr., *et al.* vs. New Orleans Waterworks Company *et als.*

The only question involved in this case is the manner in which it should be fixed for trial in the Supreme Court.

No. 9745.

The State *ex rel.* Matthews vs. Sheriff and Tax Collector.

A retail merchant who combines the sale of liquors in less quantities than a pint, under an ordinary license of \$5, can be required to pay only \$50 and not \$55, under Section 6 of State license law of 1881, E. S.



INDEX.

ACTIONS.

A suit for the dissolution of the sale of immovable property, coupled with a demand for possession, is not a purely personal action, as it involves mainly the ownership of an immovable; it partakes of the nature of a proceeding *in rem*.

Hence such a suit may properly be brought in the parish where the property is situated, and in such a case non-resident defendants may properly be cited through a curator *ad hoc* without the necessity of subjecting their property under the control of the court by process of attachment.

McKenzie, et al., vs. Bacon, et al., p. 764.

APPEAL.

The appellant who presents a defective transcript, and who is shown to have had the transcript made through or under the exclusive supervision of his own counsel, outside of the clerk's office, is legally responsible for all defects, omissions and irregularities therein, and is not entitled to any time to correct such errors or omissions. In such a case, appellee's suggestion, without a formal motion to dismiss, will prevail, and the appeal will be dismissed.

E. H. Samuels et al. vs. J. H. Brownlee, et als., p. 34.

The Supreme Court will not undertake to examine a cause on its merits if the transcript of appeal is too imperfect and incomplete to inform the court of the matters and evidence which were contested below.

But, if the shortcomings or imperfections of the transcript are not imputable to the fault of the appellant, and if the ends of justice require a review of the judgment appealed from, the appeal cannot be dismissed; but the case will be remanded to be tried *de novo*.

This relief will be granted in a case in which the papers were destroyed by fire together with the Court House after the appellant had perfected his appeal.

Charles B. Miller vs. R. H. Shotwell, et als., p. 103.

APPEAL—Continued.

An amendment on appeal, which does not alter the practical result flowing from the judgment of the court *a qua*, but merely strikes out some irrelevant matters, will not visit costs of appeal on the appellee.

Succession of Myra Clark Gaines, p. 123.

The rule is inexorable that when the judgment has given the appellee interest to which he is not entitled and the judgment is amended by disallowing it in favor of the appellant, the costs of appeal must be borne by the appellee.

L. Holzap vs. Railroad Company, et al., p. 185.

The right of a creditor of the husband to appeal from the judgment obtained by the wife against the husband is included in the express grant of the right of appeal to third persons who allege they have been aggrieved by the judgment.

When the creditor alleges in his petition of appeal that the execution of the judgment has or would deprive him of all means of satisfying his debt, he has specified the manner in and the means by which he will be irretrievably aggrieved, and has shown sufficient reason for an appeal to be granted him.

A. Cooley vs. B. C. Cooley, p. 195.

An appeal does not lie from an order commanding an administrator to show cause on a given day why he should not be ordered to furnish additional security for the faithful performance of his official duties. No irreparable injury can be wrought him by a mere order to show cause. *Non constat* that on the trial of the rule it will be discharged and his bond will be found sufficient.

Successions of Z. and E. Labaure, p. 235.

The rule has long been settled that all parties to the record who are interested in maintaining the judgment must be made parties to the appeal from it.

Where the tableau of distribution and final account of an administratrix have been homologated and the funds have been distributed in accordance therewith, and a creditor of the deceased, who was not a party to the mortuary proceedings, appeals from the judgment of homologation, he must make the creditors who have been paid parties to his appeal.

When the petition of appeal contains no prayer for citation and none is issued, the fault is the appellant's and dismissal is the penalty of his neglect. The Act of 1839, now Sec. 36 Rev. Stats., does not cure this defect.

Succession of Treadwell, p. 260.

APPEAL—Continued.

An order refusing or revoking permission to file a supplemental petition is not ordinarily appealable. No doubt, however, the rule would be different if the object of the supplemental petition were to engraft a revocatory action on the principal suit and to make the third persons concerned parties. Such right is given by Arts. 1972 and 1975, C. C., and being the only mode in which the revocatory action can be prosecuted before judgment, the right should be protected.

In this case, however, the supplemental petition does not present the features of a revocatory action, and the ruling of the court was correct. *Insurance Company vs. N. Gerson, et al., p. 349.*

An appeal taken from an order refusing to dissolve an injunction on the face of the papers, is not maintainable.

The rule is in the nature of an exception of no cause of action. It is merely an interlocutory order requiring no execution, producing no effect. Its rendition can work no irreparable injury, the less so when the injunction simply arrests funds in the hands of the executive officer of the court.

Successions of Z. and F. Labauve, p. 356.

On appeal from an order dissolving an injunction on bond, when a motion to dismiss the appeal on the ground that the interlocutory order appealed from could not work an irreparable injury, our decree denying the motion to dismiss and holding that the acts enjoined, if committed, would operate irreparable injury, necessarily involves the conclusion that the injunction should not have been dissolved on bond, and hence the dissolving order appealed from must be avoided and reversed.

J. M. Villavaso vs. Barthet, et al., p. 417.

No appeal lies to this Court in a case in which plaintiff claims less than \$2000, on distinct contracts, from each of several defendants, not bound jointly or severally, though five in number, and the claim against each nears \$1000, aggregating together some \$5000. Consent cannot confer jurisdiction *ratione materie*.

Bridget Tague vs. Insurance Company, et al., p. 456.

Appellants have a right to join in one motion and in one bond, when the suit is a unit and one judgment only is rendered in it.

A bond conditioned for an amount ample enough to cover costs, and which is that fixed by the court in the order granting the appeal, is sufficient to support a suspensive appeal taken from a judgment in a petitory action, where the property in dispute is under seques-

APPEAL—Continued.

tration in the custody of the sheriff, and no money claim is allowed by the court.

A bond of appeal need not be signed by appellants, or by any one of them. *J. Pasley vs. H. McConnell, et al.*, p. 470.

An error of calculation may be corrected by this Court upon an application for rehearing; but the rights of interested parties will be reserved. *Succession of Anger*, p. 492.

Where, in country cases, appeals are taken before judgments are signed, they may be considered as taken *nunc pro tunc*. 12 Ann. 596. *State vs. McKeown*.

Appeals prosecuted from judgments on forfeited bonds are treated as taken in "criminal matters" in the sense of Act 30 of 1878. *State vs. Cassidy*, 7 Ann. 276; *State vs. Williams*, 37 Ann. 200.

When the return day is fixed by the court on its own motion and not at the suggestion of appellant's counsel, though in direct violation of Act 30 of 1878, the fault is not imputable to the appellant and he cannot be prejudiced thereby.

An appearance bond taken by the sheriff, without an order of court admitting the accused to bail, or fixing the amount of bond is null. 6 Ann. 700, *State vs. Lougineau*; 12 Ann. 224, *State vs. Cravey*; 12 Ann. 349, *State vs. Smith*; 10 Ann. 532, *State vs. Gilbert*.

When the record enables the court to decide on the merits, either party may, at any time, refer the court to any error *apparent* on the face of the record, without making a formal assignment thereof.

State of Louisiana vs. Balise, p. 542.

A suspensive appeal bond reciting in *substance* that it is given as surety that appellant shall prosecute his appeal, and pay such judgment as may be rendered against him is good.

A devolutive appeal bond filed in the clerk's office before the expiration of the return day fixed in the order of appeal, is in time.

I. N. Glover vs. Taylor, p. 634.

Where a third person appeals suspensively from a judgment making peremptory a mandamus directing the sheriff to accept a bond which has been tendered for release of property attached and to release the attachments, and where the condition of the appeal bond is "to satisfy whatever judgment may be rendered against the appellant," the obligations of the bond are restricted to the condition so expressed and, on failure to prosecute the appeal, cannot be extended to embrace an obligation to satisfy the judgment which

APPEAL.—Continued.

had been rendered against the sheriff, or to pay general damages occasioned by the appeal.

Nor can the principal be held for damages outside of the terms of the bond, without proof of malice and want of probable cause. His position is similar to that of the original prosecutor of a civil suit, except in so far as the law has made a distinction between them in the requirement of bond.

Friedman Brothers vs. Lemlee, p. 654.

The omission of appellant to ask for citation of appeal and to have it served on appellee, when the order of appeal has been granted on motion in open court at a term different from that on which the judgment was rendered, is fatal to the appeal which must be dismissed.

Wheeler & Pierson vs. Peterkin et al., p. 663.

In appeal from a judgment rendered by a justice of the peace to a district court, where a motion is made to dismiss the same on the ground that the matter in dispute is under the lowest limit of the appellate jurisdiction of this Court, the appellant should be permitted to offer evidence to maintain his appeal, unless his want of right to the appeal conclusively appears from the face of the papers.

The State ex rel. Fontenot vs. Judge, etc., p. 718.

Where a judgment is rendered on an opposition to an account of a tutor charging him with a personal liability to the heirs represented by him, an appeal from such judgment taken by him in his capacity as tutor only, will not be entertained.

Tutorship of Minor Heirs of Byland, p. 756.

Any neglect or omission to observe the rules of this Court strictly, in the preparation of transcripts of the record in the court below, will subject the clerk to the cost of repairing such neglect or omission; and a mandate will be directed to him, ordering him to perform his duty; and, in the meantime, judgment on the appeal will be suspended.

The appellant is protected by the full certificate of the clerk where it is not shown that he *knew* the transcript to be deficient and procured the certificate notwithstanding.

Troustine & Co. vs. Ware et al, p. 779.

Where the amount in dispute is really under the lower limit of the jurisdiction of this Court, though in the averments and prayer it

APPEAL—Continued,

be greater, the claim will be considered as fictitious and the appeal dismissed.

G. L. Bright vs. A. Thompson et al., p. 801.

In a license suit, the clerical error of charging defendant with pursuing, without a license, "the business of vegetables" in a public market of the city, instead of the business of *dealing in or selling* vegetables, will not be considered when first raised in this court, because no other "business of vegetables" could be conducted in a public market except that of selling or dealing in them, and because, in absence of any note of evidence, *non constat* that evidence received without objection might not have remedied the deficient allegations.

Defendant's contention that he was exempt under art. 206 of the Constitution because following "an agricultural pursuit," is not sustained by any evidence in the record showing that fact.

The State of Louisiana vs. Cendo, p. 828.

In this suit for license on the business of "selling at retail," the defendant is described as "conducting the business of butcher in the Ninth Street Market, whose receipts exceed \$1000." Objection to this variance cannot avail, in absence of any note of evidence in the transcript, because we know that butchers in public markets do sell meats at retail, and it may have been proved that defendant followed such a business.

A butcher, in so far as he slaughters and dresses animals, may possibly be classed as a laborer or mechanic; but as such branches of his business cannot lawfully be pursued in the public markets of New Orleans, and as we have no note of the evidence received below, we cannot apply the exemption invoked under art. 206 of the Constitution.

The State of Louisiana vs. Buisson, p. 829.

Where on appeal by an opponent it appears that he has not been heard at all, but was refused hearing on a stated ground, and a judgment dismissing his opposition was entered, it is not necessary that the inventory and a mass of documents that have no relation to the issue presented by the appeal should be copied in the transcript, and a motion to dismiss for the absence of these unnecessary and irrelevant documents will not be sustained, if the pleadings, bills of exception, and other matter needful for a proper presentation of the issue to be decided, are in the transcript.

Succession of E. Commagère, p. 830.

APPEAL—Continued.

Where a motion to dismiss the appeal is made on the ground of the deficiency of the transcript as shown by the clerk's certificate, and the transcript is completed and the missing evidence supplied, and the certificate converted under a *certiorari* from this Court before the case is submitted, and no delay is occasioned by the steps taken for the completion of the transcript, the appeal will not be dismissed.

Mrs. A. Huyghe vs. H. Brinkman, p. 836.

An appeal lies from a judgment dismissing interventions the object of which is to claim the ownership of the effects seized and to subject them to money claims, where the property, which is the matter in dispute, is shown to be worth more than two thousand dollars.

Parties deeming themselves aggrieved by a judgment may, when appealing therefrom, join in one motion and furnish one bond.

The motion and the bond should be filed in the proceeding in which the judgment appealed from was rendered. It would be irregular to offer them in a different proceeding, though the intervention were filed therein.

A bond in favor of "the clerk of the court," satisfies the law. The name of that official is utterly insignificant.

E. G. Schlieder vs. I. B. Martinez, p. 847.

Where plaintiff's demand is less than two thousand dollars, accompanied by an attachment, and judgment is rendered for the debt sued for, but the attachment is dissolved, this Court is without jurisdiction to review the judgment either as respects the debts or the dissolution of the attachment.

Yale & Bowling vs. H. Routh, p. 894.

An appeal, in which the transcript was not filed within three judicial days after the return day, and in which a motion for extension of time was not seasonably made, will be dismissed, notwithstanding an order extending the time, but granted after the expiration of the legal delay prescribed for making the same.

Such orders are granted at the risk of appellants, and will not save the appeal when it appears that they were inadvertently made.

The absence of counsel does not fall within the category of circumstances beyond the control of an appellant, and is not a sufficient excuse for not filing a transcript in time, or making a seasonable motion for additional delay.

World's Exposition vs. Railroad Company, p. 905.

ASSESSMENT.

Property must be assessed in the name of the true owner. If assessed in any other name, the assessment is defective and cannot be the basis of a legal tax sale.

A woman divorced from her husband is in the same situation toward him as though no marriage had ever been contracted between them. She has the legal right to resume her original name, and property which she buys and which is recorded under that name cannot be legally assessed against her under another name, not even under her former name as a married woman.

Mrs. S. Maspereau vs. New Orleans et als., p. 400.

The action of the police jury, sitting as a board of reviewers, is of a *quasi* judicial character, and should not be disturbed except for cogent reasons and upon clear and satisfactory proof of error in assessment.

Railroad Company vs. Tax Collector, p. 760.

When an assessor finds a person in the quiet possession of property, as owner under an apparent title purporting to be derived from a judicial sale, he is justified in assessing the property in the name of the person thus holding.

He is not required to examine the court records and investigate the proceedings pertaining to the title claimed and determine the question of its validity before acting.

Mrs. Mason et al. vs. E. L. Bemiss, p. 935.

Section 9, of Act 107 of 1884, only confers upon the City Council of New Orleans power to revise valuations and correct descriptions of property actually assessed and entered upon the rolls by the board of assessors. It does not authorize the council to make original assessments or to list property which the board has omitted from the rolls. Such omissions are to be corrected by the board of assessors in the manner pointed out by Section 2 of the same act.

J. H. Mercier et al. vs. New Orleans, p. 958.

ATTACHMENT.

An attachment cannot legally issue against a succession or the property thereof, whether the succession is opened and administered in this State or in any other State.

A. Levy vs. Succession of T. L. Lehman et als., p. 9.

When the judge has granted an order authorizing the defendant to release writs of attachment and sequestration on bond, which order has not been executed, he may order the suspension of its

ATTACHMENT.—Continued.

execution until hearing of the parties, when he discovers reason to believe that it was improvidently granted.

Nothing in the law prevents a defendant from releasing the crop gathered and ungathered on a plantation by giving a bond for one-half more than its value, without being under the necessity of bonding the plantation which was also attached. The right of defendant in an attachment to bond should be favored, as mitigating the harshness of the remedy and as restoring the property to commerce or to use.

J. B. Lallande vs. A. W. Crandell, p. 192.

In this suit for damages for wrongful attachment, it appearing that, prior to the attachment, the financial embarrassments of plaintiffs were such as to necessitate the stoppage of their business unless they could obtain relief from some source; and it not appearing that there was any source from which such relief could be obtained, they cannot recover damages for breaking up of the business and loss of credit therein as occasioned by the attachment.

The sale of plaintiffs' rice mill, voluntary or forced, being inevitable, and they having tried in vain to find a purchaser before the attachment, and the forced sale thereof having been made after due advertisement and on twelve months credit, and no evidence being produced to show that any one was or had been ready or willing to buy at a higher price, and none to show any deterioration in value resulting from the seizure, we are bound to accept the price bid at the sale as the criterion of its value, and to reject the demand for damages on that account.

Considering the open and honest dealings of plaintiffs and their faithful efforts to pay their creditors at every sacrifice, communicated to all interested and to defendants themselves, the latter's proceeding by attachment, on the charge of fraudulent intent, was peculiarly injurious and insulting to plaintiffs, and substantial damages are allowed therefor.

McFarland & Dupre vs. Lehman, Abraham & Co., p. 351.

An attachment bond made payable "unto James T. Clark, Clerk of the Civil District Court and his successors in office," etc., is a bond in favor of the clerk of that court as required by the law, and is not invalidated by the fact that Clark had ceased to be clerk and had been succeeded by another. The bond being judicial is to be construed according to the law under which it was executed; and

moreover, the terms "successors in office" clearly embraced the actual clerk.

Garnishees who provoke unnecessary litigation in resisting the enforcement of their obligations, must bear the costs when the decision is against them. *M. Scooler vs. W. Hestrom*, p. 907.

ATTORNEY-AT-LAW.

Where the fee of an attorney is a contingent one, as where he agrees to prosecute the suit for one-half that may be realized from the claim or the judgment thereon, prescription for the fee only begins to run from the time it is exigible, that is from the collection of the judgment. *J. H. Shepherd vs. L. Dickson*, p. 741.

BILLS AND NOTES.

The holder of a promissory note, acquired for a valuable consideration, before maturity, can recover of the maker the full amount of same and the enforcement of the mortgage securing its payment. when the only defense urged against it is a deficiency in the quality of land sold, and the seller has been discharged from all responsibility thereon by defendants.

People's Bank vs. Mrs. Trudeau et al., p. 898.

It is an elementary principle of the law of negotiable instruments that such equities subsisting between the original parties cannot be set up against a *bona fide* transferee for value before maturity.

Where the notes were taken in payment of a debt, knowledge by the transferee of the actual insolvency of the transferor, even if proved, could give rise to no relief, except under a revocatory action, of which the petition in this case wants the essential features in the allegations, the prayer and in the parties made.

Flower, Adm., vs. Mrs. Noble, etc. p. 938.

CERTIORARI.

The supervisory jurisdiction of the Supreme Court under a *certiorari* must be restricted to an examination into the validity of the proceedings held in the lower court; it cannot be exercised to review the judgment as to its correctness either on the law or on the facts of the case.

The supervisory powers of the court must not be confounded with its appellate jurisdiction.

The State ex rel. Gooch vs. Justice of the Peace, p. 962.

CITATION.

An appearance by an attorney for a defendant in a cause, except for the purpose of excepting to the citation, cures the want of citation.

Tutorship of Minor Heirs of Byland, p. 756.

CONSTITUTIONAL LAW.

A claim for reimbursement of money paid in error, even when reduced to judgment, does not arise from a contract, but from the law, and is not protected by the provision in the Federal Constitution, which prohibits States from passing laws impairing the obligation of contracts.

A State constitution, when it does not conflict with that Constitution, is omnipotent in its disposition and even destruction of private and social rights.

A State may divest vested rights without infringing the paramount law of the land.

The State ex rel. Neugass vs. City, p. 119.

The legality and constitutionality of the Private Market Ordinance of the city of New Orleans, No. 4798, A. S., have been hitherto fully affirmed by this Court.

Under art. 86 of the Constitution, prosecutions for the violation of said ordinance may be properly carried on in the name of the State.

The State of Louisiana vs. Natal, p. 967.

COMMON CARRIERS.

Railroad companies, as public carriers, have the right to eject passengers from their cars for non-compliance with their reasonable rules.

The rules of a city railroad company, acting under a contract with the city, which requires the company to carry passengers over two sections of its line for one fare, which requires such passenger to keep and show, undetached by him, a coupon ticket, as a voucher of his right to continue on the car beyond a given point, are reasonable in law.

Any passenger refusing to comply with said rules may be ejected from the car.

DeLucas vs. Railroad Company, p. 930.

COMMUNITY OF ACQUETS AND GAINS.

A policy of insurance on the life of a man vests the rights to the policy and to the fund arising on the happening of the loss, at the date of the execution of the contract. This has been frequently held in cases where third persons are the beneficiaries, and the same rule must apply when the beneficiary is the insured himself or "his administrators, executors or assigns." Hence when such a policy is taken out by an unmarried man, the rights and interests thereunder belong to his separate estate, and do not fall into a community arising under a subsequent marriage. If in such case premiums have been paid by the community, it is entitled to have such pa-

COMMUNITY OF ACQUETS AND GAINS—Continued.

ments reimbursed to it as expenditures made by it for the benefit of the separate estate of the insured spouse.

Estate of Jacob E. Moseman, p. 219.

When separate funds or property of the husband have been used to benefit and enrich the community, it will constitute a debt of the community in favor of the husband to the amount of such fund or the value of such property. But the evidence must establish, with reasonable certainty, that the funds were thus used or the property thus employed.

The community of acquets and gains includes, at its dissolution, presumptively, everything found in the succession of the deceased spouse, and without reference to the amount brought into the marriage by the respective spouses.

Succession of M. Foreman, p. 700.

In order to charge the community for separate account of the husband, the proof must show, with reasonable certainty, that his property or money, has been used for the benefit of the community.

Succession of Eugene Breaux, p. 728.

CONTRACTS.

The owner and the pledgee of certain notes entered into a contract with a third person, by which the latter agreed to pay a certain sum for one of the notes, past due, on a fixed day, and the pledgee bound himself to hold the note and to present it on that day, and to deliver it to the third person upon payment of the sum agreed on that day.

Held: That this contract did not create a mere continuing obligation with a term, but was a commutative contract under which the pledgee was bound to present the note on the day fixed, and the third person was only bound to pay, if so presented. The pledgee had only bound herself to deliver, in case on presentment the payment was made on that date. Had the note been presented on the day fixed and not paid, the party could not have claimed delivery on subsequent payment; and it is a necessary sequence of this that the pledgee, not having presented the note according to the contract, could not demand payment on a subsequent presentment.

The owner of the note having been guilty of no fault, and having lost the benefit of the third person's obligation by the fault of the pledgee, the latter is bound to make good the damage occasioned him thereby.

J. H. Hynson vs. W. Pugh et al., p. 68.

Conventional interest cannot be recovered without proof of a contract

CONTRACTS.—Continued.

to pay such. Legal interest only can be allowed in the absence of such contract.

A claim to the ownership of securities pledged cannot be recognized when it is apparent that the pledgor did not transfer them and the pretended conveyance was made by one who never had any title to the ownership thereof, to the knowledge of the pledgee.

The value of stock cannot be recovered as the price thereof, where it is not shown that a contract to sell and purchase was entered into directly, or by an authorized agent.

The transfer of stock by a banking institution to one of its creditors, in part liquidation of his indisputable claim against it, does not justify recovery of the price value of the stock from one to whom such creditor subsequently conveyed it, in settlement of his indebtedness.

If the original transaction be null, because *ultra vires*, it is not enforceable against the transferee or his assigns.

The giving of a letter of credit to a bank to be used solely in case of an emergency or of a financial panic, and if necessary to maintain and restore the bank, does not authorize the use of it, unless in the cases stipulated.

Recalling such letter and declining to honor drafts under it, where the amount, if paid, could not possibly have saved the bank, gives no right to recover the same. Such recalling does not forfeit the right of preference which the pledgees have on the securities in hand.

John Crossley & Sons, Limited, vs. Commissioners, etc., p. 74.

The two defendant companies entered into a contract whereby the Louisiana company transferred to the Pennsylvania company certain valuable rights and privileges in consideration of the Pennsylvania company's agreement to pay to the bond subscribers of the Louisiana company who would transfer their subscriptions to it a certain amount of money.

Held: That this created an obligation on the Pennsylvania company to pay the money, subject to the suspensive protestative condition of the bond subscribers transferring their subscriptions, and no term having been fixed, the obligation was not discharged by the failure and refusal of the plaintiff, a bond subscriber, for a time, to accept the benefit of the contract. Having subsequently offered to perform the condition by transferring his subscription, the Pennsylvania company's obligation to pay became complete, it

CONTRACTS—Continued.

having received and enjoyed the full consideration of its contract, and plaintiff's vacillation and delay having placed it in no worse condition.

Inasmuch as plaintiff's suit is in affirmance of the contract which it was alleged the Louisiana company had no right to make, and as it is not the latter's fault that plaintiff has not long since received the stipulated consideration, plaintiff's claim against the Louisiana company has no foundation.

H. Beer vs. Light and Heat Co. et al., p. 330.

A stipulation in a contract between a planter and his manager that the latter would receive as compensation for his services one-third of the net proceeds of the crops raised by him must be construed to mean the proceeds realized from the crops after deduction of all charges and outlay, such as costs of cultivating, of saving, of shipping and of selling the same.

In such a contract, a stipulation that the manager or employee is to share in the losses of the enterprise cannot be construed as including the loss of working animals by death from natural causes

F. Gomez vs. Isaac Levy, Jr., p. 420.

A party who contracts with a factory for the manufacture of certain goods, and receives a partial delivery of such without objections or complaint cannot, subsequently complain as an alleged violation of the manufacturer's obligation under the contract that the goods had not been manufactured in conformity thereto.

After the debtor has been put *in mora*, his offer to execute the contract under his engagement comes too late.

Enders vs. Gingras, Mulhaupt & Co., p. 773.

Under a contract wherein a firm or commercial partnership undertakes to furnish the capital required to prosecute a designated enterprise to a third person named, who agrees to manage and control same through his influence, and the net profits thereof are to be equally divided, the expense thereof is upon the latter, unless the contrary is stipulated or agreed upon.

G. Pilsbury vs. Friedlander et als., p. 909.

CORPORATIONS.

Private corporations must be authorized by the legislature or established according to law. When legally established, they may hold real estate, and receive legacies and donations.

They may enact statutes and by-laws for their government.

The right of succession is inherent to their nature, and they transmit their successions and their rights of property.

CORPORATIONS—Continued.

A corporation cannot fulfill another office of public or personal trust. A corporation legally established may be dissolved by an act of the legislature, if they deem it necessary for the public interest.

The Grand Lodge was incorporated by an act of the legislature in 1816, and given full powers to hold real estate and to receive donations and legacies. It also chartered all such subordinate lodges as the Grand Lodge had at that time created, and conferred upon them equal powers.

By the act of 1819, all lodges that had been organized in the *interim*, were likewise incorporated, and those which might be subsequently organized also.

As a general rule the question as to the forfeiture, or dissolution of charters and acts of incorporation is one which concerns the public order, and the corporation is presumed to exist for all purposes of justice until the forfeiture is declared by the judgment of a competent court in some proceeding to which the State is a party. *Williams vs. Lodge Masons of Monroe*, p. 620.

The statute authorizing the organization of corporations for literary, scientific, religious and charitable purposes, prescribes the course to be pursued in order to effect such incorporation, and also the method of making amendments or alterations of the original articles. Courts cannot regard or give effect to amendments not made in compliance with the mode prescribed by the statute.

Where the charter provides that the board of delegates, themselves elected annually, shall annually elect a chief engineer, the action of one board in electing such officer for a term of five years, cannot destroy the right and duty of succeeding boards to elect the engineer according to the charter.

The first election only conferred upon the person elected the right to hold the office for one year, or until his successor was elected and qualified, and when, after the expiration of the year, a succeeding board of delegates has elected another to the office, his qualification ended the term of the former occupant, whose former election was no valid or legal warrant for continuing in the office.

Failure to elect on the day fixed in the charter did not exhaust or destroy the power, and did not invalidate an election held at a subsequent regular meeting.

The State ex rel. Piper vs. Batt, p. 955.

CRIMINAL LAW.

APPEAL.

An appeal in a criminal case made returnable "according to law" and which ought to be returned at the place where the court holds sessions, will be dismissed, *proprio motu*, when the transcript is filed at an improper time and place, where the court was not sitting.

When such an appeal is granted and the transcript is certified in June, from Iberville parish, the transcript should have been filed either at Monroe or Opelousas, at which the court was holding sessions in that and the following month and not at New Orleans where it was not sitting.

The State as well as the accused has an interest in the speedy determination of criminal cases.

The State of Louisiana vs. N. Joseph et al., p. 33.

An order of appeal in a criminal case, making an erroneous return both as to time and place, when suggested by appellant, is illegal and will not sustain the appeal.

An appeal lodged by appellant at a place different from that designated in the order, cannot be considered by the Supreme Court, and on motion will be dismissed.

The State of Louisiana vs. S. Cohn, p. 42.

The State can appeal in criminal cases after verdict rendered and judgment has been arrested.

The State of Louisiana vs. B. E. Brabson, p. 144.

While judges are prohibited from commenting on the facts to the jury in a criminal trial, they are required to give to the appellate court their reasons for refusing instructions that are prayed.

The State of Louisiana vs. T. J. Boasso, p. 202.

A motion for a new trial on the sole ground that the verdict is contrary to law and evidence, is not entitled to notice in this Court.

The State of Louisiana vs. J. Smith, p. 301.

To determine whether the venue was proved or not, would require this Court to consider the evidence on this point, and this the court cannot do, however the evidence may be presented in the record.

The State of Louisiana vs. A. Tanner et al., p. 307.

An appeal in a criminal proceeding, asked *after* the term during which the judgment complained of was rendered and made returnable on appellant's suggestion, on an improper day, must be dismissed as sought and returned too late.

The State of Louisiana vs. S. Burns et al., p. 363.

A bill of exceptions to the ruling of the judge in refusing a new trial,

CRIMINAL LAW.—Continued.

APPEAL.

which simply states the fact of the overruling without any recitation of facts relied on or statement of grounds on which the judge acted, affords no basis for reviewing the ruling, because it affords no certification of the facts recited in the motion.

Newly-discovered evidence, merely tending to impeach or discredit witnesses who have testified on the trial, does not necessarily afford ground for new trial, and we are not disposed to disturb rulings on such question.

The State of Louisiana vs. E. Offutt, p. 364.

Motions for appeal in criminal cases tried in Orleans parish must be filed within ten days after sentence. The law regulating criminal appeals expressly prohibits granting them after ten days have elapsed from sentence.

Appeals in criminal cases from Orleans must be made returnable within ten days after granting them.

The law regulating appeals in criminal causes cannot be relaxed when its provisions are plain and its requirements absolute.

The State of Louisiana vs. Chas. Madlar, p. 390.

An appeal taken in a criminal case and made returnable within ten days after the order of appeal is granted, will be dismissed if the transcript of appeal is not filed on the return day, or within three judicial days thereafter. Sec. 4, Act 30 of 1878; *State vs. Butler*, 35 Ann. 392.

The State of Louisiana vs. J. Francis, p. 464.

The appeal taken by a party from a conviction and sentence for a crime, and who escapes from custody during the pendency of the appeal, cannot be prosecuted by counsel, and hence must be dismissed. *State vs. Edward*, 36 Ann. 863, affirmed.

The State of Louisiana vs. Mansfield, p. 563.

Identity of a party at the bar with the convicted accused, is a matter of fact which the district court can determine at the time of passing sentence and with which this court cannot interfere, where the question is not presented so as to enable it to decide whether the trial judge was right or wrong.

The State of Louisiana vs. W. Whitney, p. 579.

The Supreme Court will not consider evidence submitted by the accused in a criminal case, in support of a motion for a new trial, unless said evidence be embodied in, or otherwise made part of, a

CRIMINAL LAW—Continued.

APPEAL.

bill of exceptions reserved by the defendant to the refusal of a new trial by the judge.

This Court cannot consider a complaint of alleged misconduct of an officer in charge of jury, not previously submitted to the trial judge and suggested for the first time on appeal, and by brief or argument. *The State of Louisiana vs. E. Deas*, p. 581.

A motion for new trial that is unaccompanied by any bill of exceptions, or evidence touching the errors complained of, will not be examined.

Unless the record discloses a bill of exceptions, motion in arrest of judgment, proper assignment of error, or error apparent on its face, the judgment will be affirmed.

The State of Louisiana vs. Wire, p. 684.

An appeal returnable at New Orleans on the first Monday in November in a criminal case, which ought to have been made returnable at Shreveport at the opening of the term, will be dismissed where it is apparent that the return day is suggested by appellant in the body of his motion.

It will not relieve the appellant even if the return day was suggested by the judge.

The error of the judge was accepted and became that of the appellant and is a fault imputable to him.

The State of Louisiana vs. Stephens, p. 928.

An appeal in a criminal case will not be dismissed on the ground that the transcript of appeal has not been filed in the Supreme Court on the return day, if it appeared that it was filed within three judicial days thereafter.

The State of Louisiana vs. Corcoran, p. 949.

CHARGE.

Where it appears from the statement of the evidence attached to a bill of exception that the laws, touching which a charge was asked of the judge, had no application to the case, he did not err in refusing the charge on the ground that it had no such application.

The State of Louisiana vs. P. Simmons, p. 41.

By our statute the trial judge is expressly forbidden to give the jury in a criminal case any opinion as to what facts have been proved or disproved.

The State of Louisiana vs. Hahn, p. 169.

When a judge has already charged the jury on a given matter and the prisoner, among his requests of charges made thereafter, includes the matter already charged, the judge may well refuse to repeat it.

CRIMINAL LAW—Continued.

CHARGE.

When a trial judge has already charged the jury that the State must affirmatively prove that the offense had been committed within the jurisdiction of the court, and a request is made afterwards for that matter to be charged, a misunderstanding of the purport of the request provoking the observation that there was no doubt of the court's jurisdiction is not serious matter of complaint. The essential thing is that the jury have been charged on that point correctly. *The State of Louisiana vs. T. J. Boasso*, p. 202.

When a bill of exceptions recites the facts which the counsel had contended before the jury, had been established by the evidence, and refers to the evidence in support thereof, and asks for charges applicable to the state of facts recited, the judge's refusal to give the charges on the ground that they are inapplicable to the case, is error, unless the judge states that there was no evidence in the case supporting or tending to support the contentions of counsel.

It is the duty of the judge to give full instructions to the jury covering the entire law of the case as respects all the facts proved or claimed by counsel to be proved, provided such claim is supported by any evidence.

Authorities reviewed and criticised.

The functions of the judge in such case is different from that involved in rulings on admissibility of testimony, when he is entitled to weigh the testimony as to proof of necessary foundation, as a matter involving the exercise of his own discretion.

The State of Louisiana vs. Tucker, p. 536.

The issue by the trial judge of a bench warrant on the motion of the prosecuting attorney for the arrest and detention of a witness who had just testified before the jury on the charge of perjury, is not an act prohibited by the statute, which forbids the judge "in his charge to the jury to state or repeat the testimony of any witness, or to give any opinion as to what facts have been proved or disproved," particularly when there is no allegation that he alluded to or commented upon the testimony of such witness.

The State of Louisiana vs. Strado, p. 562.

The opinion recently rendered on a former trial of this case, is reaffirmed; and it is further held that where the charges asked are applicable to the facts and contentions of counsel as recited in the bill of exceptions, the judge is not authorized to refuse the charges because, while not denying the material facts stated, he disputes

CRIMINAL LAW—Continued.

CHARGE.

the correctness of the contentions of counsel based thereon. Counsel has the right to urge his own theory as to the inferences of motive and intention to be drawn from the facts, and to impress the same upon the jury; and though the judge may take a different view, the question is to be determined by the jury, and in case the jury should concur with counsel, defendant has the clear right to have them instructed as to the law applicable in such case.

The State of Louisiana vs. Tucker, p. 789.

The rule that the jury is bound to accept and apply the law as laid down by the judge, and that it cannot disregard it without violating its oath and duty is reaffirmed; and it is not error to refuse a charge "that if the jury cannot conscientiously believe that the judge has charged the law correctly, they do not violate their oath in disregarding it." Such a principle would utterly emasculate and annul the rule.

It is not essential that the violence inflicted by the defendant should have been the sole cause of the death; but if it hastened the termination of life, or really contributed, mediately or immediately, to the death in a degree sufficient to be a clear contributing cause, that is sufficient. *The State of Louisiana vs. Matthews*, p. 796.

After charging the jury, as the Constitution requires, that they are the judges of the law and of the facts in criminal cases, it is proper that the judge should instruct them to the effect that they are the sole judges of the facts, but that, as regards the law of the case, they should be governed by the charge of the judge thereon. Affirming *State vs. Ford*, 37 Ann. 465; *State vs. Vinson*, 37 Ann. 792; *State vs. Hal Matthews*, recently decided at Shreveport.

The State of Louisiana vs. Cole et al., p. 843.

DISTRICT ATTORNEYS.

Under the Constitution and laws of this State, district attorneys are vested with full discretion, not under the control of courts, to prosecute offenses *not capital*, either by indictment or by information, as in their judgment the interest of the State or the ends of justice may require—and the discretion thus vested in them cannot be affected by the fact that the grand jury may be in session at the same time and in the same parish.

The State of Louisiana vs. Cole et al., p. 843.

CRIMINAL LAW—Continued.

EVIDENCE.

A copy of a coroner's inquest, by the clerk of the Criminal District Court who is the legal custodian of the same, is admissible in evidence.

A motion in arrest of judgment cannot be entertained where it is not based on errors patent on the face of the proceedings.

Testimony in support of such motion cannot be received.

The State of Louisiana vs. S. Roland, p. 18.

Proof of previously communicated threats against the life of the accused by the deceased in cases of homicide, is inadmissible unless preceded by *proof* of some assault or hostile demonstration by the deceased against the accused at the time of or immediately preceding the killing.

The question of the admissibility of such evidence is within the exclusive province of the trial judge, who must be satisfied that proper foundation has been laid before admitting the evidence, and who has the legal discretion to disbelieve testimony which to his mind appears incompatible with the proven facts and circumstances of the case.

Rulings on this point in the cases of *Ford*, *Labuzan* and *Janvier*, 37 Ann., reaffirmed. An accused cannot be allowed to introduce as evidence his own declarations of motives and intentions connected with the killing, made to another person previous to the homicide.

The State of Louisiana vs. S. Spell, p. 20.

Under an indictment for entering a store with intent to steal, the prosecuting witness testified substantially that he had walked into the back part of his premises, leaving the store in charge of a child, when he heard the child exclaim, "You are being robbed!" and thereupon rushed into the store and saw the accused in the act of running out. Held, that the judge did not err in overruling an objection to the admissibility of the child's exclamation on the ground that it was hearsay, and in holding that it was admissible as part of the *res gestæ*.

The State of Louisiana vs. F. Moore, p. 66.

In order that a party may contradict his own witness, a proper foundation must be laid therefor, by proper inquiry as to time, place and person involved in the supposed contradiction, putting him fully on guard. The subject-matter of the testimony to be contradicted must also be material and relevant to the issue, and the contradic-

CRIMINAL LAW—Continued.

EVIDENCE.

tion must be not merely for the purpose of discrediting his testimony generally, by showing that in immaterial matters, his statements were untrue.

The State of Louisiana vs. W. Clark et al., p. 105.

Oral testimony is admissible to prove the official character of the witness on the stand, when his capacity is not a matter at issue.

A witness cannot be permitted to testify to part of a conversation his memory being deficient as to the other parts, unless such part of the conversation be essentially to make up a deficiency or connecting link, which otherwise would remain unexplained and a foundation has been previously laid.

The State of Louisiana vs. J. Smith, p. 301.

Where the defendant has attempted to impeach the testimony of witnesses for the State, the latter may support the same by evidence, character for veracity and integrity.

The State of Louisiana vs. D. Boyd, p. 374.

Res gestæ are events speaking for themselves through the instinctive and spontaneous words and acts of participants, and not words of the participants when narrating the events. The distinguishing characteristic of these declarations is that they must be necessary incidents of the criminal act or immediate concomitants of it, and that they are not due to calculated policy.

Time does not absolutely and alone determine whether a statement is a part or not of the *res gestæ*. No inflexible rule as to the length of the interval between the act of killing and the declaration of the victim can be formulated. The facts of each case must speak for themselves.

If the declarations are unconsciously associated with and related to the homicidal deed, even though separated from it by a short time, they are evidence of the character of the deed and are a part of the *res gestæ*.

Where the deceased, ten minutes after he had been fatally shot, said to a witness, "if he had not been so willing to fight he would not have been shot by the defendant," the statement is a part of the *res gestæ* and should have gone to the jury.

The State of Louisiana vs. E. Molisse, p. 381.

Although the court may have refused to permit the prosecuting officer to introduce other evidence after the case has been closed, yet when the jury requests to be permitted to have the prosecuting

CRIMINAL LAW—Continued.

EVIDENCE.

witness brought before them for the purpose of examining the nature and locality of his wounds and of questioning him in relation thereto, it lies in the discretion of the judge to grant the request and such permission is not error.

When the defense offers to question the State's witness with a view to ascertain whether or not he has been a penitentiary convict, for the purpose of establishing his incompetency, and the question is ruled out on the ground that the record is the best evidence, and when no objection is made at any time to his competency, and the record, though claimed to be in the trial court, has never been produced on the trial or on motion for new trial, we must presume that there was no foundation for such objection, and that even if the court committed error, it was immaterial and no ground for reversal.

Where the counsel on either side puts to his own witness a question grossly leading and seeking to elicit evidence in itself inadmissible, the judge has the right to interfere and prevent such proceeding, even in absence of objection by opposing counsel; and such action furnishes no ground for reversal, if the ruling was otherwise correct.

A witness in a criminal case has the privilege of declining to answer a question which tends to criminate himself; and when he claims this privilege the judge is right in declining to compel him to answer. *The State of Louisiana vs. L. Crittenden*, p. 448.

After the evidence is closed on the trial of a motion in which the evidence is taken down, the trial judge may allow a witness to correct his statement as taken down, without reopening the evidence so as to be compelled to hear other and further evidence.

The declarations of accused made, not at the time of the commission of the offense, but subsequently in reply to the charge against him, are not part of the *res gestæ*; they are self-serving and inadmissible.

The State of Louisiana vs. G. Gonsoulin, p. 459.

An accomplice joined in the same indictment with the prisoner to be tried may testify, provided he be not put on trial at the same time. 23 Ann. 78; 25 Ann. 522; 7 Ann. 379.

While the jury may convict on the testimony of an accomplice alone, the judge should caution them, in prudence, not to return a verdict of guilty unless such evidence is corroborated—but this

CRIMINAL LAW—Continued.

EVIDENCE.

Court will not control him as to the language he shall employ in giving them such instructions.

The State of Louisiana vs. N. Mason et al., p. 476.

Oral testimony is admissible to prove the contents of an indictment and other important documents which were lost or mislaid, and of which there existed no copy or record.

The State of Louisiana vs. W. Whitney, p. 579.

A person to whom complaint has been made by the victim of a rape, when placed on the witness stand, cannot be permitted to repeat all the details of the outrage and the name of the ravisher as reported to her, but can only testify as to the fact of the complaint being made and as to the condition of the victim when making the complaint. Such testimony is not to be regarded as independent and original evidence to establish the guilt of the accused, but its purpose is to support the testimony of the person outraged.

The counsel for one accused of such crime, who seeks to impeach the testimony of the principal witness by showing contradictions between the statements of such witness made on the preliminary examination and those made on the trial, should be permitted to read parts of the previous deposition and ask the witness if she had so testified, and should not be compelled first to read to her the entire deposition out of the presence of the court and jury.

The State of Louisiana vs. Robertson, p. 618.

The rule is that dying declarations are admissible if made under a sense of impending dissolution, which soon thereafter transpires. 1 Glf. sec. 158; 30 Ann. 365; 31 Ann. 95; 32 Ann. 1086; 36 Ann. 920, *State vs. Moliss*. *The State of Louisiana vs. Keenan*, p. 660.

The State is not entitled to prove, in support of a charge of burglary of a house, and the larceny of a pocket-knife therein by the accused, another burglary at a different time and place and the larceny of a gold watch, to interpret the intent of the accused, in the commission of the former.

The State of Louisiana vs. Johnson, p. 686.

Parol evidence is inadmissible to prove the pendency of an indictment in a court of record. A copy of the indictment and the minutes of the court showing its presentment and filing would be the best evidence of the fact. *The State of Louisiana vs. Grayson*, p. 788.

CRIMINAL LAW—Continued.

EVIDENCE.

Where a person, after being wounded, sends for a minister and declares to him that he expects to die, has no hope of recovery and continues to speak in this strain till his death, the condition of mind prerequisite to making a valid dying declaration, is sufficiently proved.

The State of Louisiana vs. Jones, p. 792.

In criminal cases the order to separate witnesses is not one of right, and its modification by the judge within reasonable grounds must be left to his discretion. Hence, the ruling of a trial judge in rejecting the testimony of a party who had obtained admission in a court-room, on declaring that he was not a witness, and who was thereafter tendered as a witness by the accused, will not be disturbed on appeal. No fixed rule can be adopted in such matters. Judges must be guided by the peculiar circumstances surrounding the offer of such testimony.

The State of Louisiana vs. Cole et al., p. 843.

In a prosecution for manslaughter, it was urged that a few minutes before the killing the deceased and a number of companions were assembled at a certain place; that they left there together and went to the place where the accused was found and was pointed out by one of the parties to the deceased, who was told by the one thus pointing him out to go and talk to him; and the deceased, without speaking, immediately approached the accused and seized him by the throat and beat him in the face; that the accused pulled loose from his assailant and retreated to the middle of the street, where he was followed by the deceased, again seized violently and beaten by him. In which last struggle the mortal blow was given by the accused. At this stage of the testimony the witness on the stand, and who was one of the party that had accompanied the deceased, was asked in substance, when this attack was made on the accused, what did you do, and what did each one of the party present do (naming each one), at the same time and place, which question was objected to, the objection sustained, and the witness not permitted to answer. Held, that the ruling was error. It is not true that the *res gestæ* can consist only of what was said and done at the time by the participants in a combat. They may embrace what was said and done by any and all present, which have any bearing on the affair or are in any manner connected therewith.

The State of Louisiana vs. Corcoran, p. 949.

CRIMINAL LAW—Continued.

FORGERY.

Where the name forged to an instrument is, or is supposed to be, fictitious, and not the name of any real person, and inquiry is to be made of the residence or existence of such person, it is proper to call the police officers or other persons well acquainted with the place where this person is supposed to live, or is said to live, in order to show whether he does live there. And even if inquiries have been made in the place by a stranger, his testimony as to the fact of inquiry and the result of it is admissible, though it may not be satisfactory proof of the non-existence of the person in question. If the forged name be that of a fictitious instead of a real person, the offense of forgery is complete if the instrument has the appearance of being valid on its face.

Where the forgery is of a fictitious name, it would be error to charge the jury that there must be some evidence of similitude to the signature of a real person, because when there is no original there can be no similitude.

It is not necessary to prove that an accused forged an instrument in order to constitute the crime of uttering or publishing a forged instrument. The two offenses are distinct.

To constitute the crime of uttering a forged instrument, it is not essential that a fraud has been actually perpetrated by it. It is sufficient that there is the intent to defraud, and this intent may be inferentially proved.

The State of Louisiana vs. Hahn, p. 169.

There can be forgery of a certificate of marriage where no marriage was ever celebrated just as there can be forgery of a promissory note where there was no indebtedness of the maker whose name is forged. As there can be a pretended marriage so there can be forgery of a certificate of marriage that never took place.

It is not essential that the forged instrument be one that, if genuine, an action might be brought on it. If it could be used as proof in a suit either against him, whose name is forged, or in a suit against any other, whether to sustain a claim made or in defense of one, it is susceptible of forgery.

Our statutes dispense with the need of setting out any copy or *fac simile* of the forged instrument in the indictment, and it may be described by its usual and common name. It is not necessary to set out anything more than is necessary to accurately and adequately express the offense. It is neither necessary nor proper to

CRIMINAL LAW.—Continued.

FORGERY.

set forth matters of evidence in the indictment, nor to set forth the kind of suit or matter of contestation in which the forged instrument is receivable in evidence.

The publisher or alterer of a forged instrument need not have been the forger of it. The two acts are distinct and constitute two different and well-defined crimes.

The State of Louisiana vs. T. J. Bouso, p. 202.

The essential elements of forgery to be charged against the accused and proved are three :

- 1st. A writing, in such form as to be apparently of some legal efficacy.
- 2d. An evil intent, of the sort deemed fraudulent, in the mind of the defendant.
- 3d. A false making of such writing.

A jury ought to *infer* an intent to defraud the person who would have to pay the instrument, if it were genuine, although from the manner of executing the forgery, or from that person's ordinary caution, it would not be likely to impose upon him.

The State of Louisiana vs. Ford, p. 797.

INDICTMENT.

Where the blank for the year in an indictment is unfilled, the State may amend by inserting the proper year even after the evidence has closed.

In charging the crime of an assault with intent to commit a rape, it is not duplex pleading to charge a battery as well as an assault. The assault is a component part of the crime, an ingredient of it, and the battery is only an aggravation of the assault, both being the acts of the accused while endeavoring to carry out his intent to commit the more heinous crime.

The State of Louisiana vs. A. Fontenette, p. 61.

Where, under a statute punishing the offense of entering a shop with intent to steal, the indictment used the word "store" instead of shop, the variance is immaterial, as long since decided. 5 Ann. 340.

The State of Louisiana vs. F. Moore, p. 66.

In a criminal prosecution, the papers of which have been purloined from the clerk's office, the district attorney has the legal right to enter a *nolle prosequi* of the charge contained therein, and to present a new indictment or information on the same charge against the same party. To hold otherwise would render the State pow-

CRIMINAL LAW—Continued.

INDICTMENT.

less against a criminal who had friends to purloin the papers of his case.

An indictment or information which in two separate counts charges the offense of putting out an eye with a *club*, and the crime of assault with intent to commit murder with a *club*, is not bad for duplicity. The two offenses could grow out of the same act, hence they may be charged in the same indictment.

The State of Louisiana vs. Joe Pierre, p. 91.

In an indictment for murder it is not essential that the name of the deceased should follow the word "murder." If it be in another part of the sentence so that it certainly appears to be the object of that verb, and there can be no doubt upon whom the crime is charged to have been committed, it is sufficient to answer the requirements of our statute.

If the prisoner is fully informed by the indictment for the murder of what person he is accused, so that if he had been acquitted he could plead *autrefois acquit* to another indictment for the murder of the same person, the indictment is good.

The State of Louisiana vs. B. E. Brabson, p. 144.

Where it is charged that an offense was committed *at* a certain point, the word *at* means *in*.

In an indictment it is not necessary to specify that the deceased (Martha Calhoun) was a human being.

The State of Louisiana vs. J. Smith, p. 301.

A motion in arrest of judgment is well founded when it is levelled at an indictment which charges that the accused "feloniously did shoot with a dangerous weapon with intent to commit murder." Such indictment should have charged besides that the act had been done "wilfully and with malice aforethought."

The State of Louisiana vs. Ed. Scott, p. 387.

In an indictment for shooting with a dangerous weapon with intent to murder, under section 791, R. S., although it is not necessary expressly to charge an assault, yet as an assault is necessarily implied in the charge, the setting of it out is innocent surplusage, and the larger crime being otherwise properly charged, a conviction thereof will be sustained.

The indictment containing in its caption and commencement a full description of the State, parish and judicial district, the charge

CRIMINAL LAW—Continued.

INDICTMENT.

that the crime was committed in the "State, parish and district aforesaid," is a sufficient laying of the place.

The State of Louisiana vs. L. Crittenden, p. 448.

Objection to an indictment based on the ground that a member of the grand jury that found the bill was disqualified must be urged before trial, and cannot be taken advantage of by motion for new trial or motion in arrest.

The State of Louisiana vs. Mary Griffin, p. 502.

In an indictment for perjury it is not essential that the authority and jurisdiction of the court administering the oath should be expressly averred, if they sufficiently appear from the facts set out.

When the prosecution for perjury is in the same court in which the perjury was committed, it may take judicial cognizance of its own jurisdiction, if the indictment sufficiently sets forth the facts.

Although the materiality of the matter sworn to be not expressly averred, yet if the indictment sets forth the facts from which the materiality appears, that is sufficient.

The State of Louisiana vs. Schlessinger, p. 564.

In an indictment for perjury it is not essential to charge expressly that the court in which the perjury was committed was of competent jurisdiction, or that the matter sworn to was material, if facts are set forth which justify the inference that the court had jurisdiction and that the matter was material.

Neither is it essential to state in such an indictment that the judicial proceeding, which was a prosecution for murder, and in which the perjury was committed, and which is described specifically, was pending on an indictment found by a grand jury.

The State of Louisiana vs. Grover, p. 567.

An indictment is not amenable to duplicity, because it charges one or more acts contemporaneously, germane in character, and altogether making one offense, although each of said acts constitutes in itself a minor offense of the same genus with the graver one charged.

The State of Louisiana vs. Hendricks, p. 682.

Where the mortal blow is given in one parish, but death ensues in another, the crime may be prosecuted in either parish, and it is not essential to the validity of the indictment in such case that said facts should be averred therein. The crime may be charged to have been committed in the parish where the bill is found.

The State of Louisiana vs. Jones, p. 792.

CRIMINAL LAW—Continued.

INDICTMENT.

A clerical error in writing a name in an indictment cannot be invoked as vitiating the proceeding. 32 Ann. 782; 35 Ann. 293.

The State of Louisiana vs. Ford, p. 797.

A razor is not a dangerous weapon within the intendment of Revised Statutes, sec. 832.

An indictment which charges that the accused "did have, and carry, concealed on or about his person, a certain dangerous weapon called a razor," is bad.

Whether the instrument named in the indictment as a "dangerous weapon" is one within the meaning of the statute, the trial judge must decide, on hearing a motion to quash or one in arrest of judgment, as upon every other essential ingredient of an indictment.

The State of Louisiana vs. Nelson, p. 942.

Where a statute uses the words "willfully or maliciously" to qualify the act therein declared an offense, the indictment may charge the act as "wilfully and maliciously done; or it suffices if it is charged as wilfully done or as maliciously done, using either of the qualifying words alone.

Where a common law crime, such as murder, forgery, or the like, is denounced by a statute *by name*, indictments for such crime should be charged in the words and qualifications prescribed by the common law for indictments for such offenses.

When, however, a statute denounces a certain act or acts an offense and specifically describes the act, though such offense may bear a close relation to a well known common law offense, and belong to the same species, the offense thus declared is properly a statutory offense, and may be charged in the language of the statute.

An indictment under section 843, for setting fire to and burning an outhouse, etc., charging that it was done "feloniously, unlawfully and maliciously," is valid.

The State of Louisiana vs. Philbin et al., p. 964.

INFORMATION.

An information under Section 792 of the Revised Statutes, which charges that the accused wilfully, feloniously and of his malice aforethought * * * shot into and among a crowd with intent to kill and murder some person or persons, is not bad for duplicity.

The description of the *animus* of the shooting is sufficient to qualify the intent to commit murder.

CRIMINAL LAW—Continued.

INFORMATION.

The information is not deficient for using the words *into* and *among* instead of the word *at* used in the statute. It is not deficient because it does not in terms charge an *assault*, when it appears that other words used contain the necessary ingredients of an assault.

The State of Louisiana vs. W. Samuels, p. 457.

In an information charging an assault with intent to kill, it is not necessary that the pleader should qualify both the "act" and the "intent" as felonious. To qualify the intent is sufficient.

The averment that the party assailed was then in the peace of the State, is not necessary to be proved; its omission is therefore not a matter of substance which would vitiate the information; hence, objection grounded on its omission cannot be made by a motion in arrest of judgment.

The State of Louisiana vs. Sonnier, p. 962.

JURY.

A juror accepted on the faith of the truth of his sworn answers, but who on cross-examination contradicts himself, may be challenged peremptorily before the oath is administered to him.

The State of Louisiana vs. S. Roland, p. 18.

Alleged errors in rulings of the judge affirming the competency of jurors who were objected to by accused, have no weight when the jurors were peremptorily challenged and did not serve on the jury, and when it does not appear that accused's peremptory challenges were exhausted before the jury was empaneled.

The State of Louisiana vs. P. Simmons, p. 41.

The words "Foreman Grand Jury," following the signature of the foreman, mean Foreman of the Grand Jury.

The State of Louisiana vs. J. Smith, p. 301.

The disqualification of a jurymen for the reason that he is a convicted felon cannot be taken advantage of in a motion in arrest of judgment. It is assimilated to the disqualification of alienage and non-residence and objection must be made before conviction.

The State of Louisiana vs. S. Williams, p. 361.

It is not error for a judge to sustain a challenge for cause to a juror on the ground that he does not understand the ordinary use of the English language. *The State of Louisiana vs. E. Offutt*, p. 364.

In criminal cases the Supreme Court cannot review the verdict of the jury on questions of fact. The jury are the sole judges of the

CRIMINAL LAW—Continued.

JURY.

sufficiency of the evidence as to the guilt or innocence of the accused. *The State of Louisiana vs. R. S. Williams, p. 371.*

Opinion based on conversations is no ground for challenge of a juror when the juror states that he can try the case according to the law and the evidence, taking the law from the court and the evidence from the sworn witnesses, and do exact justice, regardless of such opinion. *The State of Louisiana vs. D. Boyd, p. 374.*

In order to set aside the venire, accused must point out and establish some material illegality in the drawing and show some material injury to himself.

A man living near the line between two parishes is a lawful juror in that parish in which he is a registered voter and claims his residence, when the line has not been legally and definitely settled, and it is not positive which side it would place him on when so established. The jury is presumed to be legally composed, and he who asserts the contrary assumes the burden of proof.

Applications for a change of venue are largely within the discretion of the trial judge. His action may be reviewed by this court, but his conclusion relating thereto will not be disturbed unless it clearly appears that he has misapplied the law or the facts.

To entitle accused to a change of venue, the prejudice against him must be so general throughout the parish as to render it impracticable for him to get a fair and impartial trial.

The State of Louisiana vs. G. Gonsoulin, p. 459.

The requirements of the jury law of this State contemplate the trial of causes by the jurors on the regular venire as long as any of them can be secured or obtained, and they consider talesmen simply in the light of substitutes for the jurors of the regular venire, who are to be called or used only when regular jurors are not to be had.

Hence, in a case in which a list of talesmen has been summoned under the orders of the court, because the regular venire had been exhausted, and it appears that while proceeding with the list of talesmen, a jury previously engaged on a case, reports and is discharged, it then becomes the duty of the trial judge to resume the call under the regular venire, until that be exhausted, before continuing to form a jury from talesmen.

CRIMINAL LAW—Continued.

JURY.

The ruling of a trial judge in rejecting a juror under a challenge for cause by the State, affords of itself no legal ground of complaint to the accused. The right of peremptory challenge is a right to reject but not to select.

The State of Louisiana vs. W. Creech, p. 480.

A juror cannot be heard to impeach his own verdict. 3 Ann. 435; 6 Ann. 653; 35 Ann. 1032.

The State of Louisiana vs. Isaac Bird, p. 497.

A juror who, when sworn on his *voir dire*, says that from what he knows of the character of the accused he has a little prejudice against him, but that this feeling can, in no manner, affect his verdict and that he will be governed solely by the law and the evidence, is not incompetent.

The State of Louisiana vs. Jones, p. 792.

NEW TRIAL.

A new trial is not grantable because of newly-discovered evidence, the sole object of which is to impeach the veracity of the leading witness for the State, nor on the ground that a witness for the State has made statements since the trial at variance with his testimony upon it, especially when the lower judge holds that other testimony warranted the conviction, or does not believe the newly-discovered witnesses.

The greatest reliance is placed on the trial judges in refusing new trials in criminal causes, and it would be an unwise restriction to hold that they shall not take into account their belief that false swearing has been resorted to in order to break a conviction and obtain a new trial.

The State of Louisiana vs. S. Williams, p. 361.

A motion for a new trial made in a criminal cause, after sentence, after the case has been finally closed and an appeal taken, comes too late.

Hence, the trial judge does not err if he refuses to direct his clerk to include such tardy and irrelevant proceedings in the transcript of appeal.

Therefore, the Supreme Court will not entertain any proceeding intended to coerce the district judge to order the introduction of such foreign matters in the transcript.

The State of Louisiana vs. E. Offutt, p. 364.

CRIMINAL LAW—Continued.

NEW TRIAL.

The fact that unexpected evidence was adduced furnishes no legal ground for a new trial. Wh. Cr. Pl. and Pr. § 884.

Accused is not entitled to a new trial because he or his counsel made a mistake in not adducing his entire evidence at the proper time. Wh. Cr. Pl. and Pr. §§ 876, 877.

The State of Louisiana vs. G. Gonsoulin, p. 459.

A former acquittal for the same offense cannot be urged as newly-discovered evidence in support of a new trial. Such fact must have been known to defendant, and evidence to that effect could only have been offered under a special plea of *autrefois acquit*.

Jurors cannot be heard to impeach their verdict; and when no objection is urged to the correctness of the judge's charge, the allegation that the jury misapprehended its meaning, supported by the affidavit of a juror to that effect, cannot be sustained as ground for a new trial.

The State of Louisiana vs. Miles Bates, p. 491.

A charge of the judge, in a capital case, that is not reduced to writing, and to which no bill of exceptions was taken at the time, cannot be examined upon an application by accused for a new trial. 34 Ann. 106, 1213; 35 Ann. 543, 773.

An objection that the verdict of the jury is contrary to law and the evidence is bad. 33 Ann. 313; 11 Ann. 478.

An objection, raised for the first time upon an application for a new trial, that one of the jurors who tried the case was an unnaturalized citizen, comes too late; it should have been urged when the juror was offered to be sworn. 8 R. 590; 13 Ann. 276; 21 Ann. 546, 257; 26 Ann. 383.

The State of Louisiana vs. Isaac Bird, p. 497.

An accused is not entitled to compulsory process for obtaining witnesses in his favor, in support of a motion for a new trial.

The provision of the Constitution (art. 8) touching witnesses in criminal cases, applies to witnesses on the question of the guilt or innocence of the accused, and has no reference to motions for new trials or other proceedings connected with a criminal cause.

The Supreme Court will not disturb the rulings of trial judges, in their manner of fixing and hearing motions for new trials or similar proceedings unless the same appear on their face arbitrary or glaringly unjust.

Evidence intended to impeach the testimony of witnesses on the trial

CRIMINAL LAW—Continued.

NEW TRIAL.

is not a legal ground for a motion for a new trial on the ground of newly discovered evidence.

The State of Louisiana vs. Gauthreaux et als., p. 608.

The complaint of an accused that he was refused further time to prepare a motion for new trial five days after conviction, cannot be entertained.

Such matters are within and must be left to the sound discretion of the trial judge.

The State of Louisiana vs. Major, p. 642.

When an accused person has been tried and a verdict of guilty returned against him, the trial judge is without power or authority to grant a new trial *ex proprio motu*.

The trial judge is in no sense the custodian for the accused, and it was not his duty to take care of his welfare.

There would have been ample time for him to consider measures for his relief when applied for by the accused.

The State of Louisiana vs. Williams, p. 960.

OATH.

Being sworn by a clerk, in the presence of the court, is being sworn by the court; and an oath administered by an officer, though incompetent, in presence of the court, is regarded as administered by the court.

The power to administer an oath is a ministerial one.

This Court has no power to pass upon and decide whether there was a variance between the proof administered and the indictment when presented in connection with a motion for new trial for the first time.

An objection that witnesses who testified at, or jurors who sat upon, the case, were sworn by an officer without any legal authority to administer an oath, comes too late after verdict against the accused; and objection to same cannot be entertained for the first time on application for a new trial.

The State of Louisiana vs. Dreifus, p. 877.

PERJURY.

There is an essential difference between a judicial and non-judicial oath. A judicial oath is one taken before an officer in open court; and a non-judicial oath is one taken before an officer *ex parte*, or out of court.

In case perjury is assigned on a judicial oath, it is sufficient that the

CRIMINAL LAW—Continued.

PERJURY.

person acting is one of a *class* of officers having *prima facie* authority, and does administer the oath with due formality and solemnity, in the presence of the court, it having jurisdiction of the proceedings.

In case perjury is assigned on a non-judicial oath, it is insufficient to maintain a conviction, if the person administering the oath was not legally authorized to administer *that particular oath*.

The State of Louisiana vs. Dreifus, p. 877.

PLEAS IN BAR.

The pleas of *autrefois convict* and *autrefois acquit* have derived from the common law principle that no person shall be twice put in jeopardy of life or limb for the same offense, and neither of the pleas can be sustained unless the previous trial invoked as a plea in bar shall have been for the same charge contained in the new indictment or information, and unless the evidence required in one charge would be sufficient to establish the other.

Hence the plea in bar is not good to defeat a charge of "assault with a dangerous weapon, to-wit: a knife, with the intent to kill and murder and inflicting a wound less than mayhem," when it appears that the previous trial of the accused set up in bar, had been on a charge of robbery, although at the same time and on the same person.

The State of Louisiana vs. Helveston et al., p. 314.

PRESCRIPTION.

The fact that a justice of the peace hears rumors of an offense in the neighborhood does not show that such offense was "made known" to him, so that prescription will begin to run in favor of the offender. To have that effect it must be made known by affidavit before him. R. S. 986, 2058.

The State of Louisiana vs. G. Gonsoulin, p. 459.

State vs. Alexander Belize affirmed.

Proof administered of the previous prosecution of another "person" accused of *same* "offense," is not proof of knowledge by the prosecuting officer that the accused had committed the offense, and he cannot thereby sustain his plea of prescription.

The State of Louisiana vs. H. Hanks et als., p. 462.

STATUTES.

The judges of the "City Courts" of New Orleans, under the Constitution of 1879, replace the justices of the peace under the former sys-

CRIMINAL LAW.—Continued.

STATUTES.

tem, and inherit the power to solemnize marriages from them. They are expressly required to make an "act" of every marriage they celebrate, and the common and usual name of such "act" is a marriage-certificate.

When a criminal statute makes an "intent to defraud" an ingredient of a crime, it does not mean only an intent to deprive one of personal property. Defraud has a broader meaning in such case and means to prejudice the rights of another in any way.

The State of Louisiana vs. T. J. Boasso, p. 202.

Section 805 R. S. denounces 1st, The forcible seizing and carrying a person against his will out of the State; 2d, The forcible seizing and carrying a person against his will from one part of the State to another; and 3d, The imprisoning or secreting a person without authority of law. It is not necessary to charge that the person imprisoned or secreted was forcibly seized and imprisoned or secreted.

It is sufficient to charge in the language of the statute that the person was carried from one part of the State to another and not from one parish to another, and proof that the carrying of the person was from one part of a parish to another, or from part of a city or town to another, will sustain the charge in the bill on this count. This Court cannot determine whether the evidence does or does not justify the verdict.

The State of Louisiana vs. R. T. Backarow, p. 316.

An information charging the accused with an assault with a dangerous weapon, to wit: a certain pistol * * * with intent then and there wilfully, feloniously and of his malice aforethought to kill and murder, etc., is a sufficient compliance with the requirements of Section 792 of the Revised Statutes, which denounces among others the crime of an assault with intent to commit murder.

The State of Louisiana vs. R. S. Williams, p. 371.

Article 29 of the Constitution, which provides that every law of the General Assembly must embrace but one object, and must express the same in the title, is mandatory, and any enactment which violates it is null.

Act No. 64 of 1884, entitled "An Act to provide for the punishment of the offense and crime of malicious threatening or threats, the malicious sending of threatening letters or communications of malicious

CRIMINAL LAW—Continued.

STATUTES.

publications, or resorting to malicious acts, or threats of injury to person, reputation or property, though no valuable thing be demanded, or sought to be extorted," embraces at least four separate objects, and is, therefore, unconstitutional, null and void.

The State of Louisiana vs. Heywood, p. 689.

TRIAL.

The Constitution and laws guarantee to a party charged with crime the right to be heard by counsel, and where the party is unable to employ counsel, it is the duty of the court to assign one. This right is not an empty formality, but an inestimable privilege, and the counsel so assigned should be allowed a reasonable time to make preparation for the defense, and where under oath he states that he has been unable to do so, assigning just reasons therefor, and asks a delay for the purpose of preparation, and it is refused him and he has not been wanting in diligence, *held* that such ruling was error.

The State of Louisiana vs. R. Simpson, p. 23.

An accused whose case is fixed for the second week of the term has not the right to require service of the list of jurors drawn for the third week of the term.

In a case not capital the jury may be allowed to separate during the trial.

The State of Louisiana vs. Joe Pierre, p. 91.

The constitutional right of being heard by counsel, cannot be construed into meaning that a prisoner's counsel must be permitted to re-argue *ad-infinitum* all that had already been argued and to repeat all that had already been said. There must be some restraint of the volubility of counsel since there must be a limit to the duration of a criminal trial.

The State of Louisiana vs. T. J. Boasso, p. 202.

When the term of the district court has been fixed and begun two weeks before the session of the Circuit Court, and the accused has been tried and convicted before the beginning of the latter term, and when, having no business, the Circuit Court does not meet, the district court violates no law in continuing its term for the purpose of disposing of motions for new trial, etc., and passing sentence on the convicted defendant.

When a defendant has been once arraigned and has pleaded to an indictment on a former trial, re-arraignment is unnecessary, and if

CRIMINAL LAW—Continued.

TRIAL.

made, it is no objection that the case has been previously set for trial.

The State of Louisiana vs. D. Boyd, p. 374.

Courts have always the right to correct their minutes so as to conform to the facts, especially when such facts are within the personal knowledge and recollection of the court.

It is not essential that accused should be present at the filing and trial of motions and pleas not involving the question of guilt or innocence on the merits. It is sufficient if the minutes show his presence at the arraignment, trial, verdict and sentence. 32 Ann. 560; 34 Ann. 121; 35 Ann. 9.

**The State of Louisiana vs. Gonsoulin, p. 459.*

An objection urged, after verdict, that the accused was not served with the list of the jury, comes too late. 23 Ann. 620, 621.

The State of Louisiana vs. N. Mason et al., p. 476.

A party who has been arraigned, even though it be on the very day of his trial, and who goes to trial without objecting to the lateness of the time at which he was arraigned, cannot take advantage of the alleged irregularity after trial, by means of a motion for a new trial.

The order of the trial judge separating the witnesses during the trial, falls within the legal discretion vested by law in trial courts, and a modification of the same by the judge, within reasonable bounds, will not be disturbed on appeal.

The State of Louisiana vs. G. Harrison, p. 501.

Where there are two judges in the same district clothed with equal powers and jurisdiction and authorized by statute to provide rules for the regulation of their courts and fix the terms thereof, and under this authority they have fixed their respective terms, it does not vitiate the proceedings because an accused has been tried and convicted at a term of the court which the judge presiding thereat was only authorized to hold in the absence of or inability of the other judge to attend, to whom such term was regularly assigned under the rules, where such absence or inability is shown by the record.

The State of Louisiana vs. Mary Griffin, p. 502.

It is not only the right but the duty of the trial judge to order the correction of the minutes of his court so as to make them conform with the true facts as they occurred.

The State of Louisiana vs. Major, p. 642.

CRIMINAL LAW—Continued.

TRIAL.

This Court will not interfere with the orders made by trial judges concerning the discipline of their courts. Hence, a complaint that a judge called a particular case out of its order as fixed on the trial docket, will not be entertained on appeal. Parties should consider that the district judges in this State are not mere ministerial officers, or much less children, whose every step must be traced and controlled by superior authority, but that their courts have certain inherent powers.

The State of Louisiana vs. Cole et al., p. 843.

VERDICT.

A verdict finding the prisoner guilty is a verdict against the defendant.

The State of Louisiana vs. J. Smith, p. 301.

A verdict will not be set aside because the jury was taken into a room to deliberate on their verdict where there were a number of law books on the subject of crimes and criminal proceedings, where there is no evidence that the books were read or examined by the jury.

The State of Louisiana vs. A. Tanner et al., p. 307.

In criminal cases, all the essential facts must be found by a special verdict, in order to enable the court to give a judgment of law upon the matter in issue. Nothing is to be taken by the court by implication or intendment. What is not found is supposed not to exist.

Hence, in a trial under a statute which denounces the offense of "receiving or buying any goods or chattels that shall be feloniously taken or stolen from any other person, knowing the same to have been so stolen or taken," a verdict of "Guilty of knowingly receiving stolen property" does not contain the legal requirement touching the intent with which the goods were received by the accused, and it cannot therefore be the basis of a legal sentence.

The State of Louisiana vs. Burdon et al, p. 357.

A verdict (on an information containing two counts) in these words, "Guilty—with intent to murder," being responsive to the first count, is not defective for not containing the words, *with a dangerous weapon*, which are necessarily implied.

The State of Louisiana vs. T. M. Smith, p. 479.

The judgment appealed from sustained a motion in arrest on the ground of defect in the verdict, and remanded the prisoner to custody to await a new trial. The accused, contending that the legal

CRIMINAL LAW—Continued.

VERDICT.

effect of sustaining the motion in arrest, on the ground stated, was to terminate the case and to entitle him to a discharge, and thus to make it a final judgment, prosecutes this appeal to correct the alleged error in remanding him to custody.

He is entitled to have the question passed on.

There was no error in the action of the judge *a quo*. The defect in the verdict was that, being special, it found accused guilty of no crime denounced by law, and it thus falls under the authority of Foster's case, 36 Ann. 857, and Burdon's case, 38 Ann., in both of which the verdict was set aside and prisoner remanded for new trial.

The case is different from those of Day, 37 Ann. 785, and Murdock, 35 Ann. 729, where the verdicts were not defective in form or substance, but were only set aside because not warranted by the indictment.

Reasons given for the distinction.

The State of Louisiana vs. Oliver, p. 632.

A verdict of guilty of shooting with intent to kill is not responsive to the charge of shooting with intent to murder, nor does it meet any offence denounced by any statute of the State.

Where the indictment is good but the verdict returned is unwarranted and illegal, and is, therefore, annulled and set aside, the accused is thereby not entitled to his discharge, but can be tried again under the same indictment.

The State of Louisiana vs. Hendricks, p. 682.

DAMAGES.

Railroad companies are held to the greatest care and diligence both in regard to the machinery and equipments of the road and the conduct and acts of their officers, agents and employees.

One who goes on a freight train by permission of the conductor, or the engineer acting as conductor, and pays the usual fare, is entitled to the privileges and protection of a passenger, even though the officer has been forbidden to receive passengers on such trains; provided, such order was not known to the passenger.

The going on a freight train and even taking a seat in the cab of the locomotive by the direction of the engineer in sole charge, is not contributory negligence *per se* on the part of the passenger, who has paid his fare, especially where persons are habitually or occasionally received on such trains and placed in the same or like places thereon.

DAMAGES—Continued.

Where the conduct of a passenger has contributed to the casualty, but such conduct has not been, *in a legal sense*, imprudent or negligent, he may recover if the defendant were in fault.

Hanson, Tutor, vs. Railway and Transportation Co., p. 111.

A servant who assumes the discharge of duties, the nature and mode of performance of which are fully known to him, voluntarily subjects himself to risks necessarily incident thereto, and unless such risks were increased by some other fault or negligence of the master, injury resulting therefrom will not be the subject of reparation by the master.

In the operation of coupling trains the relation between engineer and brakeman is that of fellow-servants and subject to the rule that the master is not liable for injury occasioned to one servant by the fault of another servant, in absence of proof of fault in the master in the employment or retention of the latter.

In this case the evidence fails to establish any fault or negligence for which defendant is responsible, but shows that the injury resulted from the mischievous act of an unknown third person, for whose act the defendant was not responsible.

M. H. Wallis vs. Railroad and Steamship Co., p. 156.

Touching the corresponding rights and duties of railroad companies in constructing their works, the rule of law requires that a railroad company, in enforcing its right of way over the lands of others, and in constructing its road, should leave the adjoining lands and fields which it crosses in the same condition as regards the facilities of cultivation and as concerns the utility of those lands to their owners as they were before the entry of the company.

Hence a railroad company which constructs an embankment on the lands of a planter, and thereby stops up his ditches and other artificial drains, is responsible to such owner for all losses of crops and other damages occasioned by such interruption of his drainage.

H. M. Payne vs. Railroad and Steamship Co., p. 164.

The doctrine that a passenger in a public conveyance is in some way identified with the owner or driver of it so that he cannot recover of the owner of another public conveyance for injuries caused by a collision of the two, when he has exercised no control over the conduct of the driver of the vehicle in which he is riding, is unjust, illogical and indefensible.

The correct rule is that where one is riding in a public conveyance and

DAMAGES—Continued.

has exercised and can exercise no control over the driver of it, and a collision occurs between it and another public conveyance, caused by the joint negligence of the drivers or managers of the two vehicles, the passenger is not identified with the driver of the vehicle in which he is riding, and is not prevented from recovering of the owner of the other vehicle damages for injuries sustained by the collision.

Contributory negligence will not avail as a defense when the act charged to be such negligence was the result of tremor and excitement produced by the defendant's misconduct.

Damages cannot be increased in favor of the appellee if he fails to answer the appeal and pray therein for such increase. A request for increase in the brief will not suffice.

L. Holzab vs. Railroad Company et al., p. 185.

He who is in fault and sues for damages resulting from that fault, cannot recover for the injuries inflicted on him, although the perpetrator of them was not justified in law in his own conduct.

In a civil suit for damages for injuries caused by the defendant's shooting the plaintiff, evidence of threats of the plaintiff that he intended to do violence to the defendant, and of their communication to the defendant prior to the shooting, is admissible to show the impression made on the defendant's mind by the communication.

In such suit the indictment and verdict in a criminal prosecution of the defendant for the offense of shooting the plaintiff are admissible in evidence, not as conclusive of the plaintiff's right or want of right to recover, but as proper to be considered by the jury in determining the issue before them.

S. M. Bankston vs. C. Folks, et al., p. 267.

The owner of a building is responsible for personal injury sustained by the fall of part of it, when the accident is the result of his neglect to repair, or of a vice in the original construction.

Ignorance of the condition of the building, or the circumstance that it could not be easily detected, is not exculpatory. Notice is not required as a condition precedent for the recovery of damages.

J. Barnes vs. O. Beirne, p. 280.

The general rule governing the measure of damages in actions for tortious conversion the value of the property converted with interest.

The rule is subject to exceptions where the conversion is accompanied by violence or personal outrage, and perhaps where other particular damage is shown to have been clearly and directly occasioned by the wrongful act.

DAMAGES—Continued.

But in this case we see no reason to disturb the verdict of the jury, which applied the general rule.

D. H. Chamberlain vs. R. Worrell, p. 347.

The dismissal of an injunction suit on an exception is equivalent in law to a judgment decreeing the injunction to have been wrongfully obtained.

An action in damages following such a judgment, by the defendants in the injunction suit, involves but one question, and that is the quantum of damages to be allowed.

Carondelet Canal Co. et al. vs. Otto Touche et al., p. 338.

In absence of any allegation or proof that defendant's railroad is improperly constructed or conducted, or uses defective machinery, or, in any way, occasions injury not incident to the prudent and lawful exercise of its right, plaintiff is not entitled to the injunction or damages claimed.

An action of damages will not lie for merely consequential injuries resulting from the pursuit of a business and exercise of rights, lawful in themselves, when they are exercised with prudence and caution and in a manner to cause no unnecessary injury. Such inconveniences or injuries must be borne as the tribute of individual inconvenience to the general good.

Article 156 of the present Constitution is not applicable to this case.

A. Hill vs. Railroad Company, p. 599.

A railroad company is responsible in damages for injuries sustained by a person who is run over by one of its engines at one of its crossings on the street of a city, when it is shown that the engine was being driven at a rate of speed unusual in a depot yard, and beyond the limits of speed allowed under its own regulations, and that no signals by either whistle or bell was given of the approach of the engine.

A verdict of the jury allowing \$10,000 damages for injuries caused by such an accident to a boy who lost an arm thereby, and who belongs to a laboring family, will not be disturbed on appeal. The allowance is not excessive.

Ketchum vs. Railroad Company, p. 777.

An action for damages resulting from the *passive* violation of a communicative contract, or one containing mutual stipulations and covenants between the parties, must be preceded by putting the obligor *in mora*, as a condition thereto.

The want or failure of the plaintiff to put him *in mora* does not oblige

DAMAGES—Continued.

defendant to except or specially deny that fact. It is the duty of the plaintiff to allege and prove it, else he cannot recover.

P. C. Livingston vs. P. Souilly, p. 781.

Where the defendant in an attachment claims damages for the illegal issuing of the writ, one item of which is the alleged sacrifice of his goods seized and sold thereunder, and it appears that a low appraisalment of the goods was procured by his own contrivance, and he was himself the purchaser of the goods at the sheriff's sale through a person interposed, and also concealed a part of the goods whilst under seizure which, in consequence, were not included in the sale, such facts deprived defendant of all right to complain.

Yale & Bowling vs. H. Routh, p. 894.

DIVORCE.

In an action for divorce predicated on a previous judgment of separation from bed and board, rendered one year previously, it is incumbent on the plaintiff to allege and to prove that in the mean time no reconciliation had taken place.

The failure to make such proof is fatal to plaintiff's case.

He must make proof of all elements imposed as conditions precedent to the judgment which he seeks to obtain.

J. Von Hoven vs. His Wife, p. 904.

DONATIONS INTER VIVOS.

A donation *inter vivos* duly accepted by the donee need not be accompanied by any other delivery.

A person who is alleged to be too ignorant of the English language to understand the meaning of an act of donation drawn in that language will be held bound by such an act, on proof that she understood the English language sufficiently well to dictate a will in that language.

Rauzet vs. Rauzet, p. 669.

DONATIONS MORTIS CAUSA.

A testamentary disposition by which the testator bequeaths all his property to his grand children, on condition that the legacy should remain under the administration of his testamentary executor until the legatees shall have reached the age of majority, does not create a *fidei commissum*, and has not the character of a condition which is impossible or reprobated by law. Under such a disposition the executor is not made a legatee with instruction to preserve for and turn over the property to another person.

A disposition whereby the testator bequeaths his whole property to his minor grand-children, on condition of their reaching the age of

DONATIONS MORTIS CAUSA—Continued.

majority, but that in default thereof, the property shall pass to certain designated charitable institutions, is not amenable to the objection that it is a substitution as prohibited by the civil code.

That feature of a will presents a double institution of heirs depending upon a suspensive condition, but not a double testamentary disposition of the same property, first in favor of one person, and at his death to another person. In this case if the legacy ever vests in the grandchildren, it cannot never reach the asylums, under the effect of the will.

Legatees, whether of age or under age, cannot accept a testamentary succession in part or on conditions different from those imposed by the testator. *Succession of Jacob Strauss, p. 55.*

Every disposition by which the donee or the legatee is charged to preserve for or to return to a third person is null; though a disposition by which a third person is called to take the gift in case the donee does not take it is valid; and so is a disposition by which the usufruct is given to one and the naked property to another.

The intention of the testator must principally be endeavored to be ascertained without departing from the proper signification of the terms of the testament, and same must be understood in the sense in which it can have effect rather than that in which it can have none. The intention of the testator must prevail over the grammatical meaning of the words employed in the testament, if from other dispositions contained therein or other words employed, it is manifest that he had another thought than that the terms employed in a particular disposition would otherwise convey.

"Legacies to pious uses" are those which are destined to some work of piety, or object of charity, and are highly favored by the law, on account of their motives for sacred uses and their advantage to the public weal.

Williams vs. Lodge Masons of Monroe, p. 620.

EVIDENCE.

Where a man's wife has an interest in a suit, and where the husband has no separate interest therein, the latter cannot testify.

R. Beltran vs. C. Gauthreaux et als., p. 106.

A wife cannot be a witness in her suit against her husband for dissolution of the community, separation of property, and the recovery of her moneyed claim against him. The prohibition is not personal to the husband, and cannot be waived by him. It is founded upon public policy and considerations of social order and is peremptory.

A. Cooley vs. B. C. Cooley, p. 195.

EVIDENCE—Continued.

Parol testimony is admissible to show the real consideration of a contract evidenced by an authentic act, when the same is not expressed or described therein. The mortgagor who acknowledges an indebtedness as the foundation of the mortgage, when the act makes no mention of the source or origin of the debt, can have recourse to parol evidence to show the consideration of the debt or principal obligation, as a necessary step to establish the subsequent extinction or satisfaction of the debt.

The reason of the rule is that the evidence is admissible, not to vary or contradict the act, but to perfect it by supplementing omitted information.

A party who allows his former attorney to give evidence of matters confided to him by the client, without objection, will be presumed to have given his consent thereto, as provided for in Article 2283, C. C. *L. Dickson vs. Clerk et al.*, p. 736.

The rule with regard to the books of a merchant being inadmissible in his favor, does not apply to those of corporations.

The testimony of witnesses on a former trial of same suit, may be used by either party on a second or subsequent trial thereof, if the witnesses are dead or, for other cause, cannot be then produced.

This rule is applicable to evidence offered on such former trial and admitted without objection, in pursuance of a previous agreement of parties, when that rejection of same would occasion the party offering it either injury or surprise.

Commissioners, etc., vs. Converse et als., p. 871.

ESTOPPEL.

A plea of estoppel cannot be maintained where it appears that the party against whom the plea is directed was ignorant of the true facts relating to the matter which formed the subject of the plea. *Watkins vs. Cawthorn*, 33 Ann. 1194.

A party is not estopped from prosecuting a claim because the same claim was urged in a previous suit on which he took, seasonably, a voluntary non-suit.

Carroll et al. vs. Cockerham, et al., p. 813.

EXECUTORY PROCESS.

Paragraph 4 of art. 739 of the Code of Practice, which empowers a seized debtor to arrest an executory process for the reason "that time has been granted him for paying the debt, although this circumstance be not mentioned in the contract" has reference to, and contemplates only, an agreement made since the execution of the

EXECUTORY PROCESS—Continued.

contract and not before. It may be enforced if made part of the contract as a suspensive condition depending upon the happening of an uncertain future event; but not when claimed to have been made before the contract.

Such a previous stipulation, when not included in the contract, will be deemed as having been formally abandoned by the contradicting parties. *Mortgage Co. vs. Mrs. Ralston*, p. 593.

Under the Act of April, 1853, and the Constitution of 1864, the clerk had no authority to grant an order of seizure and sale.

Mrs. Davis vs. Mrs. Scriber et al., p. 654.

Where defendant in executory process enjoins the enforcement or negotiable mortgage notes held by a third person who acquired before maturity, on the grounds of payment and compensation between the maker and the original payee of the notes, alleging simulation and fraud in the title of the transferee, failure to establish such simulation and fraud destroys the foundation of the case. *Flower, Adm., vs. Mrs. Noble, etc.*, p. 938.

GRAND JURY.

Criminal courts have no authority to examine members of the grand jury as witnesses concerning proceedings which may have taken place in their room or during their deliberations.

There is no law which prescribes the *quantum* of evidence on which grand juries must rest their conclusions in returning indictments. Their findings amount at most to accusations, and in their conclusions they are beyond the control of the courts.

The State of Louisiana vs. Lewis, p. 680.

HABEAS CORPUS.

The Supreme Court has no original jurisdiction in *habeas corpus* cases, which do not come within the provisions of article 89 of the Constitution.

In the Matter of William Ross, p. 523.

HOMESTEAD.

Where at the moment when the debtor acquired an immovable, there stood recorded against him in the parish a judgment, the judicial mortgage resulting from such record attached to the property *eo instanti* with the ownership, and he could not acquire a homestead in said property to the prejudice of such mortgage.

The jurisprudence is constant and uniform that privileges, mortgages and real rights attaching to property cannot be disturbed or affected by homestead rights which did not exist at the moment when they attached.

HOMESTEAD—Continued.

The rule covers judicial as well as conventional mortgages

John Taylor vs. Bertrand Saloy, p. 62.

A conventional mortgage granted by a debtor upon property which, at its date, constituted the duly registered homestead of the debtor, though inoperative while the conditions of the homestead exist, may be enforced against the property when the homestead therein has ceased by reason of the removal of the debtor and his family to another State. *J. O'haffe & Sons vs. McGehee & Co., p. 278.*

Under the amendment of Art. 81 of the Constitution of 1879, this Court has appellate jurisdiction of suits involving rights to homesteads, irrespective of the value of the property alleged to be exempt.

Homestead provisions of the Constitution of 1879, avail only those who register claims therefor, antecedent to contracting debts sought to be enforced against it.

A judgment liquidates, but does not create a debt. It recognizes existing, but confers no new or additional rights.

Property exempted from seizure and sale, under the provisions of the homestead law of 1865, is predial and not urban.

Laws conferring homestead rights must be strictly construed.

J. H. Kinder vs. Sheriff et al., p. 713.

HUSBAND AND WIFE.

A wife enjoining the seizure and sale of movables seized under executory process against her husband as part of the mortgaged property, on the double ground that they belong to her and were not covered by the mortgage, because not attached to the mortgaged property, has no interest in the last question, because, if they do not belong to her, it is not her concern whether they were covered by the mortgage and were properly seized or not; and if they do belong to her, it is of no consequence whether they were attached to the property or not. The question of title is the only material issue.

Although we have held that the agency of the husband is not incompatible with the wife's separate administration, yet such agency must be clear and certain, and the administration must be distinctly conducted in her name and for her account.

Under the circumstances of this case, where the husband conducted, as one plantation, three adjoining places, one belonging to his wife and the others to himself, carried on the whole business in his own name, shipped the crops, obtained advances and supplies, and received credits on his own account, such administration is that of the husband and the fruits belong to the community.

HUSBAND AND WIFE—Continued.

Movables on such places, destined to the use of the whole property, purchased during the existence of the community and found in the husband's possession, are presumed to belong to the community.

These presumptions can only be rebutted by clear evidence establishing that they were purchased by the wife with paraphernal funds under her separate administration and control.

The evidence in this case fails to establish the wife's title, and as she has no authority to vindicate rights appertaining to the community, her claim is rejected.

Mrs. J. Trezevant vs. Sheriff et al., p. 146.

A suit against a married woman should be brought against her and her husband.

It is only in case the husband is absent or refuses his authorization that the judge can validly authorize the wife to stand in judgment alone.

In this case, the husband was not sued and has not appeared. There being no allegation or pretense that he was absent or had refused, the judge's authorization was invalid.

The vice was not cured by going to trial without excepting on this ground. The objections to evidence on the ground that the wife was not legally authorized to stand in judgment should have been sustained.

Under Article 606 C. P., the judgment, however rendered, was subject to nullity.

Saunders et al. vs. S. E. Burns, p. 367.

The forced heirs of a married woman have a legal right to sue the surviving husband for a specific amount of paraphernal funds of their deceased mother received by the father, if the latter has not been confirmed and qualified as their tutor during their minority. In such a case the father is their debtor under the rights of the mother, and they can enforce all her rights without recourse to an action for an account.

Richardson et al. vs. Richardson, p. 657.

The dowry is given to the husband for him to enjoy the same so long as the marriage shall last. R. C. C. 2347.

With respect to the effects of the dowry, the husband is subject to all the obligations of the usufructuary. R. C. C. 2365, 549, 594.

If the dowry consist of immovables, or of movables not valued by the marriage contract, the husband or his heirs may be compelled to restore the same at the dissolution of the marriage. R. C. C. 2367.

At the dissolution of the marriage all effects which both husband and wife reciprocally possess, are presumed common effects, or gains,

HUSBAND AND WIFE—Continued.

unless it be satisfactorily shown which of such effects they brought in marriage or which have been given them separately, or which they have respectively inherited.

Succession of Eugene Breaux, p. 728.

A judgment of separation between husband and wife as to third persons, only proves *rem ipsam*. No legal presumption of its correctness arises from the mere signing the decree.

Where such judgment is charged fraudulent and simulated and proof has been administered going to sustain such charge, it is incumbent on those interested in maintaining such judgment, that its reality and the validity of its consideration should be established by evidence *aliunde*.

Where a husband makes a transfer to his wife without any valid consideration and such transfer exceeds the disposal portion of his estate, his forced heirs after his death may, by suit, demand that the transfer be annulled in excess of the disposable portion even though the property has passed into the hands of third persons, and can be brought back into the succession of the transferor or donor free from all charges created by the transferee or donee. C. C. 1516.

Contracts between husband and wife are restricted to the exceptions in C. C. 2446, and all those outside of the limits therein prescribed are null and void. *Carroll et al. vs. Cockerham et al., p. 813.*

INJUNCTION.

The codal provisions of our practice touching injunctions are broader and more comprehensive than the rule of the chancery courts and include causes for injunctions that would not be sanctioned in a common-law court. Differences in the manner of obtaining the writs under the two systems are not less manifest than the difference in their scope. Under our system when it has been judicially determined that the writ was rightfully issued, there can be no doubt that the party who has been injured by disobedience of it may recover all damages he has suffered thereby.

J. Levy vs. N. O. Water Works Company, p. 29.

District courts have no power to question the authority of mandates of this court, or to refuse to execute them; but the utmost effect which can be claimed for them, so far as their execution is concerned, is that they shall be executed according to law. When an application is made to restrain further proceedings in execution of

INJUNCTION—Continued.

a writ on the ground that the requirements of the law as to the mode of execution have been violated, the district court does not exceed its powers in granting such an injunction. When, thereafter, it has rendered a judgment dissolving the injunction, the party cast had the right to a suspensive appeal, and in granting the same the judge only performed his legal duty.

During the pendency of such appeal, the injunction operates as if never dissolved, and it is not the duty of the judge to proceed with the execution of a writ thus enjoined.

An application for mandamus directing him so to proceed cannot be allowed. *The State ex rel. Sentell vs. Judge, etc., p. 31.*

The dissolution of an injunction on bond is an exercise of the discretionary power vested expressly in the judge by the terms of the Code of Practice. When refused, a mandamus will not lie to compel a dissolution. The remedy is by appeal.

The State ex rel. Roth vs. Judge, etc., p. 49.

No injunction lies to restrain the enforcement of a municipal ordinance which has been abandoned and become inoperative, whether that fact is brought to the knowledge of the court of the first instance or on appeal.

R. H. Browne et al. vs. New Orleans et al., p. 517.

Injunction will not lie against a prospective nuisance, except in cases where its establishment will occasion imminent danger or irreparable injury, or at least where there is no question that the proposed erection will be a nuisance in the sense of the law.

Defendants having obtained permission from the city to erect a steam engine on their own premises, plaintiff, a neighbor, cannot enjoin them from such erection in advance, upon allegations of apprehended danger and injury, when the evidence leaves it doubtful whether such danger or injury will result from the erection in the mode proposed by defendants, and when, if they arise of a nature to justify legal redress, the remedy then afforded will be ample and sufficient to abate them.

It is not necessary to determine what amount or character of danger or injury would support plaintiff's right to judicial relief.

Mrs. Bell vs. Riggs & Bro., p. 555.

In executions under writs of *fi. fa.*, excessive seizure is not a legal ground of injunction of the execution; the remedy is to apply for reduction of seizure under art. 642, Code of Practice.

INJUNCTION—Continued.

Parties who abuse the writ of injunction to stay execution of moneyed judgments against them, should be mulcted in damages.

Mrs. Lambeth vs. Sentell et als., p. 691.

The appointment of plaintiff as sexton of St. Patrick's cemeteries was a contract for personal service. The position has no feature of a franchise or public office, and even if assimilated to a private office such as held by an officer of a corporation, those officers are ordinarily regarded as servants or agents and subject to discharge for cause.

Injunction is not allowed as a remedy to enforce, or prevent the breach of, contracts for personal service.

To authorize the application of injunction, in any case, to prevent the breach of a mere personal contract, the following are essential conditions: (1) that the injury apprehended should not be susceptible of adequate compensation in damages; (2) that the contract should be clearly established, its terms free from doubt, and plaintiff's construction of it clear and certain; (3) that plaintiff should show complete performance on his part of his obligations under the contract.

These conditions are not established to our satisfaction by the evidence in this case and, without precluding the parties as to any questions in a proper action, the injunction is set aside and the parties are remitted to ordinary remedies.

J. J. Healy vs. Rev. Allen, p. 867.

Mandamus will not lie to compel a judge of the district court to grant an injunction which he has refused, when the case for injunction does not fall within any specific provision of law, but is based only on the general provision of Art. 303, C. C., authorizing judges to grant injunctions when necessary "to prevent any injurious act." Such applications are addressed to the discretion of the judge, which is not subject to control under our supervisory jurisdiction.

The State ex rel. Savage vs. Judge, etc., p. 916.

The judgment rendered on injunction by a court of competent jurisdiction must be held as having disposed of all the points of law involved in the alleged illegality of the execution, especially when it appears that there had been a regular trial, in which all the rules of legal procedure had been observed. Hence, such a judgment cannot be reviewed otherwise than on appeal.

The State ex rel. Gooch vs. Justice of the Peace, p. 968.

INSOLVENCY.

In insolvent proceedings, where no objection is made to the votes of creditors before the notary holding the meeting or within ten days after the filing of the proces verbal, objections based on the informality or insufficiency of the affidavits to the debts made before the notary cannot, thereafter, be urged.

A surety or accommodation maker or endorser of a note, only becomes a creditor of his principal when he has paid the debt and, until such payment, he is not entitled to vote as a creditor in the insolvent proceedings of his principal.

T. O. Terry & Sons vs. Their Creditors, p. 15.

Section 1808, R. S., strikes with nullity all contracts which an insolvent enters into with intent or purpose to give one creditor a preference over another, if made within three months next preceding his failure. The word "failure" in this statute means judicial failure, or a failure declared by a judgment or order insolvent proceeding.

Seixas, Syndic, vs. Citizens' Bank, p. 424.

INSURANCE.

Where an insurer knows that the premises may be used for storing cotton, and inserts this written clause: "It is understood that when the above building is used as a warehouse the rate will be changed," the storing of cotton will not avoid or forfeit the policy. On the contrary, these words indicate that the policy is to remain in force, for unless it remained in force the rate could not be changed. In such case, even conceding that a right to "change" meant a right to "increase," it was a right reserved to insurer, who alone could fix rates. The insurer could demand a higher rate, or he could cancel the policy where a right to cancel is provided. But, under the facts of this case, where the insurer did neither, the policy remained in force and the plaintiff must recover.

S. B. Steers etc., vs. Insurance Co., p. 952.

JUDGMENT.

All issues presented in a cause by the pleadings, on which evidence is introduced on trial, will be considered as disposed of by a final judgment, although the latter be silent on some of the issues in the case.

Rauzet vs. Rauzet, p. 669.

A judgment rendered by a court of competent jurisdiction imparts absolute verity, and has the force of the thing adjudged until set aside in a direct action of nullity; it cannot be attacked collaterally.

Mrs. Kent vs. Brown & Learned, p. 802.

The State having once taken proceedings for the forfeiture of a bail

JUDGMENT—Continued.

bond in a criminal case, and having obtained a judgment against the parties, which is final and has never been, in any mode, annulled, avoided or reversed, cannot recover another and new judgment on the same bond against the same parties.

The State of Louisiana vs. C. Harrison, p. 299.

JUDICIAL SALES.

There is nothing reprehensible in an agreement by which a party contemplating purchase at a judicial sale for cash, agrees with a third person that, if he acquires, he will sell to the latter on terms of credit—in absence at least of any evidence that the third person intended to bid at the sale or that the agreement was made with the purpose of preventing competition.

R. Beltran vs. C. Gauthreaux, et als., p. 106.

A judicial sale made without an order of court, or in contravention of the terms of such an order where one exists, is an absolute nullity, and no resort to a direct order is necessary to have it declared.

And even where the nullity is relative only, if asserted by reconventional demand in the answer, and all the parties in interest with respect to the sale are before the court, such nullity may be determined and decreed.

A judgment or judicial order must be construed in connection with the averments and prayer of the petition therefor. And where the averments of a petition presented by the surviving partner of a community administering the succession of the deceased spouse, are to the effect that a sale of the community property is essential to pay the community debts, and the prayer of the petition is in conformity therewith, the order of sale rendered on such petition will be construed to require the sale of an immovable belonging to the community in its entirety and to confer no authority to sell only the undivided interest of the deceased therein; and a sale of such interest would be null.

Succession of Mrs. L. E. Bright, p. 141.

The purchaser of immovable property of an insolvent succession sold under executory process cannot retain the balance of the purchase price after satisfying the claim of the seizing and ranking mortgage creditors, unless there are special mortgages of inferior rank existing against the property, or unless he is threatened with eviction by the holders of general mortgages affecting the proper-

JUDICIAL SALES—Continued.

ty. The right to retain said balance cannot be exercised even if there are special mortgages when it appears that the holders of the same have asked to be paid out of the proceeds of the sale, and when similar proceedings have been resorted to by all the mortgage creditors, who have thus all transferred their rights from the thing to the proceeds.

In such a condition of things the funds must be turned over to the administrator of the succession.

J. Tessier vs. L. Bourgeois, p. 256.

In an action by a judgment debtor to annul a sheriff's sale of his property seized under a judgment against him, the adjudicatee cannot question his original title, because that would destroy the sole foundation of his own.

When property has been sold in execution of a judgment during the pendency of a devolutive appeal, the subsequent reduction of the amount of the judgment by the appellate court has no effect upon the validity of the title acquired at the sale, even if the purchaser be the judgment creditor. The latter is only bound to restore the excess of the price which may have been applied to her original judgment.

The non-payment of accrued taxes does not destroy the validity of the adjudication.

The rule of Art. 684, C. P., prohibiting sale unless the price bid exceed prior mortgages and privileges, applies exclusively to special or conventional mortgages.

The mortgage certificate in this case showed no conventional mortgages or privileges exceeding the bid.

The registry of seizure of immovable property in New Orleans, under Act 189 of 1857, operates merely as a substitute for actual seizure and possession by the sheriff, and has nothing to do with the establishment or notice of a privilege. The privilege resulting from such seizure arises not from its registry, but from its actual continuance as a subsisting seizure.

When a prior special mortgage has been cancelled and erased from the records prior to the sale, in pursuance of a final judgment to that effect by a court of competent jurisdiction, and does not appear on the mortgage certificate read at the sale, the judgment debtor cannot, long afterwards, claim the nullity of the sale on the ground that the price bid did not exceed the amount of such cancelled mortgage. *J. Pasley vs. A. McConnell et al., p. 470.*

JUDICIAL SALES—Continued.

A judge has at all times the right, upon proper proceedings and proof, to correct clerical errors that occur in interlocutory orders, or chambers decrees he has granted, on giving due notice to interested parties.

To relieve a purchaser of real property from compliance with the terms of his bid at a judicial sale, he must show that there is a cloud upon the *title of the vendor*; mere irregularities in proceedings in sale will not avail him, as he is protected by the decree under which the sale is made, and his right to restitution, in case of loss or injury thereto.

Successions of M. A. and J. B. Byrne, p. 518.

An adjudicatee may be compelled to comply with the terms of a sale when the title tendered is such as he is bound to accept.

Such adjudicatee cannot urge, as a defense, that the title offered him by the owner was made to such owner by an agent whose procurement was, at the time, revoked by the *notorious* insanity and seclusion of the principal, *unless* the mental derangement was such as would have justified interdiction, and the purchaser was aware of the incapacity.

Where the purchaser bought in good faith and paid a fair price, which enured to the benefit of the principal, and where the principal or his curator, after his interdiction, could not successfully claim the nullity of the transaction, or could not be made to take back the property, the sale will not be vitiated.

N. B. Phelps vs. A. Reinach, p. 547.

Want of notice of order of seizure and sale or of the seizure, where the defendant administrator has waived such notice, comes within the irregularities referred to in C. C. article 3543, and are cured by the prescription of five years, which runs against minors.

A purchaser at a judicial sale under an order of seizure and sale of a court of competent jurisdiction, in a proceeding against the legal representative of the person in whose sole name the property stood of record, without knowledge, express or implied, of the existence of any claim of a deceased wife in community, is a purchaser in good faith, and although the heirs of such deceased wife may recover her share of the property, they are entitled to revenues only from the date of their claim, and must reimburse the expenditures of defendants, such as taxes.

Oriol, Tutor, vs. Moss et al., p. 770.

JURISDICTION.

A suit enjoining the collection of taxes in amount less than two thousand dollars on the ground that the property has been sold at a probate sale and the inscription of the taxes has been erased and the lien and privilege for them has been transferred to the proceeds of sale, is not within the jurisdiction of the Supreme Court, and cannot be put within its jurisdiction by a letter from the appellee's attorney to the appellant's attorney, written after the appeal has been taken and perfected, informing him that the taxes due are really more than were enjoined and that they exceed two thousand dollars.

If more taxes were due than were enjoined there was no hindrance to the collection of the excess over those enjoined.

J. C. Denis, President, etc., vs. Tax Collector, p. 39.

The decision of questions of jurisdiction belongs necessarily to the court before which they are raised, and its decision is final unless reversed by an appellate tribunal.

The State ex rel. Halphen vs. Judges, etc., p. 97.

When a tax payer enjoins the seizure and sale of his property for taxes, he occupies the position of a judgment debtor enjoining the execution of a judgment against himself; and the test of our jurisdiction is the amount of the taxes and not the value of the property. The Constitution does not vest this Court with jurisdiction, regardless of amount, of cases involving the legality of assessments, and we cannot assume it.

The ground of the injunction involving no question as to the legality or constitutionality of the tax, but assailing solely the legality of the assessment, the appeal is dismissed.

Henry C. Minor vs. Sheriff, etc., p. 98.

The Supreme Court has no jurisdiction over suit by mandamus to compel the clerk of a district court to give access to an employee of the police jury in his office for the purpose of transcribing mutilated archives, when the petition contains no moneyed demand, and the record fails to disclose any pecuniary interest exceeding \$2000 in any of the parties to the suit.

Police Jury vs. W. Hubbs, Clerk, etc., p. 149.

The Supreme Court has no jurisdiction over tax suits regardless of the amount involved, unless the legality or constitutionality of the tax be in contestation.

Hence in a suit which presents the question of the legality of a tax.

JURISDICTION—Continued.

and in which the tax is resisted on the further grounds of illegality of the assessment and irregularities in the mode of levying and of collecting the tax, the court will entertain the appeal on one branch of the contestation, the illegality of the tax, and will ignore the appeal on the other branch of the case.

O. D. Favrot vs. Baton Rouge, p. 230.

A writ of prohibition will not issue to arrest the execution of a judgment of one of the courts of appeals, on the complaint of the party cast, on the ground of want of jurisdiction, unless it appears from the record that the court was absolutely without jurisdiction in the premises.

In an action of boundary between the owners of two contiguous estates, the test of jurisdiction is not in the value of either or both of the adjacent estates, but in the value of the strip of land included between the two contested lines; and if it appears that the value of such strip of land is in the sum of three hundred dollars, the jurisdiction of the cause on appeal is in the court of appeals, and not in the Supreme Court. The case of *Lombard vs. Belanger*, 25 Ann. 311, affirmed.

The State ex rel. Levet vs. Lapeyrollerie, p. 264.

When a plea to the jurisdiction *ratione personæ* has been filed in the District Court and referred to and tried with the merits, and judgment has been rendered sustaining the plea and dismissing the demand, the party injured has the right to appeal from such judgment to the proper appellate tribunal. Such appeal vests the latter with full jurisdiction over the case and over all questions of law and fact involved therein, including that of the jurisdiction of the District Court. In determining such question and reversing the judgment appealed from, the judges of said court do not transcend the bounds of their jurisdiction, and the application for the writ of prohibition has no foundation.

The State ex rel. Goodwin vs. Judges, etc., p. 270.

The courts of this State have no jurisdiction over a suit by an individual, the object of which is to enforce specific performance of a contract with the State, where the latter is not a party to the suit, has not consented to be sued and is not represented therein by a State functionary duly empowered to do so, at the bringing of the action. The power conferred to represent may be recalled. The withdrawal thereof leaves the once constituted agent without authority to further represent.

The State ex rel. Guaranty Co. vs. Auditor, p. 337.

JURISDICTION—Continued.

This Court has not jurisdiction of a criminal cause when the fine imposed is three hundred dollars. It must exceed that sum.

If the costs added to the fine make an aggregate of over three hundred dollars, that will not confer jurisdiction. The *fine* must exceed that sum by the express letter of the Constitution.

The State vs. W. H. Chapman, p. 348.

In the exercise of its supervisory jurisdiction the Supreme Court cannot entertain a complaint against an inferior court, which practically involves the correctness of a judgment rendered by said court, which had unquestioned jurisdiction *ratione materiæ et personæ* over the cause, or the correctness of any of its rulings in such a cause, when it appears that the rules of law and practice governing the trial of causes have been observed.

Such an attempt would be an unjustifiable assumption of jurisdiction and powers not granted by the Constitution or sanctioned by law or jurisprudence.

The State ex rel. Wood Bros. vs. Judge, etc., p. 377.

The jurisdiction of this Court must be tested by the pecuniary amount in dispute, as shown by the pleadings and as appearing from the nature of the action, and not by the jurisdictional allegations, or by the affidavit of the appellant.

The substantive allegations in the pleadings, not the alleged opinion of litigants, will be considered in all questions of jurisdiction.

No allegation and no affidavit can create an appealable amount of interest in a litigation which from its very nature and essence cannot involve a pecuniary amount in dispute equal to the lower limit of the jurisdiction of the Supreme Court.

Th. Buddig vs. Th. Baldrin, p. 394.

In an action by a judgment creditor to have the purchase of property declared simulated and to be in reality for account of the debtor, the value of the property, and not the amount of the judgment, is the matter in dispute. 27 Ann. 186.

Godshaw & Plant, vs. Judges, etc., p. 643.

Where the execution of a judgment of an inferior court is sought to be prevented by means of a writ of prohibition on the ground of the want of jurisdiction in the court rendering the judgment, the circumstance that such court had overruled the plea to its jurisdiction, and assumed jurisdiction of the cause, does not debar this Court from reviewing the question of said court's jurisdiction and its ruling thereon. In fact, before that court took jurisdiction of the cause, an application to this Court for its interference would be premature.

The State ex rel. Levet vs. Lapeyrollerie, p. 912.

JUSTICES OF THE PEACE.

A justice of the peace has no jurisdiction *ratione materiae* to entertain a suit, in which damages actually suffered, amounting to \$90, are demanded, and in which defendants are enjoined from claiming and collecting daily charges for the use of a market stall, and from closing same and keeping it closed, and from ever interfering with him in his business." 37 Ann. 583, State ex rel. New Orleans vs. Judge ; 33 Ann. 146, State ex rel. Frederick vs. Skiuner.

Chas. Clerc vs. Mayor, etc., p. 732.

LAWS.

That portion of Act No. 74 of 1880, which places the unpaid salaries of school teachers, subsequent to 1872 and prior to January 1, 1880, on the same footing with the valid indebtedness of the city of New Orleans, is unconstitutional and therefore null.

C. Labatt vs. New Orleans, p. 283.

New legislation cannot be engrafted upon different and distinct subject matter by way of amendment without mention being made of the object in the title ; but any subject matter that is germane to the original text may be incorporated without being amenable to this objection, if it be stated in the title what particular law is to be thereby amended or reversed.

Williams vs. Lodge Masons of Monroe, p. 620.

LEASE.

Failure of lessor to maintain the thing leased in a condition such as to serve the use for which it is hired, and to make repairs necessary to that end, while it may give the lessee the right to claim a dissolution, or to claim damages resulting from such failure, does not confer upon him the right to continue to use and occupy the premises without compensation ; and if, notwithstanding a suit to dissolve, he fails to restore or offer to restore the thing leased to the lessor and continues to use and occupy it, he is liable for the rent during the term of such occupancy.

Where the lessee fails to pay the rent due under such circumstances, the writ of provisional seizure is a lawful remedy, and damages cannot be recovered for its issuance.

Mrs. Mulhaupt vs. W. Enders, 744.

Pending an action involving the title of immovable property, which is rented under a previous contract of lease, the tenant, from whom the rents are adversely claimed by the parties, may be authorized to deposit the same as they mature, subject to the final decision of the cause, in a bank selected as judicial depository.

Clark & Meader vs. Sheriff et als., p. 862.

LITIGIOUS RIGHTS.

The last article of the Code defining litigious rights to be those which cannot be exercised without undergoing a lawsuit, does not apply to those litigious rights from which one can be released by paying the real price of the transfer under Art. 2652, because the next article particularly defines this latter right to be litigious whenever there exists a suit and contestation on it. These two articles regulate a particular kind of litigious right, and there must be an existing suit for the enforcement of it, or release cannot be had by paying the price of its transfer.

The fact that a suit may be necessary to enforce a claim does not make the claim a litigious right.

T. McDougall vs. J. Monlezun et als., p. 223.

LUNATICS.

Proceedings under Sec. 1768, R. S., relative to the confinement of lunatics and insane persons in the State insane asylum, are not violative of the constitutional provision, (Art. 6), which requires "*due process of law*," previous to deprivation of life, liberty or property.

A judgment of interdiction is not a condition precedent essentially required for proceedings under Sec. 1768, R. S.

In the Matter of William Ross, p. 523.

MARRIAGE

Persons legally married are, until a dissolution of marriage, incapable of contracting another.

Hence a marriage attempted by the wife of a previous marriage, before its dissolution by law or by the legal presumption of the death of her husband, is not valid. In a suit intended to enforce legal effects of such a marriage against the pretended second husband the latter as defendant can plead the nullity of the marriage by way of exception and without resorting to a direct action. No legal effects can result from such a union.

The term of absence without news of either of the spouses, which gives a sufficient cause to the other to contract another marriage is ten years.

An absence of four years, unaccompanied by any circumstances tending to justify the belief that the absent husband is dead, is not sufficient to create the legal presumption of the validity of a second marriage contracted by the wife.

The burden of proof in such a case is on the wife who seeks to enforce the legality of her second marriage, to show that the absent husband was dead at the time that she attempted to contract another marriage.

Mrs. C. McCaffrey vs. J. H. Benson, p. 198.

MARRIED WOMEN.

In a suit against a married woman, appertaining to her separate property-rights, demands respecting the community cannot be determined.

A judgment in a previous suit against her by some plaintiff, annulling a sale made to her ostensibly of that part of the property claimed in the present suit by plaintiff, and "putting the parties in the condition they stood prior to the transaction," forms *res adjudicata* with respect to the parties, and will protect a title she may receive under judgment of partition.

Heirs of Mason vs. Mrs. Layton et al., p. 675.

MANDAMUS.

A mandamus properly lies to compel the City Council to provide for the payment of an acknowledged claim against the city. If such mandamus is disobeyed, the judge issuing it can punish for contempt those guilty of the disobedience.

In such case the process for contempt should not be directed against the entire City Council but against those only who have refused to obey the writ.

Disobedience to a mandamus, ordering the City Council to provide for the payment of a city debt, is shown by those members of the council who, after the debt is budgeted on the report of the finance committee, vote against an ordinance for its payment.

The State ex rel. Bauman et al. vs. Judge, etc., p. 43.

Mandamus will not lie to compel an inferior judge to proceed to the trial of an appealable case which he has dismissed by sustaining a plea to his jurisdiction. The remedy is by appeal.

Our jurisprudence would be revolutionized if we should hold that every right that has heretofore been enforced by appeal, and every wrong that has heretofore been redressed by appeal, may now be enforced or redressed by mandamus whenever the necessities of a suitor appears to require or invite it.

The State ex rel. Halphen vs. Judges, etc., p. 97.

A mandamus will issue to compel a railroad company to allow the transfer on its books of shares in the name of the relator, when it is established that a party, to whom the company says the stock belongs in part, has been finally adjudged not to have any interest therein.

The judgment, although foreign, having acquired the force of *res judicata*, must be given that effect. On a charge that it is erroneous, this Court will not go behind it to test its correctness.

The State ex rel. Plaisent vs. Railroad Company, p. 312.

MANDAMUS—Continued.

Ejectment proceedings are summary in character.

A prayer that the defendant be *cited* is not a conversion of such proceedings into ordinary ones. The word used is that found in the statute.

Mandamus is the appropriate remedy to compel the trial as *summary*, of such suit, where the district judge has on that account ruled as a question of practice or procedure, that it has ceased to be such and had been converted into an *ordinary* action.

The State ex rel. Citizens' Bank vs. Judge, etc., p. 499.

A judgment of this Court, the execution of which is made to depend upon a protestative condition, and dependent on an event which it is in the power of one of the parties to bring about or to hinder, cannot be executed until it is first determined whether the condition or event has transpired within the time fixed and limited in the decree.

The ascertainment of the fact whether the condition on which the execution of said judgment is made to depend, is a judicial one, and cannot be ascertained or determined in a mandamus proceeding.

One having resorted to a judicial proceeding by rule to show cause taken on the interested party, who joined issue by answer, and the introduction of proof with regard to the performance of said condition, cannot, after an adverse judgment thereon, withdraw therefrom and resort to a mandamus to obtain his desired relief.

The State ex rel. Hepting vs. Judge, etc., p. 558.

A mandamus lies to compel the performance of duties purely ministerial in their nature and so clear and specific that no element of discretion is left in their performance.

It will lie to judges of inferior courts, in order to require them to do justice according to the powers of their office, whenever they have delayed acting; and to prevent a denial of justice; and when the law has assigned no relief by the ordinary means; and when justice and reason require that some mode should exist of redressing a wrong or an abuse of any nature whatever.

The writ will issue to compel a district judge to grant an injunction restraining a tax collector from collecting the tax of fifty cents per bale on cotton within the Fifth Levee District, authorized by Act 44 of 1886, until its alleged unconstitutionality can be judicially determined.

The State ex rel Gaynor vs. Judge, etc., p. 923.

MINORS.

Abstracts of inventories recorded to preserve the mortgage of minors are not evidence of the validity of the minor's claim, much less are they conclusive against the tutor as to the amount appearing on them to be due the minor.

And as the general mortgage created by recording these abstracts is not fixed in amount by such recording merely, so a special mortgage on a particular piece of property, executed under permission of the court to replace that general mortgage, does not irrevocably fix the sum stated therein as the sum secured to be the sum due the minor.

And hence it follows that where a special mortgage has been given by a natural tutor to secure to his son and ward the one-half of the community property as it appears on the inventory without deduction of the community debts, and in subsequent proceedings in settlement of the succession it is claimed that the sum secured in the mortgage is reducible by the debts that have been paid, evidence of such payment and of the condition of the succession when it fell to the heir is admissible in order to ascertain what was the actual value of the succession at that time.

This does not abrade the general doctrine that protects the sanctity of judicial declarations and authentic acts. These acts of a tutor are required to be done in certain contingencies to accomplish certain purposes, and the law that required the performance of them fixes their meaning and limits their effect and consequence.

Succession of R. F. Theurer, p. 510.

A consent to take up a case for trial that has been fixed for a different day, is not such a consent as will vitiate a judgment, although a minor be a party thereto.

Members of a family meeting have the right to waive the three days delay allowed by law for their citation, and convene at an earlier date. R. C. C. 285; 9 Ann. 560, Gasson vs. Palfrey.

Successions of M. A. and J. B. Byrne, p. 518.

The legal effects of a purchase by the surviving father or mother of the community property at a sale thereof at public auction to pay debts, are not the same as a purchase by the same party of said community property at the price of estimation, on the advice of a family meeting, under Article 343 C. C. Under the latter sale, the property remains mortgaged to secure the price; while under the former, no such mortgage is recognized by law. The only mortgage is in favor of minors on account of the tutorship, but not for the usufruct.

R. L. Cochran vs. Mrs. Violet et al., p. 525.

MINORS—Continued.

When the legal mortgage of a minor on the property of his tutor was originally inscribed after the majority of the former, failure to reinscribe within ten years operates the peremption of the mortgage, which cannot thereafter be enforced against property formerly belonging to the tutor, in the hands of a third possessor.

J. H. Lusk vs. T. J. Powell, p. 616.

In case of conflict between provisions of the Civil Code and those of the Code of Practice on questions of practice, the provisions of the latter Code must prevail.

Under Article 958, Code of Practice, the office or function of curator *ad litem* has no longer any existence in law.

When laws *in pari materia* are to be interpreted, that construction is to be preferred which will give effect to all their provisions.

Hence, article 958, C. P., in abolishing the function of *curator ad litem*, does not abrogate any of the rights vested in emancipated minors by sec. 2, chap. 2, of the Civil Code on the subject of emancipation.

Their right to appear in courts in order to enforce such rights, without assistance, is therefore maintained.

Richardson vs. Richardson, p. 639.

MORTGAGE.

Article 3304 C. C., making valid a mortgage granted on the property of another when the mortgagor subsequently acquires the ownership, requires three elements to give it application, viz:

1. "A person contracting an obligation towards another," *i. e.*, becoming his *debtor*;
2. That such *debtor* should have granted a mortgage on property of which he was not the owner;
3. That such *debtor* should "subsequently acquire the ownership of the property."

It has no application when the person who subsequently acquired the property had granted a mortgage as agent, and in the name of the then owner, without any personal guarantee, and with full exhibition of his powers embodied in authentic act of procuration referred to in the act of mortgage.

Although it was judicially determined that the procuration did not authorize the mortgage and that, therefore, it was not binding on the principal, yet, under the express terms of the Code the mandatory, having exhibited the power of attorney under which he acted, incurred no responsibility. C. C. arts. 3012 and 3013.

Hence, not having contracted a debt by virtue of the act, his subse-

MORTGAGE—Continued.

quent acquisition of the property did not validate the mortgage. The rights of the commissioners herein being based exclusively on the bank's claim of mortgage, and that thus falling to the ground, they have no rights or interest to set up the alleged nullities of the judicial sale attacked.

L. L. Levy vs. Mrs. Ada Lane et al., p. 252.

All things which the owner of a tract of land has placed upon it for its service and improvement, such as working animals, implements of husbandry, machinery and other appurtenances, are immovable by destination, and are covered by a pre-existing mortgage which attaches to the realty.

But the effect of the mortgage on such movables is maintained only as long as the condition of immovable by destination continues, hence the owner may remove them from the mortgaged premises and if the removal is done in good faith, and if by means of a sale, it is followed by delivery to the purchaser equally in good faith, the effect of the mortgage thereon is destroyed.

Hence, in such a case, the creditor cannot pursue such things in the hands of a third party, purchaser and possessor in good faith, so as to subject them to his mortgage.

But his right to prevent, by legal proceedings, the removal of such movables from the mortgaged premises, or to pursue them in the hands of a third possessor in bad faith, is fully recognized.

M. Weil vs. J. Lapeyre et al., p. 303.

When a third person, under color of a pretended sale of immovables by destination subject at the time to a mortgage, unaccompanied by delivery and removal, subsequently, removes them fraudulently and sells and converts the price to his own use, the mortgagee, on establishing the fraud, the insolvency of the debtor and the insufficiency of the remaining mortgaged property to pay the debt, may recover from the third person the price received by him for the property fraudulently removed.

This case compared *Weil vs. Lapeyre* recently decided and shown to be in accordance with the principles there announced.

Mechanics and Traders' Insurance Company vs. Gerson et als. p. 310.

When property, part of which is subject to a mortgage, is sold by the owner, and the purchaser, in part payment of the price, assumes payment of the mortgage debt, the latter, as part of the price, is secured by vendor's privilege on the whole property sold; but

MORTGAGE—Continued.

the mortgage remains confined to the part originally subject thereto.

When in proceeding by executory process to enforce the mortgage alone, without reference to the privilege, an order of seizure and sale issues against the whole property, it embraces property not covered by the mortgage, and is, therefore, error and the order must be set aside on appeal.

Citizens' Bank vs. Cuny, et al., p. 360.

An instrument, executed in the State of Alabama and shown to be a mortgage in that State, will be treated as such by the courts of Louisiana; but as the lands affected thereby are situated in Louisiana, its effect must be regulated by the laws of this State.

Under our laws, a mortgage does not, of itself, operate a divestiture of title from the mortgagor to the mortgagee.

The mortgagor retains the title and under it will defeat claims of ownership set up by the mortgagee, as resulting from the mortgage.

A common-law mortgage is not similar to a *vente à réméré*, under the Civil Code of Louisiana.

C. B. Miller vs. Shotwell et al., p. 890.

MUNICIPAL CORPORATIONS.

A municipal corporation has no right to enforce obedience to the ordinances which it has the power to pass, by fine or imprisonment or other penalty, unless that right has been unquestionably conferred by the lawgiver. The infliction of punishment for the commission or omission of the act declared to be an offense, is a prerogative which, as a rule, appertains exclusively to the sovereign.

The city of New Orleans has no right to inflict a fine and, in default of payment, imprisonment for non-compliance with an ordinance relative to the establishment of a uniform grade for all sidewalks within corporate limits. That right was not delegated to it by the charter. The words found in section 7, which authorize provision for the punishment of any violation of certain ordinances refer to such regulations as the council is authorized to pass and have executed as may be necessary and proper to preserve the peace and good order of the city, and to maintain its cleanliness and health. They surely do not justify a fine, and in default of payment, the imprisonment of the transgressor of the ordinance attacked in this instance.

The State of Louisiana vs. George L. Bright, p. 1.

MUNICIPAL CORPORATIONS—Continued.

The city of New Orleans has control of its streets and drainage, and may improve the one and alter the other as circumstances require.

The city can change its system of drainage and do whatever is essential to perfect it, but it cannot wantonly and unnecessarily disregard the rights of its inhabitants.

The city can widen a ditch lying along the border of the plaintiffs' Canal Company, but must cover it, as without a covering ingress and egress to and from the canal would be impeded or prevented. In widening the ditch to improve the drainage the city cannot needlessly interfere with the rights and privileges of the canal company. *Carondelet Canal Company vs. New Orleans*, p. 308.

Under its police power, the State has the right to recall and abrogate any powers previously conferred on any municipal corporation and to vest such powers in another and distinct State functionary.

Hence, the Legislature had the power to, as it did by the Act No. 7 of 1870, abrogate the police jury of the parish of Orleans, right bank, and to vest powers of the same in the city of New Orleans, to which that territory including Algiers became henceforth attached.

Under that legislation, the city of New Orleans was clothed with the exclusive power and authority to regulate the use of the river banks on the right bank of the river in Algiers, and that power included the authority of allotting such space as in its discretion was necessary for a public ferry landing.

The legal exercise of that power is incompatible with the right of a riparian owner to encroach, for his personal use, on any portion of the space thus allotted for the use of a public ferry landing.

Such an attempt will be rebuked by the courts, and all obstructions of that nature must be removed.

The case of *Watson vs. Turnbull*, 34 Ann. 698, affirmed.

T. Pickles vs. Dry Dock Company et als., p. 412.

The Legislature of the State has vested the city of New Orleans with authority to regulate the use of her streets and to authorize the establishment thereon of railroads operated by steam. The ordinance of 1871, No. 1031 A. S., authorizing the N. O. Jackson and G. N. R. R. Co. to use steam on its track on St. Joseph street, was a valid exercise of that power.

The act of the General Assembly, No. 78 of 1870, never went into effect by reason of non-compliance with the terms of its concluding section; and even if it had gone into effect the proper con-

MUNICIPAL CORPORATIONS—Continued.

struction of it would be that it was a mere negative authority to use steam on St. Joseph street, under said act, but that it did not prohibit the city from granting such authority.

A. Hill vs. Railroad Company, p. 599.

Police juries, like all other corporations created under the laws of Louisiana, are artificial beings who can act only in the mode prescribed by the law creating them.

No officer of a police jury can legally bind or stand in judgment for the corporation without special authorization.

Parol testimony is inadmissible in proof of such authorization, as police juries can act only by ordinances or resolutions.

Police Jury vs. City of Monroe, p. 630.

NAVIGABLE STREAMS.

The police juries of the several parishes have no power to interfere with or obstruct navigation on any navigable watercourse, by the construction of bridges without draw across the same or by the erection of embankments therein.

A watercourse will be held to be a navigable stream when in its natural state it is such as to afford a channel for useful commerce.

That condition is not affected by the formation thereon of natural barriers resulting from sand bars or rafts formed by the accumulation of timber.

Goodwill et al. vs. Police Jury p. 752.

NEW ORLEANS WATERWORKS COMPANY.

The act of incorporation of the New Orleans Waterworks Company forbids it to charge more for water than was paid to the city at the date of its incorporation on March 31, 1877, and the charge made by the city at that time was fifteen cents for a thousand gallons to large consumers.

An owner of a rice-mill in New Orleans is entitled to the use of water conveyed through the pipes and conduits of the Waterworks Company on paying in advance for his supply at that rate.

J. Levy vs. N. O. Waterworks Company, p. 25.

NEW TRIAL.

The right of judges to grant new trials *ex officio* is subject to the same delays which apply to parties.

Culverhouse et al. vs. Marks, p. 667.

NOTARY.

A notary will not be held individually responsible for paying the price of sale, deposited by the purchaser, to the ostensible owner and vendor in the absence of proper instructions given to him and accepted by him to pay it otherwise.

J. A. McCoy vs. H. Weber et al., p. 418.

PARTITION.

In partition suits between co-owners, who are "of age and present," but who "cannot agree on the partition and mode of making it," the rules established by the Code relative to the partition of successions, are applicable, under the express terms of C. C. 1290.

Whether the judicial partition is made in kind or by sale, it is now settled that the mortgages and privileges created by one co-owner on his own undivided share, are transferred from the entire property to the share allotted to him, or, in case of sale, to his share of the proceeds.

After such a sale, when a rule is taken upon the mortgage creditor to show cause why his mortgage should not be cancelled and erased as affecting the property, the creditor cannot, in answer thereto, attack the validity of the judgment of partition, unless at least for absolute nullities.

The co-owners in partition suits have the perfect right to agree to submit the questions to the court, on issue properly joined, and the judgment of the court rendered, on such issue, according to law and evidence and not according to any consent, is not a consent judgment.

Parties have the right to waive delays with reference to submission of their causes and the signature of judgments therein, without impairing the validity of the proceedings. After judgment in partition and proceedings commenced in execution thereof by advertisement of the sale, a seizure under executory process by the mortgage creditor forms no obstacle to the sale, which proceeds, subject to the rights of the creditor, which, as shown, pass to his debtor's share of the proceeds.

The share of the co-owner under a partition sale is only ascertained after deduction of his share of the costs of the proceeding, and the mortgage creditor must submit to such deduction.

R. Beltram vs. C. Gauthreaux et als., p. 106.

A partition by sale of promissory notes belonging to a succession under administration, will not be ordered in the absence of proof to show that such a mode of partition is the only convenient one under the circumstances, and when it appears that such a sale could injure some of the heirs who are minors.

The most convenient and the speediest mode of affecting a partition among the heirs of a succession under administration, of past due promissory notes, is to require the succession representative to enforce the collection of the same, and to divide the proceeds among the heirs according to their respective shares

Halliday et al. vs. Halliday et al., p. 175.

PARTITION — Continued.

When a part-owner of a vessel, suing for a partition and account, has prayed for a sale of the ship, he cannot on appeal complain of a decree of sale made in conformity to the prayer of his own petition never changed or amended.

The principles upon which the decree herein is based are approved, and with the correction of error, apparently clerical, in allowance for commissions is affirmed. *J. Oteri vs. S. Oteri et al.*, p. 408.

PARTNERSHIP.

Where partnership property has been sequestered by one of the partners to prevent devastation and irreparable injury by the other partner, and the property remains in judicial custody, this other partner cannot have the sequestration set aside on bond under article 279 of the Code of Practice. He is not such defendant as is contemplated by that article. The sequestration is not of his property, but of the property of the partnership in which he has only an interest.

A sequestration is indivisible so long as the property to be seized is undivided. The release on bond of one half of each piece of property would leave the other half of each piece in the sheriff's hands, and as that officer could permit no interference with that the release would be a vain act.

When acts of preservation are necessary to be done at once on sequestered property and the judge has issued an order for their performance, a writ of prohibition will not issue commanding him not to execute that order. The judge's first duty is to preserve property in judicial custody.

The State ex rel. Roth vs. Judge, etc., p. 49.

A member of an ordinary partnership, who contracts a partnership debt and who is the financier and business manager of his firm, and the only member having an individual credit, should he pay this debt with his own money or property, could not legally avoid such payment or the contract connected with it, on the ground of error, the error consisting in not knowing at the date of the contract that he was only bound for his virile share and not the whole of the debt. *W. B. Schmidt vs. F. E. Foucher et al.*, p. 93.

The following clause in an act of partnership does not attest an agreement binding on both parties that the partnership should continue at the death of one of the partners between the survivor and the heirs of the deceased: "In the event of the death of either of the

PARTNERSHIP—Continued.

parties to this act, it is to be optional with the survivor whether said co-partnership shall continue or not."

Such a stipulation does not create an agreement equally binding on both parties, but it gives all the advantage to the survivor, without any corresponding right to the heirs of the deceased. It does not comply with the requirements of the Civil Code touching the right of continuing a partnership after the death of one or more of the partners, and it has no sanction in law. Hence, it cannot be enforced. *E. J. Hart & Co. vs. Anger & Nicol*, p. 341.

Held, that plaintiff was and remained one-fourth owner of ship "S. J. Oteri" until November 14, 1883, at which date his interest terminated by his voluntary acceptance of the return of the price which he had paid for said interest.

Held, that for the trips made by said ship prior to August 24, 1883, when the firm of S. Oteri & Bro. was dissolved and terminated, he is entitled to accounting of profits on same basis as had been always customary in previous transactions.

Held, that after the termination of the partnership, plaintiff's interest in the mercantile ventures of buying and selling fruit, thereafter carried on by S. Oteri, ceased; and that, as he could not be held for losses on such ventures, he cannot claim the profit. His interest thereafter was confined to his share of the earnings of the vessel *per se*. As these have not been kept in such manner as to enable us to ascertain their actual value, and as this is the fault of defendant, plaintiff is allowed his share of a liberal charter-price of the ship during that period. *J. Oteri vs. S. Oteri*, p. 403.

PETITORY ACTION.

In a petitory action the description of the lands in suit, by sections and townships in reference to United States surveys, is sufficient. That is certain which can be made certain.

A petition charging that the defendants are in joint possession of the lands in suit, is not amenable to the objection that it does not charge what portion of the several tracts sued for is in the separate possession of any of the defendants.

Louis et al. vs. Giroir et als., p. 723.

When in a possessory action the parties urge claims and counter claims which necessarily involve the question of title, and are clear incidents of ownership, an issue which cannot be tried in such an action, the parties will be relegated to the petitory action as a necessary step to a proper adjudication of such claims.

PETITORY ACTION—Continued.

Courts cannot be required to decide controversies by piecemeals—a decision of the fundamental question must precede a discussion of rights incident thereto.

Mrs. H. Huyghe vs. H. Brinkman, p. 836.

PLEADINGS AND PRACTICE.

An amended petition which purports to supply omissions in general allegations contained in the original petition, and to correct clerical errors in other allegations, and which conclude with a prayer for the same amount of money, based on the same cause of action, does not alter the substance of the demand, and is therefore admissible.

H. M. Payne vs. Railroad and Steamship Company, p. 164.

The joinder of an action against one defendant for damages for breach of contract with an action against another defendant for damages resulting from a tort, is not good ground of exception where the defendants have been allowed to sever in their defense and separate trials have been had even if it be objectionable where there has been no severance.

It is not mis-joinder for a plaintiff husband to sue in his own name for money expended for his wife's illness caused by an injury to her, and for damages for her sufferings caused by that injury, since these damages fall into the community of which he is the head and master.

L. Holsab vs. Railroad Company et al., p. 185.

Where a peremptory exception, sustained below, has been reversed on appeal, and the record leaves in doubt whether a trial on the merits was had, the cause will be remanded for a trial thereof.

J. McDougall vs. J. Monlesun et als., p. 223.

A peremptory exception, which goes to the very foundation of the suit, such as the alleged nullity of the citation, should be decided *in limine*, hence it is bad practice in a court to refer similar exceptions to the merits.

If there is no citation there can be no trial on the merits, hence the injustice of subjecting the parties to the trouble and expense of introducing evidence on the merits, when eventually the case may go off on the exception.

A judgment against an absent party on whom citation was served through his alleged attorney, in fact, but who is shown not to be such an agent, is practically against a party who is not legally before the court, and is therefore a nullity.

A. A. Farmer vs. Hafley, administrator, p. 232.

PLEADINGS AND PRACTICE—Continued.

A suit in revendication of real estate must be dismissed, where it appears that prior to the institution thereof, the plaintiffs have sold all their interest to the land.

The dismissal of such suit carries with it that of an intervenor claiming the same property as plaintiff's vendee, the more so, where in terms the judgment so expressly declares.

Barron vs. J. W. Jacobs et al., p. 370.

Defenses of want of consideration, extinguishment by remission, prematurity resulting from inexpiration of extension of time granted, against a mortgage note sued on, are inconsistent and inadmissible.

An injunction on those grounds, the evidence sustaining neither, is properly dissolved.

An appeal from the judgment dissolving is frivolous, and damages are allowable.

Citizens' Bank vs. N. M. Renaché, p. 376.

Exceptions which affect the very foundation of the suit should be decided *in limine*, and should not be referred to the merits.

A demand for the payment of the price of property, which is in fact an action for the specific performance of a contract of sale, is inconsistent with a demand for the rescission of the sale for non-payment of the price, and on a timely exception by defendant, plaintiff should be required to elect between the two inconsistent demands.

R. L. Cochran vs. Mrs. Violet et al., p. 525.

When peremptory exceptions filed *in limine* have been tried and overruled, and answers have been filed, and at a subsequent term the case has been fixed and taken up and is on trial on the merits, the judge has no authority to interrupt said trial, and, of his own motion, to set aside the former judgment on exceptions and grant a new trial thereof, and forthwith to hear them and render judgment thereon sustaining the exceptions and dismissing plaintiff's suit.

The exceptions, *as such*, were out of the case, and the judge had no more authority to reinstate and try them *as exceptions*, than he would have had to interpose such exceptions originally.

The overruling of exceptions is not *res judicata* on the subject matter thereof and does not preclude the court from rendering a different ruling when the same matter is brought up anew in proper form, as by answer to the merits; but this principle does not authorize the Court to revive a defunct exception, and by sustaining it, defeat and deny the trial on the merits, which has been regularly opened.

Culverhouse et al. vs. Marks, p. 667.

PLEADINGS AND PRACTICE—Continued.

Plaintiff's want of authority to institute suit must be specially urged by way of exception *in limine litis*, or it will not prevail.

Heirs of Mason vs. Mrs. Layton et al., p. 675.

Plaintiffs seized certain movables as the property of their debtor. A third person intervened claiming title and possession under transfer before sale and asked for judgment decreeing him to be the owner. Plaintiff answered alleging his title to be in fraud of creditors and simulated. Before trial intervenor moved to strike out all the allegations except those showing simulation and to restrict the issue to simulation *vel non*. The case was so tried.

Held, that after thus accepting and submitting this issue to the decision of the court, intervenor cannot now dispute plaintiff's right to raise this issue otherwise than by a direct action in declaration of simulation, even if otherwise the objection was tenable as to alleged simulation of sales of movables, on which it is unnecessary to express an opinion.

In such a proceeding the allegation that the sale attacked embraces all the property of the debtor, is a sufficient allegation of injury to the creditor.

On the facts of the case, the evidence sustains the conclusions of the judge.

E. G. Schlieder vs. L. B. Martinez, p. 847.

It is unnecessary that all joint obligees interested in the enforcement of a joint obligation, should be joined as plaintiffs in a suit to enforce it. Anyone may sue and recover thereon to the extent of his interest in it.

Commissioners, etc., vs. Converse et al., 871.

The charge that a plaintiff sues in two capacities that are inconsistent with each other, should be taken advantage by exception. It is too late after judgment and by motion for a new trial.

Ashbey vs. Ashbey, p. 902.

The object or purpose of a suit or the matter in dispute should be determined not by the prayer of the petition alone, but from the body of the petition in conjunction with the prayer.

Even if the prayer does not ask in plain terms the decree that the allegations of the petition would clearly warrant, such omission will not prejudice the petitioner's right to recover on the averments of his petition, where they are sufficient to sustain the proper action and decree, and there is a prayer for general relief.

The State ex rel. Levet vs. Lapeyrollerie, p. 912.

A decree of this Court reversing a judgment of the district court rejecting all evidence in support of a party's demand, on the ground

PLEADINGS AND PRACTICE—Continued.

that his petition set forth no cause of action, has only the effect of deciding that if *all* the averments of said petition are proved, the party is entitled to some relief.

Where, after trial on the merits, certain important allegations are not proved, the case is in no manner affected by our former decree, but stands on its intrinsic merits.

Flower, Adm. vs. Mrs. Noble, etc., p. 938.

PLEDGE.

It is now settled in jurisprudence that the property held in pledge by a creditor may be seized out of his possession by another creditor of the pledgee, and sold subject to the pledgee's claim.

If the thing pledged is a promissory note the pledgee made garnishee cannot be heard to urge the defense that the note is only accommodation paper, pledged for a specific purpose, and not to be enforced against the drawer for any other purpose, as such defense could be resorted to by the drawer only when sued on the note.

Kirkpatrick & Co. vs. Clay Oldham, p. 553.

Delivery of the thing pledged is essential to the validity of the contract of pledge.

What constitutes delivery depends on the nature of the object pledged and on the circumstances of the case.

The pledgee need not always have manual corporeal possession of the thing pledged.

A third person may be detainer of it by agreement between the parties. C. C. 3162.

The pledgor may have possession of the thing pledged for account of the pledgee. He occupies then the position of trustee or possessor *ad hoc*.

Under a cession of property the creditors of the insolvent do not acquire a right of ownership in the property surrendered, but only the right of possession and the power of administration. The ownership remains in the insolvent. C. C. 2178, 2182.

If among the assets of the insolvent there be a thing pledged, the possession of it does not pass to the creditors, being vested in the pledgee. No man can transfer a greater right than he himself has.

The obligation of pledge is contractual. It vests in the creditor the right of possession and of privilege on the thing pledged. The right of detention being as much a part of the security as the things pledged are a part of the guaranty, the creditor cannot be deprived of same by the voluntary act (bankruptcy) of his debtor

PLEDGE—Continued.

nor by the insolvent laws of the State. The obligation of contracts cannot be impaired.

Notwithstanding the pledgor's insolvency, the pledgee can proceed to sell the pledge in the way stipulated by the contract.

A power of attorney, coupled with an interest, is not revoked by the death or bankruptcy of the principal. Art. 3027 of the Civil Code applies to a gratuitous mandate.

G. Jacquet vs. His Creditors, p. 863.

POLICE JURY.

Police juries like all other corporations created under the laws of Louisiana, are artificial beings or persons who can act only in the mode prescribed by the law creating them. The president cannot stand in judgment for the police jury, without special authorization. Affirming Police Jury of Ouachita vs. Mayor and Council of Monroe, 38 Ann. *Huffpauir, President, etc., vs. Wise*, p. 704.

POLICE POWER OF STATE.

A contract entered into with the State Board of Engineers, under Act No. 7 of 1884, for cutting the bends and straightening certain navigable watercourses in this State, the expense of which is borne by private and interested individuals, and under the circumstances detailed in opinion, is a private enterprise and cannot be maintained or enforced on the pretense that it is in the exercise of the police power of the State, or that it finds sanction in the levee laws of the State. *Chaffe & Sons vs. Trezevant et als.*, p. 746.

POSSESSION.

One who claims property by inheritance from his mother and at her death goes into possession of the same under an honest belief that he is the sole heir, a belief founded on the fact of his brother—the only other child of his mother—having joined the army in the war between the States, and not being heard from thereafter up to the death of the mother, an interval of many years, is a possessor in good faith. As such possessor, he can only be made liable for rents from judicial demand, if evicted, and the party evicting must pay him for improvements, to extent of the price of the materials and the workmanship, or the enhanced value of the soil, and if the latter is not proved the measure of reimbursement must be controlled by proof of the former.

Hutchinson, Tutor, vs. Mrs. A. Jamison et als., p. 150.

PRESCRIPTION.

In a petitory action met by the defense of the prescription of ten years, the main legal discussion involves the question of the alleged just title, the good faith and the length of time of the defendant's possession of the property in controversy. The legality or validity of plaintiff's title is a question of secondary consideration, which comes up in case only that defendant's plea of prescription should not be found good.

A just title is one which in form and intent is translativ of property, which the purchaser acquires from one whom he believes in good faith to be the true owner.

If the possession begins in good faith, the right of pleading the prescription of ten years is not affected or impaired by the fact that the possession may subsequently have been in bad faith.

Irregularities and defects in a tax deed, which is *prima facie* valid, and which are not apparent or stamped on the face of the deed, are cured by the prescription of ten years.

Prescription is suspended by the minority of the parties against whom it is pleaded. Hence, if it appears from the record that the party to be affected by the plea of prescription was a minor a short time before the time at which it must have begun to run, and if the record does not show the precise time at which he obtained his majority, the cause will be remanded for trial of that issue.

R. R. Barrow et al. vs. Mrs. M. Wilson et als., p. 209.

An action to annul a judgment must be brought within a year of its rendition where the suit is based upon alleged frauds or ill-practices, or within a year of the discovery of the same.

Where a party is duly notified of such alleged frauds and ill-practices, orally or by writing, as by means of a petition duly served on him, and refuses to believe the oral communication or to read the written notice, he will be bound, he will be held to be duly notified as if he had in fact taken thorough personal cognizance of the information imparted.

Mrs. A. Bory vs. N. K. Knox, p. 379.

Dismissal of a suit, on motion of defendant's counsel, because of failure of plaintiff to furnish bond for costs as required by an order of the court, does not constitute such voluntary abandonment by plaintiff as will defeat the operation of the suit to interrupt prescription.

S. Belden vs. Slaughterhouse Co., p. 391.

Good faith purifies the title of its defects and causes the possessor under a just title to be preferred to the true proprietor who has remained so long neglectful of his rights.

PRESCRIPTION—Continued.

That there is no defect stamped on the face of the deed is what is meant by valid in point of form.

A possessor cannot be deprived of pleading prescription because he might, by inquiry and careful examination, discover that his vendor had no title.

A title defective in form cannot be the basis of prescription. By this is meant a title on the face of which some defect appears, and not one that may be found defective by circumstances, or evidence *dehors* the instrument.

If, upon examination of the recitals contained in a deed, they prove erroneous, this would only be an error of fact, and would not prevent the possessor under it from pleading prescription.

Mrs. Pattison vs. Dr. Maloney, p. 885.

An acknowledged account is barred only by the prescription of ten years.

Ashbey vs. Ashbey, p. 902.

PRINCIPAL AND AGENT.

As a general rule, the knowledge of the agent is the constructive knowledge of the principal.

Where an agent acts in double capacity, as in case a president of a bank contracts on the part of the bank with himself as an individual, or as the representative of a firm of which he is a member, if, in such transaction, the president of the bank is faithful to the interests of the bank, his principal and his action is favorable to the bank, his knowledge of any material fact bearing on the validity of the contracts such, for instance, as his own or his firm's insolvency, will be held to be the knowledge of the bank. If, on the contrary, the agent or bank president acts only for his own or his firm's benefit, regardless of the interests of the bank, his knowledge will be not regarded as the knowledge of the bank.

Seizas, Syndic, vs. Citizens' Bank, p. 424.

Jurisprudence has discarded the former stringent rule which made agents of foreign principals personally liable on contracts executed by them in that capacity, without any distinction whether they describe themselves in the contract as agents or not.

In suits against agents to make them thus responsible, courts must endeavor to ascertain from the nature and tenor of the contract, to which of the parties credit was given, and they will be guided by the rule that the agent of a foreign principal is not, as a question of law, personally liable on every contract made for his principal. It

PRINCIPAL AND AGENT—Continued.

is rather a question of fact in each case to be ascertained by the terms of the particular contract and the surrounding circumstances.

To avoid personal liability on a contract made for his principal, the agent must disclose his agency as well as his principal, either at the time that the contract is entered into or when he is sued as personally liable thereon.

In a contract of affreightment, which contains on its face the fact of the agency and discloses by its terms the principal for whom it is executed, the agent will be exonerated from personal liability.

J. H. Maury & Co. vs. L. Ranger & Co., p. 485.

A power of attorney is revoked by the interdiction of the principal, but continues in force until the judgment to that effect has been rendered. The mandate does not expire by the *seclusion* of the principal or his confinement for treatment in an insane asylum; but it does by the *reclusion*.

The word *seclusion*, found in Art. 3027, R. C. C., line 5th, should be read *reclusion*. It was introduced in the Code of 1825 by the compilers. In case of discrepancy between the French and English texts, the former prevails.

Reclusion means incarceration under a sentence to undergo an infamous punishment, carrying civil degradation in a house of forced labor.

Seclusion means a voluntary confinement or retreat from social life.

Ignorance of the revocation of a power of attorney will protect an innocent third party dealing in good faith with the agent as such.

N. B. Phelps vs. Reinach, p. 547.

PRIVILEGES.

The lien of the unpaid vendor of cotton, when enforced in five days, is superior to that of the holder for value of a bill of lading for the cotton.

Although the vendee of the cotton has put it on shipboard, and has drawn his bill of exchange against it, and the bill of exchange with bill of lading attached was bought by an innocent party for full value who has had the bills endorsed and delivered to him, yet if the vendor has not been paid and he pursues his vendee and the cotton within the five days allowed him, he must prevail over the holder of the bill of lading.

The vendor's lien on cotton for five days yields to nothing unless it may be to a warehouse receipt which has been pledged as collat-

PRIVILEGES—Continued.

eral for money borrowed, and not to that unless the receipt has been paraphed before issue "for hypothecation."

Harris, Parker & Co. vs. A. G. Nicolopulo, p. 12.

If a vendor of parts and pieces of machinery of a sugar mill, which are detachable, permit them to be sold confusedly with the mass of machinery and the sugar-house, without provoking a separate appraisal of them, he loses his privilege upon them.

A vendor of such pieces of machinery has no privilege upon the sugar-house and the acre of ground on which it stands and the other machinery in it, and if he ignores the privilege he has and sets up and attempts to enforce the privilege he has not, he will lose that which he has and will be remediless.

Seannell & Lafaye vs. R. Beauvais, p. 217.

The furnisher of machinery and materials for a vacuum pan apparatus in a sugar-house which are removable, acquires no privilege for the price thereof on the sugar-house, all the machinery therein and on the one acre of land on which it is situated; the law restricts his privilege to the machinery and other things which he has sold to the owner of the sugar-house. The decision in *Seannell & Lafaye vs. Beauvais*, 38 Ann., affirmed.

Shakspeare, Smith & Co. vs. Ware, p. 570.

A sold machinery to B with obligation and guarantee to erect same, and that it should possess a specific working capacity. After having made advances to A, B refused to accept the mill because not complying with conditions of sale, and claimed from A reimbursement of advances. Thereupon, A, B and C made a contract by which C agreed to be substituted as purchaser in place of B, and A agreed to accept him as such substitute and to release B, and C, with the guarantee of A, agreed to repay to B the amount of his advances to A. *Held*, that B was not the vendor of the machinery to C, and was not entitled to vendor's privilege for the sum agreed to be paid to him.

Claycomb & McNeely vs. Bisbee et als., p. 575.

PROHIBITION.

In applications for the writ of prohibition against inferior courts, we must necessarily act on the state of facts existing at the time of the application. If the particular grievance complained of no longer exists, there is no longer any need of the relief sought.

PROHIBITION—Continued.

An application for a prohibition to an inferior judge, based on an alleged usurpation of jurisdiction, in that the suit or a former or similar suit had been transferred from the same judge to the United States Court and was still pending there, must be denied if it appear that the transferred suit has been dismissed from the United States Court prior to the application for the prohibition.

The State ex rel. Davidson vs. Judge, etc., p. 178.

An application for a prohibition will not be considered, unless a plea to the jurisdiction has been first filed and overruled in the lower court.

The State ex rel. Girardey vs. Steele et al, p. 569.

Exceptions to the form of proceedings do not draw in question the jurisdiction of the court.

It is not until an exception to the jurisdiction of an inferior court has been filed and illegally overruled that a prohibition lies from this Court.

The State ex rel. Smith vs. Judge, etc., p. 920.

In an application for writs of *certiorari* and prohibition, the complaint of the relator that the inferior court has issued an unwarranted execution against his property, will not be favorably entertained by the Supreme Court, if the record shows that the relator had himself previously submitted to the court *a qua* the question of the alleged illegality of the execution which he resists by means of an injunction.

The State ex rel. Gooch vs. Justice of the Peace, p. 968.

PUBLIC OFFICERS.

An agreement entered into between two rival candidates for a public office, whereby each one of them undertakes and binds himself to pay the other, in case of his own election, one-half of the net profits of the office, for the term, is in violation of good order and public policy, subversive of the best interests of society, has a tendency to destroy the safeguards of the ballot-box and cannot be enforced by the courts.

J. N. Glover vs. Taylor, p. 634.

RECUSATION.

Prohibition lies against a judge who takes jurisdiction to decide a plea of recusation against himself, on the ground that he had been employed as advocate in the cause.

A rule, taken in a cause in which final judgment has been rendered, calling defendant to show cause why a writ of *capias ad satisfaciendum* should not issue, and why he should not pay the judgment or be sent to prison, is a proceeding in the same cause, and the

RECUSATION—Continued.

judge who has been employed as advocate, even before the judgment, is subject to recusation. Nor is the case affected by the fact that he had been the counsel of the party who claims his recusation. *The State ex rel. Trimble vs. Judge, etc., p. 247.*

It is the duty of a judge recusing himself upon grounds other than *personal* interest in the suit, to appoint a lawyer, having the qualifications of a judge, of the district in which the recused case is pending; and if no lawyer can be obtained at the term of the court at which the recusation is declared, the judge shall immediately appoint some judge of an adjoining district to try the case. In the event the recused cause shall not have been tried within nine months from the date of the recusation, it shall be the duty of the district judge to order the transfer of the case to the district court of the nearest parish in the adjoining district, the judge of which is competent to try the case.

In case of such transfer of the suit, the judge of the court to which the transfer is made has as full and complete authority and jurisdiction over the same as if it had originated in that jurisdiction.

The State ex rel. Gates vs. Judge, p. 452.

Under the provisions of Act No. 40 of 1880, the judge of an adjoining district, who is called to try a cause, in which the presiding judge is recused, acts *pro hac vice* and in *that court*, and during the time he is thus engaged in the performance of duty, the presiding judge is displaced.

The judge of an adjoining district thus appointed, has no authority to grant an order at chambers within his own judicial district, and in his capacity as judge of the latter, transferring the suit to an adjoining district. Such an act is a nullity.

J. O. Halphen vs. Gilbeau et al., p. 724.

REGISTRY.

The unpaid price of sale of movable property, unless it be specially provided to the contrary, is secured by vendor's lien.

A sale and counter-letter of movable property, recorded in the conveyance office in which transfers and contracts relative to real estate *alone* are required to be registered, are not notice to third persons equivalent to knowledge.

McCann & Son vs. Bradley, p. 482.

REMOVAL TO U. S. COURT.

A suit upon an account by a commercial firm of Missouri against a commercial firm of this State and the members thereof *in solido*,

REMOVAL TO U. S. COURT—Continued.

presents a single controversy, which is removable to the U. S. Courts by parties on either side; but all the parties on the same side must concur in the application, and one defendant cannot remove in opposition to the wish of his co-defendants. In this case one partner of defendant firm claimed, while the other opposed, the removal, and the application was properly denied.

In a second application, the defendant Trager alleged that there was a separate controversy between himself on the one side and his co-defendants and plaintiffs on the other, and asked a removal on that ground. We find no such controversy presented on the record, and the judge did not err in refusing the removal.

Fusz & Buckner vs. Trager & Noble, p. 173.

To entitle a party to a removal to the United States Circuit Court, there must exist in the suit a separate and distinct cause of action, upon which a separate and distinct suit might properly have been brought and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other.

To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit, as it has been begun. *Succession of Kate Townsend vs. Sykes et al.*, p. 410.

RES JUDICATA.

A *mandamus* will issue to compel a railroad company to allow the transfer, on its books, of shares in the name of the relator, when it is established that a party, to whom the company says the stock belongs in part, has been finally adjudged not to have any interest therein.

The judgment, although foreign, having acquired the force of *res judicata*, must be given that effect. On a charge that it is erroneous, this Court will not go behind it to test its correctness.

The State ex rel. Plaisent vs. Railroad Co., p. 312.

A final judgment rejecting, on the ground of prescription of four years, an action by a minor against his tutor for acts of the tutorship, cannot sustain the plea of *res adjudicata* to a subsequent action between the same parties for an account of the usufruct by the surviving parent of the property of his child, after the termination of the usufruct. *R. L. Cochran vs. Mrs. Violet et al.*, p. 525.

RES JUDICATA—Continued.

In civil actions the verdict of the jury, like a judgment, forms the authority of the thing adjudged upon all matters and demands set up in the pleadings; and it is not required that the verdict should contain a statement of all the considerations which led the jury to find a general verdict.

Thus, the jury in finding a verdict in favor of plaintiff in full of his demand against parties who are sued as partners, need not say that they found the existence of the partnership, although the same may be especially denied as a means of defense.

The silence of the jury on a reconventional demand, when they return a general verdict in favor of plaintiff, will be construed as a rejection of said demand.

The same construction will be applied to a privilege prayed for by plaintiff. *Shakspeare, Smith & Co. vs. Ware, p. 570.*

When the defendant in a suit files a plea to the jurisdiction of the court and the plea is overruled and a judgment rendered, and no appeal is taken, the question of jurisdiction becomes *res adjudicata*, and the judgment cannot in a collateral proceeding be treated as an absolute nullity for want of jurisdiction in the court rendering it. *Tutorship of Minor Heirs of Byland, p. 756.*

It appearing from the unambiguous language of a written compromise made the basis of a judgment, that the terms thereof did not embrace the thing demanded in a subsequent suit, the plea of *res judicata* is overruled.

Amount of attorney's fee fixed according to the circumstances of a particular case. *Succession of J. L. Sterry, p. 854.*

REVOCATORY ACTION.

In a revocatory action three things are requisite to maintain it—fraud on the part of the vendor, knowledge on the part of the vendee, and actual injury to the other creditors.

Knowledge may be express or constructive.

Seixas, Syndic, vs. Citizens' Bank, p. 424.

Where a judgment creditor resorts to a revocatory action to annul a sale made by his debtor, on the ground of fraud, such debtor and vendor in the contract assailed is a necessary party to the suit.

S. Black vs. Bordelon, Tutor, p. 696.

SALE.

Parties offering goods and wares on the market, through brokers whom they employ as their agents for such purposes, are bound for all the stipulations made in their behalf by their said agents.

SALE—Continued.

This obligation includes guarantees that perishable goods will keep good and merchantable during a certain period of time.

Goods of a uniform nature, such as manufactured liquid goods, for instance syrup, which are sold to be delivered in separate packages, may be returned as unmerchantable, even though some of the packages have the appearance of being good and sound.

The redhibitory defects of such goods cannot be tested under the rule of law which provides that the vice of one of several things sold together, gives rise to the redhibition if all of the things were matched, such as a pair of horses; but it must be governed by the principle which releases the purchaser from his contract when it appears that the defect of the thing sold renders its use so inconvenient as to justify the conclusion that he would not have purchased it had he known of the vice.

Flash, Preston & Co. vs. American Glucose Co., p. 4.

The conveyance of property in the form of a sale does not vest the ownership in the apparent buyer if the deed was really intended by both parties to be a mortgage.

The answers of one of the parties to interrogatories on facts and articles propounded by the other, are equivalent to a counter-letter and have the same force and effect. They are unquestionably admissible in evidence. *L. A. Crozier vs. W. H. Ragan, p. 154.*

When parties really intend to create a mortgage for the security of an existing or contemplated debt and adopt the form of a sale with a counter-letter which, taken together, exhibit such intention, the contract will be construed as a mortgage and effect will be given to it accordingly.

But when the act of sale and the counter-letter both concur in asserting that it is a sale, the latter containing the agreement that the vendor may redeem within a given time, it must be held to be a sale with the right of redemption, and if the right is not exercised within the time agreed on it is lost forever.

When the vendee or his representative, he being dead, attempts to sell the land before the expiration of the time for redemption, and the vendor enjoins the sale on other grounds and the time expires before the trial of the suit, the defendant will be mulcted in costs that were incurred before the expiration of the time.

A. D. Henkel vs. Sheriff et al., p. 271.

A contract, evidenced by an act of sale and a counter-letter, which together show that the sale, made part cash and part on time, al-

SALE—Continued.

though not designed by the parties to be absolutely final and conclusive, but intended to enable the vendor to use the notes in his business, the title to be put back in the vendor's name as soon as the notes issued are retired and returned to the purchaser and drawer, does not establish a simulation, but a real transaction, by which the title passed.

Purchasers of such notes, for a valid consideration and before maturity, are entitled to recover the amount thereof, with lien on the property sold. *McCann & Son vs. H. Bradley, p. 482.*

A sale cannot be annulled by an opposition to a distribution of the proceeds of the sale. When a sale is real, a direct revocatory action must be brought for its annulment.

When there is opposition to the distribution of the proceeds on a bare allegation of fraud, collusion, etc., in making the sale, the Court will not delay the distribution until it shall suit the pleasure of the opponent to institute a proper action to annul it, unless he has used some conservatory process to prevent the distribution.

Succession of Auger, p. 492.

An heir, or the transferee of an heir, acquires the right the decedent possessed, to sue for the resolution of a sale for the non-payment of the purchase price; but same is necessarily restricted to the interest of such heir or transferee.

A right to sue for the enforcement of a vendor's lien is different from that to sue for the resolution of a sale; and the former is not an auxiliary of the latter. This right does not pass to the purchaser of the vendor's notes, unless there be a special contract to that effect.

Neither the heirs of a deceased person nor the transferee can sue for the resolution of a sale until previous tender has been made of the outstanding purchase notes, and such part of the price as may have been paid by the purchaser.

Such a tender is a condition precedent to the institution of the suit.

Heirs of Castle vs. Mrs. Floyd et al., p. 583.

There can be no contract of sale without a fixed price. Where the consideration of a contract called by the parties a sale, is that the transferee of the property shall settle a certain debt of the vendor on the most advantageous terms, without any sum being named, and the transferee takes possession of the property and settles the debt and records his title, though the contract cannot be regarded a sale, yet a creditor of the vendor or transferor, who

SALE—Continued.

seizes the property, must first pay out of the proceeds to the transferee in said contract, in possession, the amount that he, the transferee, had paid in settling the debt of the transferor or vendor.
J. S. Prude vs. R. C. Morris et al., p. 767.

SEIZURE.

The seized debtor has not the right to point out property to be seized when the creditor who prosecutes the execution of the judgment has a privilege or mortgage on the debtor's property.

The seizure of immovable property is not invalidated by the failure to serve notice of seizure on the tenants. *Pipkin vs. Sheriff*, 36 Ann. 782, affirmed.
Mrs. Lambeth vs. Sentell et al., p. 691.

SIMULATION.

When a sale is a mere simulation it may be disregarded and be treated as a nullity by a creditor of the seller, but when the sale is real, however fraudulent, the creditor cannot seize the property in the possession of the buyer, but must resort to the revocatory action. And this rule is applicable to the sale of movables as well as immovables.
J. C. Johnson vs. Kingsland & Ferguson, p. 248.

In a direct action to revoke a sale, containing the requisite averments and prayer for the revocatory action, and where the sale is alleged to be "simulated and fraudulent," the judge is authorized to grant the relief if the evidence establishes either simulation or fraud, or both. *Affirming Johnson vs. Mayer*, 30 Ann. 1203.

W. Mackesy vs. T. Schuls et al., 385.

In a case of doubt, where the circumstances are suspicious, this Court will not reverse the conclusion decreeing the simulation of a sale of the judge *a quo*, who saw and heard the witnesses.

Olaycomb & McNeely vs. Bisbee et al., p. 575.

This suit is an attack by a creditor upon titles of third persons, on the ground that they are pure simulations, and that the property belongs to the debtor and is subject to his debts.

On the evidence the simulation is not established to our satisfaction.

Todd, Curator, vs. Larkin et al., p. 672.

SLANDER.

In an action in damages for slander, the only possible defenses are: either a *denial* or a *justification*, or a confession, under mitigating circumstances. There is no such thing in law as a half-way justification. An answer which sets forth all these defenses equivocates and is inconsistent.

SLANDER - Continued.

Drunkenness is not a defense to such an action, though it may perhaps be a matter in mitigation.

Neither is apology, unless accepted, to operate a release from responsibility.

Whatever be the provocation under which one acts, who utters abusive and defamatory epithets, it cannot be imputed to the party injured, who did not participate or is not connected with it.

The unauthorized use of opprobrious epithets which reflect upon and bring into contempt and disrepute the honor of a female of good social standing, implies malice, as slanderous *per se*, and suffices to maintain an action in damages without proving special damage.

Although injuries to the feelings, and to one's social position, be not susceptible of precise adjustment, still they are recognized as a legitimate ground for the recovery of reasonable indemnity, under the exceptional features of each case.

Where excessive damages are allowed, they may be reduced on appeal.

Mrs. C. Williams vs. D. McManus, p. 161.

SUCCESSIONS.

After a succession has been fully administered, all its debts paid, and nothing remains in the administration except the property, the purposes of the administration are fully accomplished, and the heirs, all and singly, have an absolute right to require it to be terminated and to be put into possession of the estate.

The wishes of some of the co-heirs for a continuance of the administration cannot control or destroy the legal right of the others to terminate it to enter into possession of their own.

Succession of E. S. Powell, p. 181.

The administrator of a succession which, though apparently solvent, owes debts and is unsettled, and which the heirs, though present, have never accepted, may bring a real action for the revendication of property claimed to belong to the succession and held by adverse title not derived from the decedent, in his own name and without joining the heirs.

The law and jurisprudence on the subject fully reviewed.

Woodward, Administrator, vs. Thomas et als., p. 238.

An administrator of a succession against whom a judgment has been rendered in order to remove him, has the right of appeal from said judgment, and having perfected such an appeal, he has a right of appeal from an order of the court appointing another person to succeed him in the administration of the succession; such an appeal may be treated as an auxiliary to the other.

SUCCESSIONS—Continued.

The Supreme Court has jurisdiction over a contest involving the right of administration of a succession, if the assets of the latter exceed \$2000. *Succession of Seth Bedford, p. 244.*

An administrator is not compelled to sell the working animals to pay the debts apart from the plantation. They are immovable by destination, and if they die during the term of the administration the administrator is not to be charged with their value in the absence of fault or negligence on his part.

Nor should an administrator be charged with the annual rents of the plantation, where, after the proper efforts, he has been unable to lease the plantation to a suitable tenant, and has been compelled to work the place on account of the succession. In such case he is subject to no charge for rents or for failure to make adequate crops where it is not shown that such failure is attributable to his fault. *Succession of Mrs. M. A. Myrick, p. 611.*

Article 990, Code of Practice, does not contemplate sales of property of estates made at the instance of succession representatives, but such as are applied for by creditors only. Under the provisions of the Constitutions of 1845, 1852 and 1864, and statutes enforcing them, clerks had jurisdiction and authority to grant orders for the sale of succession property. 12 Ann. 56, *Succession of Boyd*; 21 Ann. 505, *Wood vs. Lee*.

The clerk having been possessed of jurisdiction to grant the order, same protects the adjudicatee and subsequent purchasers.

Davie vs. Scriber et als., p. 654.

A creditor who has an unliquidated and unacknowledged demand against a succession, is not bound to prosecute the rendition and effect the liquidation of his claim and its recognition and enforcement by an opposition to the account, but may proceed at once by an independent and direct action for that purpose.

H. Stafford et al. vs. Succession of McIntosh, p. 664.

There is no law to justify and no room or reason for the appointment of an administrator to a succession which owes no debts, and after the property has been put in the possession of the heirs who have accepted the same, thus winding up and finally settling up the succession.

If the existence of debts should be afterwards discovered, the creditors would have recourse against the heirs, but not against the succession which has ceased to exist. *Succession of Thibodeaux, p. 716.*

SUCCESSIONS--Continued.

When a community is unliquidated and owes debts, the administration of the estate of the husband involves that of the community, and the community property may be validly sold by the administrator of the husband's succession for the payment of community debts. In case of sale by an administrator to pay debts, rules applicable to alienation of minor's property do not apply, and citation to heirs is unnecessary. *Oriol, Tutor vs. Herndon et al.*, p. 759.

A probate sale, made in pursuance of an agreement between the executor of the estate to which the property belongs and his partner in business, by which such partner is to buy the property in his own name but for the benefit of his firm, is void.

Carroll et al. vs. Cocherham et al., p. 813.

After judgment has been rendered homologating an executor's account so far as not opposed, other opponents cannot come in and attack the account. The delay fixed by law must have elapsed before an homologation can be made, and they who have permitted it to pass without preferring their complaints are shut out thereafter.

But where an opposition contesting generally the whole account has been filed in time, this opponent may supplement her opposition by specifications and amplifications of the original after the homologation has been made. The judgment qualified by the words "so far as not opposed" reserved her rights.

An opponent heir who alleges that she signed a receipt to the executor in full settlement in error, and that the real estate of the succession has been bought by the executor through an interposed person, and so seeks to annul the sale and bring the property back into the succession, is not required to make tender of the sum she has received before she can be heard to impugn the settlement or attack the sale. *Succession of E. Commagère*, p. 830.

The law authorizes oppositions to accounts rendered by succession representatives to recognized heirs, ordered to be put in possession of the estate.

Such opposition may be made either by the heirs themselves or "other claimants," under the express provision of the Code of Practice.

The court before which the succession proceedings have been instituted is seized of jurisdiction from the inception to the termination thereof and is competent to pass upon such oppositions.

Succession of J. L. Sterry, p. 854.

The testamentary executor of the will of a decedent, who has been judicially recognized, and who has qualified as such, and who is

SUCCESSIONS—Continued.

also universal legatee under the will, cannot at his option shift his position without the sanction or authorization of the court and assume or exercise rights of ownership of the property of the succession.

Hence, a sale of succession property made by such executor under such circumstances transfers nothing and no rights to the purchaser, and is null and void.

The holder of the property under such a title must account for rents and revenues of the same during the whole time of his possession.

Succession of Kate Townsend vs. Sykes et al., p. 859.

When at a succession sale the widow in community and the tutrix of the minor heirs (sole heirs) purchases a piece of property that belonged to the community, in order to receive a valid title under the adjudication, she is not compelled to pay over the amount of her bid; provided, she is properly charged with it in the account of the administrator and the money is not needed to pay the debts, and where it is shown that after the payment of the debts a balance remains, which is paid over to her by the agent or the one entitled to receive it. *Mrs. Mason et al. vs. E. L. Bemiss*, p. 935.

Claims against a succession, although recognized by the administrator on his tableau as debts of the succession, must be proved up when opposed by heirs and creditors, in default of which they will be rejected.

Promissory notes executed by the deceased and prescribed on their face before they are placed on the tableau will be rejected as prescribed, on the opposition of heirs and creditors, unless interruption of prescription be legally proved.

Estate of Romero, p. 947.

SUPREME COURT.

The writ of prohibition is the proper remedy to restrain a district judge who attempts to enjoin the execution of a judgment rendered by the Supreme Court, on the alleged ground that said judgment is not yet final.

District judges are absolutely powerless to judicially investigate and determine the validity of the official acts of any of the clerks of the Supreme Court. The certified copy of a judgment of this Court issued by one of its clerks and forwarded to the court whence the appeal was taken, is the mandate of this Court for the execution of the judgment, and it must be obeyed by the lower court.

SUPREME COURT—Continued.

That court has no power or authority to ascertain in an injunction proceeding or in any other mode whether the mandate issued properly or otherwise. Complaints for alleged errors of any of the clerks of this Court, in issuing such certificate or in the performance of any of their official functions, must be addressed to this Court only; the power to correct such errors is lodged in no other authority. A district judge will not be held in contempt for assuming powers which he honestly but erroneously believed to be of the essence of his court.

The State ex rel. Heirs of Gee vs. Judge, etc., p. 274.

In a case wherein the judgment of this Court has been reversed by the Supreme Court of the United States, and remanded "for further proceedings to be had therein not inconsistent" therewith, this Court is fully competent to judge of *all facts* not set forth in that finding, and decree as in its opinion justice may require. 91 U. S. 423, *ex parte French*; U. S. R. S. 709, and authorities cited.

The failure of an appellee to request an amendment of the judgment of the district court, and an increase of the tax levy ordered therein, deprives him of remedy therefor in this Court.

The State ex rel. Fisk vs. Police Jury, p. 505.

Under an application for a *certiorari*, a question of law involving the validity of the proceedings attacked may be determined by the Supreme Court.

In the Matter of William Ross, p. 523.

The Supreme Court will take judicial cognizance of its own judgments in the trial of causes involving executions predicated thereon.

Mrs. Lambeth vs. Sentell et als., p. 691.

The Supreme Court will notice *ex propria motu* radical defects of pleadings in consequence; of which no final judgment could be rendered in the premises.

Hoffpauir, President, etc., vs. Wise, p. 704.

Where a court acts clearly within the bounds of its jurisdiction, and no vital defects or irregularities mark the proceedings in a case before it, this Court will not, under its supervisory powers, annul the judgment rendered in such case, though it may be contrary to the law and the evidence.

Inferior courts should, as a rule, respect the decisions of appellate courts, and be guided by their authority; but though it may be charged that the judge of an inferior court has refused to be governed by the decree of the appellate court, on an appeal from one

SUPREME COURT—Continued.

of his own judgments in his (the inferior judge's) decisions in other like cases before him, this Court is without power to compel him to conform his action and conclusions to the views of such higher tribunal.

The State ex rel. Wood & Bro. vs. Judge, etc., p. 921.

SURETYSHIP.

A surety, sued for indemnity by a co-surety who has paid under judgment, has no interest to question the validity of the transfer by another surety to the plaintiff, where such transfer impairs no right of his against the transferrer.

An illegal deduction contained in a judicial proceeding, and corrected by the court of last resort, cannot serve as a foundation for the plea of *estoppel* in a subsequent suit.

Evidence showing the signature of a bond by principal and sureties, suit against the sureties, payment by some of them under judgment, the insolvency of certain of them, and other material facts, authorizes recovery from a co-surety to a certain extent.

Articles 2104 and 3058, R. C. C., must be combined together. When thus construed, they mean that where loss is occasioned by the insolvency of one or more co-sureties, whether solitary or joint, it must be borne by the solvent sureties when called upon by the paying surety for indemnity or reimbursement of what was paid under judgment. *E. F. Stockmeyer vs. Henry Oertling, p. 100.*

TAXATION.

A manufacturer of beer, or one charged as "engaged in the business of a brewery," is not exempt from license taxation under the State Constitution. The subject of such exemption is regulated by Art. 206 of the Constitution. Article 207 refers alone to a property tax.

A brewer or manufacturer of beer is not one "engaged in distilling and rectifying alcoholic or malt liquors," and is not therefore subject to the license tax provided by Section 9 of Act 4 of the Extra Session of 1881; but such license is governed and regulated by section 3 of said act. Under that section, where the receipts are \$30,000, and less than \$40,000 such manufacturer is only liable to a license tax of ten dollars, instead of seventy-five dollars.

The State of Louisiana vs. Weckerling, p. 36.

A tax of ten mills by the city of Baton Rouge is not illegal because it does not conform to the limit of municipal power of taxation as fixed by the charter of 1878. That feature of the charter must

TAXATION—Continued.

yield to, and be controlled by Art. 209 of the Constitution. The decision in the case of *Laycock vs. City of Baton Rouge* affirmed.
C. D. Favrot vs. Baton Rouge, p. 230.

Parishes are vested with the power to tax persons and property in incorporated towns, unless such power is withdrawn by legislative authority.

No legislative act has deprived the parish of St. Tammany of the power to levy such taxation in the town of Madisonville.

The Act 110 of 1880, conferring upon incorporated towns the power of amending their charters, only conferred on them the power to regulate their internal organization and the modes and agencies by which the powers and privileges conferred upon them by law might be exercised. It did not authorize them, by such amendments, to extend their powers and privileges or to alter or destroy the existing authority of the State or parish over their inhabitants.

Hence, the provisions of the amended charter of Madisonville adopted under that act, prohibiting the imposition of a parish tax or license, is *ultra vires*, null and void.

Tax Collector and Police Jury vs. Dendinger, p. 261.

Certificates of indebtedness issued by the Board of Directors of the Public Schools of the city of New Orleans during the years 1874, 1875 and 1876, are not evidences of debt against the city. Holders of such certificates have no other claim against the city of New Orleans, beyond the right to participate in the unpaid portions of the taxes levied by the city, in obedience to law, for the respective years in which the certificates were issued; but they have no right to recover judgment against the city thereon with a view to have the same converted into bonds under the provisions of Act 67 of 1884, which is an act amendatory of Act 133 of 1880, intended to authorize the liquidation of the indebtedness of the city of New Orleans.
Labatt vs. New Orleans, p. 283.

The University of Louisiana is a public institution that the Constitution has recognized, and commanded the Legislature to maintain and support it.

By the Act of July 5, 1884, a contract was made by and between the State and the Administrators of the Tulane Education Fund whereby the State delivered to the Administrators the rights, privileges, franchises, immunities and property of the University, and the Administrators engaged to dedicate all their revenues to its main-

TAXATION—Continued.

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The character or quality of taxability is not ineffaceably stamped on property, and it may be removed by the act of its owner. The Legislature cannot exempt from taxation property that is constitutionally liable to it, but an owner of property may translate it to the domain of constitutional exemption by dedicating it to a public use.

Primarily the Legislature determines what is a public use, and when it has declared what may be so regarded, courts will not interfere except in clear cases of usurpation or abuse of authority. What is for the public good and what are public purposes are for the Legislature to say, and it has a large discretion in determining these questions, which will not be controlled by the courts unless under the exceptions above noted and such like.

Although the title to property be not in the public, if the revenues of it are dedicated wholly to public use and purposes, it is public property within the intendment of the Constitution, and possesses all the immunities and is entitled to the exemptions from taxation of public property.

Administrators of Tulane Education Fund vs. Assessors et als., p. 292.

Acts No. 78 of 1876, and 46 of 1877, creating the Fardoche and Grossetête Lovee District for the purpose of constructing and maintaining certain special levees and authorizing the levy of a contribution upon the lands protected thereby, are not inconsistent with the Articles of the Constitution of 1879 on the subject of taxation.

Such local assessments for public works, levied not on taxable property generally for mere common public benefit, but only on particular property specially benefited by the works, as an equivalent for the direct benefit conferred, are not considered as taxes within the meaning of constitutional restrictions on the power of taxation.

H. Oarnock vs. Levee District Company, p. 323.

Merchants who indiscriminately transact business, both as *wholesale* and *retail* dealers, are liable to a license in each capacity.

New Orleans vs. U. Koen & Co., p. 328.

Under Article 207 of the Constitution, the capital, machinery and other property employed in the manufacture of articles of wood is exempt from taxation, although the same be used as well for purposes which would not entitle the owner to exemption if he exclusively thus used it.

TAXATION—Continued.

In such case, such property is partly taxable and partly not, in proportion of its relative value as employed or used in each business.

Principle applied to a saw-mill and appurtenances employed to manufacture raw materials and articles of wood, but not extended to *vessels* used to convey timbers for saw-mill purposes and which is sold in the market and dressed in the articles of wood.

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Section 7 of the act applies the same rule of graduation to home companies and to foreign companies transacting business here through branches or agencies; and it might, with equal force, be contended that foreign companies were to be taxed according to their premiums earned at home as well as here as that home companies should be taxed according to their premiums earned through like agencies in other States.

“Rebates” being a deduction from stipulated premiums allowed in pursuance of antecedent contract, the difference constitutes the only premium actually earned by the company, and in estimating the gross amount of premiums the rebates are properly deducted.

Inasmuch as the basis of graduation is restricted to premiums received for business done in the State it is self-evident that the deductions allowed should suffer the same restriction, *i. e.*, the only return and unearned premiums and rebates deducted should be those arising from and connected with the business done in the State.

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TAXATION—Continued.

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The taxing power of a municipality is its only power for obtaining revenue, by exactions levied on its citizens, and that power is limited to the *ad valorem*, or property tax, and the license tax; and any statute or municipal ordinance authorizing a levy beyond the constitutional limitation is null and void.

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Under Article 206 of the Constitution, the power granted "to levy a license tax" is discretionary and not mandatory. The State or city may abstain from taxing, or may exempt from license, any occupation or calling, subject to the restriction that, if a particular calling is taxed, the tax must conform to the constitutional rules.

The contrary rule with regard to property taxation results from the provision of Article 203, that "*all property shall be taxed according to its value*," and of Article 207, the "*following property shall be exempt from taxation, and no other.*"

There are no equivalent constitutional provisions relative to license taxation, requiring *all* occupations or *all* persons pursuing any occupation to be taxed, or declaring that *no other* than certain occupations shall be exempted.

Hence, the city has the right to abstain from taxing, or to exempt, any particular calling or business, and, having by the terms of her ordinance expressly exempted the business of defendant, there is no legislative authority for collecting such tax, and the city's demand must be rejected.

New Orleans vs. J. Mülé, p. 826.

Held, That under the section 6 of the State license law, Act 4, 2d Ex. Sess. of 1881, a retail dealer whose ordinary license would be five dollars, but who combines with said business the sale of liquors in less quantities than one pint, can only be required to pay a total license of \$50, and not \$55, as claimed by the parish.

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A monition which relates to informalities in the decrees under which judicial sales are made and to irregular and defective proceedings connected with the sales, will cure the same defects which are reached and set at rest by the prescription of five years under the provisions of Art. 3543, Civil Code, and both remedies may be invoked to cure informalities in the assessment and in the sale for taxes.

In an assessment not absolutely void, a monition will cure a defect in the description of the property, in listing the same on the resident instead of non-resident rolls, an omission to extend State and parish taxes on separate assessment rolls, and other errors not necessarily fatal to the assessment.

A complaint that the taxes for which property was sold are excessive comes too late after the sale is completed; it may be a good ground for an injunction, but not for a suit in nullity.

Mrs. Kent vs. Brown & Learned, p. 802.

USUFRUCT.

The action for account of the usufruct is barred by the prescription of ten years only, to be computed from the termination of the usufruct.

R. L. Cochran vs. Mrs. Violet et al., p. 523.

WILL.

In a contest over an olographic will, the probate of which has been resisted as soon as the instrument was presented, on the ground that said will is not in the handwriting of the deceased, and is, therefore, a forgery, the burden of proof of the validity of the will is on the party who presents the same for probate.

The proof of the writing and signature of the testator by at least two credible witnesses, which is considered sufficient under the laws of Louisiana, applies only to wills which are not opposed or contested.

In contestations which involve the validity of wills, as regards the genuineness of the same, all legal modes of proof, including the testimony of experts, and comparisons of writings are admissible, and all such evidence must be considered by the courts.

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In such cases the alleged physical incapacity of the testator, at the date of the instrument, to write a will or to date the same, is a legal element of proof to be considered. So is the mode of acquiring possession of the will by the party who presents it for probate an element to be considered; and in case that a mysterious or unnatural manner is indicated by the party, the burden of proof is on him to show the actual delivery of the will to him as alleged.

The court will also consider the character of the dispositions contained in a contested will, as a means of testing the validity of the will, by the probabilities of such donations.

When the evidence in a cause is sufficient to justify a final judgment in the case, courts of justice would be derelict to their duty in refusing to give it legal effect and to thus end the litigation.

Evidence and considerations which, in a contest over a will in the olographic form, would justify that the will is not genuine, must carry with them the conclusion that the will was not written by the deceased, and is therefore a forgery.

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To constitute a presentation of a will in the sense of the Code it is not necessary that it shall be delivered to the witnesses by the testator with his own hand, and no particular words or set form of speech is necessary to constitute a declaration that the instrument is the testator's will.

It is sufficient if the will, having been written by another at the request of the testator and out of the presence of the witnesses, shall have been read aloud by one of the witnesses in the presence and hearing of the testator and of the other witnesses, and is then held towards the testator by the writer of it, who asks, "Is this paper that has just been read your will?" and the testator answers, "It is," and it is then signed by the testator and is attested by the witnesses in his and their presence.

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In the interpretation of wills the principal aim must be to discover the intention of the testator, and the first duty is to give effect to that intention unless the law reprobates it. To accomplish this, conflicting clauses must be harmonized, or, if they are irreconcilable, the last disposition must prevail over those that precede it. Courts will presume that a testator meant to dispose of his property as the law permits him to do rather than that he intended to do what was unlawful, and will construe his disposition accordingly.

There is not a prohibited substitution in this disposition of property by last will:—"I give and bequeath to my wife all the property, movable and immovable, which I leave at my death, but in usufruct only, and after her death, said property is to be divided equally between my son and the heirs of my said wife, and for that purpose I give her in full ownership one-half of what I may leave, and the other half to my said son to be by him enjoyed after the death of my said wife."

Construed to mean that one-half of the estate was bequeathed to the wife in full ownership, and the other half to the son, but as the testator could give to his wife no more than one-third of his estate, the son being of a previous marriage, her bequest was reduced to one-third. *Succession of R. F. Theurer, p. 510.*

The will of the decedent was probated after due notice to the major heirs and to the legal representatives of the minor heirs; the executor was duly qualified and fully administered the estate; he filed his final account, assigning to the several heirs their special legacies, and fixing the distributive share of the residue falling to each heir and prayed for its homologation, service of the petition having been accepted by the major heirs and the legal representatives of the minors; while said account was pending, said heirs and representatives received and receipted for their said legacies and shares, and granted full acquittance to the executor; and thereupon judgment was rendered homologating the account and granting final discharge to the executor.

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Ex. G. A. A.

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Heirs of Barrow vs. Barrow, p. 645.

Ex. S. A. A.

SUPREME COURT—Continued.

That court has no power or authority to ascertain in an injunction proceeding or in any other mode whether the mandate issued properly or otherwise. Complaints for alleged errors of any of the clerks of this Court, in issuing such certificate or in the performance of any of their official functions, must be addressed to this Court only; the power to correct such errors is lodged in no other authority. A district judge will not be held in contempt for assuming powers which he honestly but erroneously believed to be of the essence of his court.

The State ex rel. Heirs of Gee vs. Judge, etc., p. 274.

In a case wherein the judgment of this Court has been reversed by the Supreme Court of the United States, and remanded "for further proceedings to be had therein not inconsistent" therewith, this Court is fully competent to judge of *all facts* not set forth in that finding, and decree as in its opinion justice may require. 91 U. S. 423, *ex parte French*; U. S. R. S. 709, and authorities cited.

The failure of an appellee to request an amendment of the judgment of the district court, and an increase of the tax levy ordered therein, deprives him of remedy therefor in this Court.

The State ex rel. Fisk vs. Police Jury, p. 505.

Under an application for a *certiorari*, a question of law involving the validity of the proceedings attacked may be determined by the Supreme Court.

In the Matter of William Ross, p. 523.

The Supreme Court will take judicial cognizance of its own judgments in the trial of causes involving executions predicated thereon.

Mrs. Lambeth vs. Sentell et als., p. 691.

The Supreme Court will notice *ex propria motu* radical defects of pleadings in consequence; of which no final judgment could be rendered in the premises.

Hoffpauir, President, etc., vs. Wise, p. 704.

Where a court acts clearly within the bounds of its jurisdiction, and no vital defects or irregularities mark the proceedings in a case before it, this Court will not, under its supervisory powers, annul the judgment rendered in such case, though it may be contrary to the law and the evidence.

Inferior courts should, as a rule, respect the decisions of appellate courts, and be guided by their authority; but though it may be charged that the judge of an inferior court has refused to be governed by the decree of the appellate court, on an appeal from one

SUPREME COURT—Continued.

of his own judgments in his (the inferior judge's) decisions in other like cases before him, this Court is without power to compel him to conform his action and conclusions to the views of such higher tribunal.

The State ex rel. Wood & Bro. vs. Judge, etc., p. 921.

SURETYSHIP.

A surety, sued for indemnity by a co-surety who has paid under judgment, has no interest to question the validity of the transfer by another surety to the plaintiff, where such transfer impairs no right of his against the transferrer.

An illegal deduction contained in a judicial proceeding, and corrected by the court of last resort, cannot serve as a foundation for the plea of *estoppel* in a subsequent suit.

Evidence showing the signature of a bond by principal and sureties, suit against the sureties, payment by some of them under judgment, the insolvency of certain of them, and other material facts, authorizes recovery from a co-surety to a certain extent.

Articles 2104 and 3058, R. C. C., must be combined together. When thus construed, they mean that where loss is occasioned by the insolvency of one or more co-sureties, whether solitary or joint, it must be borne by the solvent sureties when called upon by the paying surety for indemnity or reimbursement of what was paid under judgment. *E. F. Stockmeyer vs. Henry Oertling, p. 100.*

TAXATION.

A manufacturer of beer, or one charged as "engaged in the business of a brewery," is not exempt from license taxation under the State Constitution. The subject of such exemption is regulated by Art. 206 of the Constitution. Article 207 refers alone to a property tax.

A brewer or manufacturer of beer is not one "engaged in distilling and rectifying alcoholic or malt liquors," and is not therefore subject to the license tax provided by Section 9 of Act 4 of the Extra Session of 1881; but such license is governed and regulated by section 3 of said act. Under that section, where the receipts are \$30,000, and less than \$40,000 such manufacturer is only liable to a license tax of ten dollars, instead of seventy-five dollars.

The State of Louisiana vs. Weckerling, p. 36.

A tax of ten mills by the city of Baton Rouge is not illegal because it does not conform to the limit of municipal power of taxation as fixed by the charter of 1878. That feature of the charter must

TAXATION—Continued.

yield to, and be controlled by Art. 209 of the Constitution. The decision in the case of *Laycock vs. City of Baton Rouge* affirmed.

C. D. Favrot vs. Baton Rouge, p. 230.

Parishes are vested with the power to tax persons and property in incorporated towns, unless such power is withdrawn by legislative authority.

No legislative act has deprived the parish of St. Tammany of the power to levy such taxation in the town of Madisonville.

The Act 110 of 1880, conferring upon incorporated towns the power of amending their charters, only conferred on them the power to regulate their internal organization and the modes and agencies by which the powers and privileges conferred upon them by law might be exercised. It did not authorize them, by such amendments, to extend their powers and privileges or to alter or destroy the existing authority of the State or parish over their inhabitants.

Hence, the provisions of the amended charter of Madisonville adopted under that act, prohibiting the imposition of a parish tax or license, is *ultra vires*, null and void.

Tax Collector and Police Jury vs. Dendinger, p. 261.

Certificates of indebtedness issued by the Board of Directors of the Public Schools of the city of New Orleans during the years 1874, 1875 and 1876, are not evidences of debt against the city. Holders of such certificates have no other claim against the city of New Orleans, beyond the right to participate in the unpaid portions of the taxes levied by the city, in obedience to law, for the respective years in which the certificates were issued; but they have no right to recover judgment against the city thereon with a view to have the same converted into bonds under the provisions of Act 67 of 1884, which is an act amendatory of Act 133 of 1880, intended to authorize the liquidation of the indebtedness of the city of New Orleans.

Labatt vs. New Orleans, p. 283.

The University of Louisiana is a public institution that the Constitution has recognized, and commanded the Legislature to maintain and support it.

By the Act of July 5, 1884, a contract was made by and between the State and the Administrators of the Tulane Education Fund whereby the State delivered to the Administrators the rights, privileges, franchises, immunities and property of the University, and the Administrators engaged to dedicate all their revenues to its main-

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Primarily the Legislature determines what is a public use, and when it has declared what may be so regarded, courts will not interfere except in clear cases of usurpation or abuse of authority. What is for the public good and what are public purposes are for the Legislature to say, and it has a large discretion in determining these questions, which will not be controlled by the courts unless under the exceptions above noted and such like.

Although the title to property be not in the public, if the revenues of it are dedicated wholly to public use and purposes, it is public property within the intendment of the Constitution, and possesses all the immunities and is entitled to the exemptions from taxation of public property.

Administrators of Tulane Education Fund vs. Assessors et als., p. 292.

Acts No. 78 of 1876, and 46 of 1877, creating the Fardoche and Grossette Levee District for the purpose of constructing and maintaining certain special levees and authorizing the levy of a contribution upon the lands protected thereby, are not inconsistent with the Articles of the Constitution of 1879 on the subject of taxation.

Such local assessments for public works, levied not on taxable property generally for mere common public benefit, but only on particular property specially benefited by the works, as an equivalent for the direct benefit conferred, are not considered as taxes within the meaning of constitutional restrictions on the power of taxation.

H. Charnock vs. Levee District Company, p. 323.

Merchants who indiscriminately transact business, both as *wholesale* and *retail* dealers, are liable to a license in each capacity.

New Orleans vs. U. Koen & Co., p. 328.

Under Article 207 of the Constitution, the capital, machinery and other property employed in the manufacture of articles of wood is exempt from taxation, although the same be used as well for purposes which would not entitle the owner to exemption if he exclusively thus used it.

TAXATION—Continued.

In such case, such property is partly taxable and partly not, in proportion of its relative value as employed or used in each business.

Principle applied to a saw-mill and appurtenances employed to manufacture raw materials and articles of wood, but not extended to *vessels* used to convey timbers for saw-mill purposes and which is sold in the market and dressed in the articles of wood.

H. Martin vs. New Orleans et als., p. 397.

Under Act No. 4 of 1882, the license is imposed on the business pursued by an insurance company in the State of Louisiana, and not on business done through branches or agencies established in other States, subject to their laws and to the taxation imposed thereby.

Section 7 of the act applies the same rule of graduation to home companies and to foreign companies transacting business here through branches or agencies; and it might, with equal force, be contended that foreign companies were to be taxed according to their premiums earned at home as well as here as that home companies should be taxed according to their premiums earned through like agencies in other States.

“Rebates” being a deduction from stipulated premiums allowed in pursuance of antecedent contract, the difference constitutes the only premium actually earned by the company, and in estimating the gross amount of premiums the rebates are properly deducted.

Inasmuch as the basis of graduation is restricted to premiums received for business done in the State it is self-evident that the deductions allowed should suffer the same restriction, *i. e.*, the only return and unearned premiums and rebates deducted should be those arising from and connected with the business done in the State.

It seems probable that, in this respect, the defendant has not complied with the law, but as the evidence is not sufficient to fix the license according to this view, non-suit must be given.

The State of Louisiana vs. Insurance Company, p. 465.

The plaintiff and appellee having failed to make the police jury party to rule on sheriff and assessor, to assess the tax demanded, this Court cannot afford him relief.

Proceedings by mandamus are *stricti juris*, and must conform to Code of Practice.

Fisk vs. Police Jury, p. 508.

An ordinance of a municipal corporation, authorizing the exaction of certain rates, fees, charges and tariffs from each and every person selling articles within its corporate limits, but *without* the market-house or market-place; or person keeping a butcher's stand

TAXATION—Continued.

within the corporate limits, but *without* the market-place, or market-house, for the purpose of raising *revenue*, is one exacting a "tax" or "license" for revenue, and same cannot be enforced as contributions sought to be raised by the exercise of the police power delegated to it.

The taxing power of a municipality is its only power for obtaining revenue, by exactions levied on its citizens, and that power is limited to the *ad valorem*, or property tax, and the license tax; and any statute or municipal ordinance authorizing a levy beyond the constitutional limitation is null and void.

F. Mestayer vs. S. Corrigé, p. 707.

Under Article 206 of the Constitution, the power granted "to levy a license tax" is discretionary and not mandatory. The State or city may abstain from taxing, or may exempt from license, any occupation or calling, subject to the restriction that, if a particular calling is taxed, the tax must conform to the constitutional rules.

The contrary rule with regard to property taxation results from the provision of Article 203, that "*all* property *shall* be taxed according to its value," and of Article 207, the "*following* property shall be exempt from taxation, *and no other.*"

There are no equivalent constitutional provisions relative to license taxation, requiring *all* occupations or *all* persons pursuing any occupation to be taxed, or declaring that *no other* than certain occupations shall be exempted.

Hence, the city has the right to abstain from taxing, or to exempt, any particular calling or business, and, having by the terms of her ordinance expressly exempted the business of defendant, there is no legislative authority for collecting such tax, and the city's demand must be rejected.

New Orleans vs. J. Mülé, p. 826.

Held, That under the section 6 of the State license law, Act 4, 2d Ex. Sess. of 1881, a retail dealer whose ordinary license would be five dollars, but who combines with said business the sale of liquors in less quantities than one pint, can only be required to pay a total license of \$50, and not \$55, as claimed by the parish.

Police Jury vs. Marrero, p. 896.

TAX SALES.

The State Tax Collector cannot be compelled by a mandamus to receive from a purchaser of land forfeited to the State, and again offered for sale in payment of the price bid, where the property is burdened with back taxes due the State and city, three per cent

TAX SALES—Continued.

Louisiana bonds, known as "Baby Bonds," though the purchaser has paid the amount owing for costs, fees, commissions, etc., in cash. *The State ex rel. Luminais vs. Tax Collector*, p. 533.

In testing the validity of sales for taxes, the courts of this State are guided by the same rules which prevail in judicial sales.

A monition which relates to informalities in the decrees under which judicial sales are made and to irregular and defective proceedings connected with the sales, will cure the same defects which are reached and set at rest by the prescription of five years under the provisions of Art. 3543, Civil Code, and both remedies may be invoked to cure informalities in the assessment and in the sale for taxes.

In an assessment not absolutely void, a monition will cure a defect in the description of the property, in listing the same on the resident instead of non-resident rolls, an omission to extend State and parish taxes on separate assessment rolls, and other errors not necessarily fatal to the assessment.

A complaint that the taxes for which property was sold are excessive comes too late after the sale is completed; it may be a good ground for an injunction, but not for a suit in nullity.

Mrs. Kent vs. Brown & Learned, p. 802.

USUFRUCT.

The action for account of the usufruct is barred by the prescription of ten years only, to be computed from the termination of the usufruct.

R. L. Cochran vs. Mrs. Violet et al., p. 523.

WILL.

In a contest over an olographic will, the probate of which has been resisted as soon as the instrument was presented, on the ground that said will is not in the handwriting of the deceased, and is, therefore, a forgery, the burden of proof of the validity of the will is on the party who presents the same for probate.

The proof of the writing and signature of the testator by at least two credible witnesses, which is considered sufficient under the laws of Louisiana, applies only to wills which are not opposed or contested.

In contestations which involve the validity of wills, as regards the genuineness of the same, all legal modes of proof, including the testimony of experts, and comparisons of writings are admissible. and all such evidence must be considered by the courts.

WILL--Continued.

In such cases the alleged physical incapacity of the testator, at the date of the instrument, to write a will or to date the same, is a legal element of proof to be considered. So is the mode of acquiring possession of the will by the party who presents it for probate an element to be considered; and in case that a mysterious or unnatural manner is indicated by the party, the burden of proof is on him to show the actual delivery of the will to him as alleged.

The court will also consider the character of the dispositions contained in a contested will, as a means of testing the validity of the will, by the probabilities of such donations.

When the evidence in a cause is sufficient to justify a final judgment in the case, courts of justice would be derelict to their duty in refusing to give it legal effect and to thus end the litigation.

Evidence and considerations which, in a contest over a will in the olographic form, would justify that the will is not genuine, must carry with them the conclusion that the will was not written by the deceased, and is therefore a forgery.

Succession of Myra Olark Gaines, p. 123.

To constitute a presentation of a will in the sense of the Code it is not necessary that it shall be delivered to the witnesses by the testator with his own hand, and no particular words or set form of speech is necessary to constitute a declaration that the instrument is the testator's will.

It is sufficient if the will, having been written by another at the request of the testator and out of the presence of the witnesses, shall have been read aloud by one of the witnesses in the presence and hearing of the testator and of the other witnesses, and is then held towards the testator by the writer of it, who asks, "Is this paper that has just been read your will?" and the testator answers, "It is," and it is then signed by the testator and is attested by the witnesses in his and their presence.

The object of the law is to guard against a false instrument being exhibited instead of the true will, and that object is accomplished by the formalities above recited.

The circumstance that the writer of the will read it aloud a second time after the witness had so read it, is not an interruption or turning aside to other acts.

WILL—Continued.

Where only some of the heirs contest, it is not good ground of exception that all are not joined for *non constat* that the others wish to contest. *Bourke, adm'r, et al., vs. J. M. Wilson, et al., p. 320.*

In the interpretation of wills the principal aim must be to discover the intention of the testator, and the first duty is to give effect to that intention unless the law reprobates it. To accomplish this, conflicting clauses must be harmonized, or, if they are irreconcilable, the last disposition must prevail over those that precede it. Courts will presume that a testator meant to dispose of his property as the law permits him to do rather than that he intended to do what was unlawful, and will construe his disposition accordingly.

There is not a prohibited substitution in this disposition of property by last will:—"I give and bequeath to my wife all the property, movable and immovable, which I leave at my death, but in usufruct only, and after her death, said property is to be divided equally between my son and the heirs of my said wife, and for that purpose I give her in full ownership one-half of what I may leave, and the other half to my said son to be by him enjoyed after the death of my said wife."

Construed to mean that one-half of the estate was bequeathed to the wife in full ownership, and the other half to the son, but as the testator could give to his wife no more than one-third of his estate, the son being of a previous marriage, her bequest was reduced to one-third. *Succession of R. F. Theurer, p. 510.*

The will of the decedent was probated after due notice to the major heirs and to the legal representatives of the minor heirs; the executor was duly qualified and fully administered the estate; he filed his final account, assigning to the several heirs their special legacies, and fixing the distributive share of the residue falling to each heir and prayed for its homologation, service of the petition having been accepted by the major heirs and the legal representatives of the minors; while said account was pending, said heirs and representatives received and receipted for their said legacies and shares, and granted full acquittance to the executor: and thereupon judgment was rendered homologating the account and granting final discharge to the executor.

After such proceedings, the heirs cannot be heard eight years afterwards to attack the validity of the will and the settlement of the

WILL—Continued.

executor. Such an action will not be sustained upon a bare allegation of error and fraud without the slightest suggestion of the nature and ground of such charge.

The plea of estoppel to such a suit was properly sustained as to all the plaintiffs except John W. Barrow, who was a minor unrepresented at the time, and was no party to the proceedings or settlement.

As to him, however, the prescription of five years from his majority applies and his action is barred.

Heirs of Barrow vs. Barrow, p. 645.

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